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State of Washington

NO. 34566-1-III

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

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

Appellants,

v.

STATE OF WASHINGTON EMPLOYMENT SECURITY  
DEPARTMENT,

Respondent.

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**BRIEF OF RESPONDENT RE: SYSTEM-TWT TRANSPORT**

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## I. INTRODUCTION

System-TWT Transport (System), a motor carrier, attempts to avoid unemployment compensation taxes for its drivers who own and operate their own trucks (owner-operators), claiming they are independent contractors for purposes of a statutory exception from coverage under the Employment Security Act. The Commissioner of the Employment Security Department properly ruled that System's owner-operators are in its employment for purposes of the Act and that System failed to prove the exception from the Act's coverage. The Commissioner's findings in this Administrative Procedure Act appeal are supported by substantial evidence, and the conclusions are free of legal error because this case is controlled by *Western Ports Transportation, Inc. v. Employment Security Department*, where the court ruled an owner-operator was in covered employment of a motor carrier for unemployment insurance purposes, and federal law did not preempt the Act. *W. Ports Trans. Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 450-58, 41 P.3d 510 (2002). *Western Ports* has been the law in Washington for over 14 years, is consistent with many other states' decisions, and should not be overruled.

System, however, raises a theory of federal preemption that depends 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 obligates employers to pay unemployment taxes for employment covered by the Act, and the assessment or its basis does not affect worker classification for any other legal purpose. Moreover, this tax obligation imposes only a minor cost increase and does not have the significant impact necessary to invoke federal preemption. System also focuses on the auditor's conduct to claim arbitrary and capricious or unconstitutional action and asks this Court to reweigh evidence, make new findings, and go far beyond the scope of judicial review and relevant precedent. The Court should affirm the Commissioner's order.

## II. COUNTERSTATEMENT OF THE ISSUES

- 1) Did the Commissioner correctly rule that System failed to prove its owner-operators were free from its control or direction over the performance of services under RCW 50.04.140(1) as construed in *Western Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 41 P.3d 510 (2002)? And, did System fail to show *Western Ports* is wrong and harmful such that it should be overruled?
- 2) Does the Federal Aviation Administration Authorization Act, 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?
- 3) Did System fail to establish arbitrary and capricious action or unconstitutional audit conduct when the Employment Security Act does not require the audit to be done in a particular way, and System had a de novo hearing in which it was not prejudiced in its ability to present a defense to the tax assessment?

### III. STATEMENT OF THE CASE

System-TWT Transport is a common contract or for-hire general freight carrier headquartered and operating in Washington. Agency Record System-TWT Transport Vol. 1 (ARST1) 3-5 (Stipulations ¶ 1). The Department selected System for an audit based on research by an auditor indicating System was likely misclassifying its owner-operators (truck drivers who haul freight for System using their own trucking equipment) as independent contractors and, thus, not paying required unemployment insurance taxes on their wages. ARST3 193, 222-23. The auditor had previously audited a different trucking company in Seattle, after which, the company “didn’t disagree that they should be reporting, but they asked that we continue auditing trucking companies because they want to be able to play on a level playing field. . . . He didn’t want . . . his neighbors [to] have an unfair advantage over him.” ARST3 191.

To become an owner-operator for System, a truck owner must complete an application and agreement under which the owner-operator leases his/her truck to System and then drives it to haul freight for System. ARST1 3 (Stipulations ¶ 3), 6-38.<sup>1</sup> System also employs “company drivers” who haul freight for System driving trucking equipment owned by System. System does not dispute that its company drivers are in

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<sup>1</sup> A copy of the application and agreement is attached as Appendix A.

employment under the Act. ARST1 3 (Stipulations ¶ 2). System's appeal concerns the classification of owner-operators, who performed a variety of services, including accepting freight onto the owner-operator's truck at pickup locations specified by System, covering the freight with tarps as necessary, driving freight to a delivery location designated by System to deliver it to System's customer. ARST1 4 (Stipulations ¶ 5). System collects payment from the customers and then pays the owner-operators for hauling the freight. ARST1 4 (Stipulations ¶ 6).

Following an audit, the Department determined the owner-operators were in covered employment under the Act and assessed System \$264,057.40 in unpaid taxes, interest, and penalties for the years 2007, 2008, and 2009, except for the first quarter of 2007. ARST1 4 (Stipulations ¶ 7).

System appealed the assessment to the Office of Administrative Hearings (OAH), which held a de novo evidentiary hearing to contest the assessment as provided by the Administrative Procedure Act (APA), RCW 34.05. After engaging in discovery, System filed a consolidated motion for summary judgment on behalf of itself and three other trucking carriers, arguing that the owner-operators were independent contractors, that federal law preempts the Employment Security Act with respect to their owner-operators, and that the audits were predetermined and conducted by

auditors who did not follow audit standards, which required dismissal of the assessments. ARST3 52-86. The Administrative Law Judge (ALJ) denied the motion and concluded the owner-operators driving services amounted to covered employment under the Act, but the value of leased equipment should not be taxed as wages. ARST2 401-13. The ALJ rejected System's preemption argument as a matter of law based on *Western Ports*, 110 Wn. App. at 450-58 (owner-operator was in employment of a motor carrier for unemployment insurance purposes, and federal transportation law does not preempt the Employment Security Act), and found there were "genuine disputes of material fact regarding the relationships between carriers and contractors." ARST2 410-11. Addressing the claims of faulty audits, the ALJ declined to dismiss the assessments and recognized the challenges to the audits would be addressed at a hearing on the merits. ARST2 411.

With respect to payments made for the value of the equipment versus wages for personal services, the ALJ further explained concerning the need for apportionment:

The department should consider fair apportionment of payment under the contract attributable to driving or other personal services. . . . *The taxing authority should not be expected to determine the contractual pay rates and industry average pay rates, but the burden should be on the taxpayer to provide this information with some evidentiary support.*

ARST2 398 (emphasis added). The ALJ provided examples of how such apportionment could be accomplished. *Id.* The remand order further directed the Department to determine whether any of the owner-operators it included in the assessment performed no services in Washington, but again stated that “[t]he taxing authority should not be expected to determine situs of service of each entity paid by the petitioner in the audit years, but the burden should be on the taxpayer to provide this information, with some evidentiary support[.]” ARST2 399. Further, the remand order directed the Department to identify owner-operators that were incorporated businesses and, with respect to each such entity, to determine whether all personal services are performed only by corporate officers, again placing the burden on the carriers to provide information with evidentiary support. ARST2 398.<sup>2</sup>

After procedural events not pertinent to the merits of this appeal,<sup>3</sup> the parties agreed to a hearing on the merits based on stipulated findings in

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<sup>2</sup> System’s assertion that the ALJ ordered the Department to factor out equipment costs is incorrect. *See* Br. Appellant 10 n.12. Rather, the ALJ placed the burden on System to supply additional information for the Department’s consideration. ARST2 398.

<sup>3</sup> After the ALJ’s remand order, the carriers provided certain additional information to the Department, and the parties discussed settlement. The carriers subsequently asserted an agreement had been reached by email between counsel. *Eagle Sys., Inc., et al. v. Emp’t Sec. Dep’t*, 181 Wn. App. 455, 457, 326 P.3d 764 (2014). The Department disputed this. *Id.* System moved the ALJ to enforce the alleged settlement, and the ALJ denied the motion. *Id.* at 458. System and other carriers then filed in Pierce County Superior Court a motion for an order for contempt and to show cause why the

lieu of witness testimony. ARST1 3-5. The parties' stipulations addressed the issues discussed in the ALJ's order of remand, including bifurcation of payments attributable to wages and equipment lease, situs of service, and owner-operators' corporate status. They also resolved the amount owed on the assessment if System lost on the merits: "For this case, the Carrier and the Department agree that if the owner/operators in the audit are found to be Carrier's employees under RCW [Title] 50, then the Carrier is liable for taxes in the amount of \$58,300.99 for the years 2007, 2008 and 2009, excepting the first quarter of 2007." ARST1 5 (Stipulations ¶ 11). *See also id.* (Stipulations ¶ 9 (regarding attributing 70% of the payments as for lease of trucks and thus not taxable, and 30% of payments as "remuneration paid to the owner/operators [] for the operation of the equipment in hauling freight," for purposes of this case), ¶ 10 (owner-operators who operate businesses with employees are themselves not System's employees and have been excluded from the audit)).

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alleged settlement being negotiated in the pending administrative proceedings should not be enforced. *Id.* The superior court issued an order finding a binding settlement of the administrative appeals. *Id.* at 458-59. The Department appealed the superior court order enforcing the purported settlement agreement to the Court of Appeals. *Eagle Sys., Inc.*, 181 Wn. App. at 457-59. The Court of Appeals vacated the alleged settlement agreement on personal jurisdiction grounds because the carriers did not properly commence the action. *Id.* at 461. The court did not address whether a settlement agreement existed. *Id.* The matters were then remanded to OAH for administrative evidentiary hearings on the tax assessment appeals by System and the other carriers. ARST2 384-88.

The parties' stipulations also included attached exhibits, ARST1 6-38,<sup>4</sup> and they reference records previously offered by the parties in support and opposition of summary judgment, which this Court may consider in reviewing the Commissioner's decision. ARST1 5 (Stipulations ¶ 12).<sup>5</sup>

The ALJ entered an initial order upholding the assessment in the modified amount as stipulated by the parties. ARST2 319-26.<sup>6</sup> The ALJ found that the owner-operators were in System's employment under RCW 50.04.100. ARST2 322 (CL 4). The findings also note several provisions of the contract between System and owner-operators that showed control or direction over the performance of services. ARST2 320-21 (FF 10-22).

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<sup>4</sup> System attached multiple *additional* records to its Petitioner's Brief in superior court, asserting that "ESD submitted an incomplete record," CP 200 n.5, and System cites to the additional material in its Brief of Appellant. But the parties' stipulations specifically identified the evidence the trier of fact was to consider. ARST1 5 (Stipulations ¶ 12). Because the additional materials were not listed in the stipulated evidence, they should not be considered on appeal. *See* ARST1 140.

<sup>5</sup> The Court should disregard System's allegations about errors in adjustments to the assessment amounts after the ALJ's remand order, the parties' discussions of these issues and negotiations of a potential resolution, and facts pertaining to discovery disputes because they are based on records other than those that the parties stipulated the trier of fact may consider. *See* Br. Appellant 11 n.18; ARST1 5 (Stipulations ¶ 12). But even if these issues are considered, they do not affect the outcome of this case.

While System asserts that this case went before the ALJ in "essentially the same posture the case would have been in if ESD had not breached the settlement agreement," Br. Appellant 12 n.17, this is not so. Crucially, as described herein, there are now findings and conclusions for the courts to review on judicial review (while previously there were none), and there is now a record as to the merits as a result of the parties' stipulations. The earlier absence of these necessary components of any judicial review under the APA is why settlement discussions broke down; the Department was concerned that the prior judicial review petition under the alleged settlement would result in a remand, wasting the parties' time and resources. It is incorrect that the Department's actions or alleged breach of settlement were designed to prejudice the carriers or increase their costs.

<sup>6</sup> A copy of the Initial Order is attached as Appendix B.

Based on these findings, the ALJ concluded that System “has not met its burden, establishing that the owner-operators are exempt from tax as independent contractors pursuant to RCW 50.04.140,” because System “exhibited significant control over the performance of service[.]” ARST2 323 (CL 9). Having ruled that System failed the first element of the conjunctive independent contractor exception test in RCW 50.04.140(1), the ALJ did not address the second and third elements. ARST2 323 (CL 10). The ALJ ruled that the Department’s assessment was not preempted and should not be excluded or dismissed. ARST2 323-24 (CL 11-14).

System filed a petition for review to the Department’s Commissioner, and the Department responded. ARST2 337-41, 343-47. The Commissioner entered an order upholding the order of the ALJ, with additions and modifications. ARST2 350-82.<sup>7</sup> The Commissioner agreed with the ALJ that Washington’s Employment Security Act as applied to motor carriers is not preempted by the FAAAAA preemption clause. ARST2 364. The Commissioner ruled the Department’s assessment was not void, nor the result of arbitrary and capricious action. ARST2 364-67.

The Commissioner upheld the ALJ’s ruling that the owner-operators were in System’s employment and not excepted from coverage as independent contractors. ARST2 370-80. Concerning the “control or

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<sup>7</sup> A copy of the Decision of Commissioner is attached as Appendix C.

direction” element of the independent contractor exception test in RCW 50.04.140(1), the Commissioner found that “System exerts extensive controls over the methods and details of how the freight-hauling and truck-driving services are to be performed by the owner-operators,” proceeding to list a *page-and-a-half* of examples from the contract to augment the ALJ’s findings. ARST2 372-73. The Commissioner also went on to address the second and third elements of the exception test. Concerning the second element, the Commissioner ruled that because the owner-operators performed service outside of System’s places of business, System met its burden of proof. ARST2 376-78. As to the third element, the Commissioner ruled System *failed* its burden of proving the owner-operators were independently established businesses. ARST2 378-80. The Commissioner ordered System to pay \$58,300.99 for the audit period.

On judicial review, the superior court affirmed the commissioner’s decision. CP 632-38, 639.

#### IV. SCOPE AND STANDARD OF REVIEW

Judicial review of the decision of the Commissioner of the Employment Security Department is governed by the APA pursuant to 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—except to the extent the Commissioner’s decision adopted any findings and conclusions of the ALJ’s order. *Tapper v. Emp’t Sec. Dep’t*, 122 Wn.2d 397, 405-06, 858 P.2d 494 (1993). System improperly assigns error only to the superior court’s order. Br. Appellant 2. Given that this is APA judicial review, System is required to assign error to the findings and conclusions of the agency’s final order.<sup>8</sup>

The Commissioner’s decision is considered prima facie correct, and the burden of demonstrating the invalidity of an agency action is on the party challenging the decision—here, System. 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 undertakes the limited task of reviewing the Commissioner’s findings to determine, based solely 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).

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<sup>8</sup> In footnotes throughout its brief, System also quotes extensively from the superior court’s letter ruling. But this Court does not review the superior court’s decision, whose findings and conclusions are superfluous. *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 110 P.3d 812 (2005). It reviews the Commissioner’s final decision.

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 is to “view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed” at the administrative proceeding 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 then determines de novo whether the Commissioner correctly applied the law to those findings. *Tapper*, 122 Wn.2d at 407. However, because the Department has expertise in interpreting and applying unemployment tax law, the Court should afford substantial weight to the agency’s interpretation of it. *Courtney*, 171 Wn. App. at 660.

## V. ARGUMENT<sup>9</sup>

Under the Employment Security Act, Title 50 RCW, all Washington employers must contribute to the unemployment compensation fund for the benefit of their employees. RCW 50.01.010; RCW 50.24.010. The Act is intended to “mitigate the negative effects of involuntary unemployment” by applying the “insurance

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<sup>9</sup> System places large portions of its argument in paragraph-length or even page-length footnotes. Arguments in footnotes are ambiguously raised and need not be considered. *State v. Johnson*, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993).

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). “To accomplish this goal, courts must liberally construe the statute, viewing with caution any construction that would narrow coverage.” *Id.* at 36; *Shoreline Cmty. Coll. Dist. No. 7 v. Emp’t Sec. Dep’t*, 120 Wn.2d 394, 406, 842 P.2d 938 (1992). Therefore, “exemptions from taxation statutes are strictly construed in favor of applying the tax, with the burden of proof 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, unless the employer can prove all elements of a narrow statutory exception under RCW 50.04.140. System does not appeal the Commissioner’s conclusion that the owner-operators are in System’s employment. And, System failed to prove all elements necessary to establish exception because the owner-operators are subject to control or direction concerning performance of services under RCW 50.04.140(1)(a) and are not independently engaged in business under (1)(c).

System claims the Act is preempted by federal law based on the false premise that the assessment will restructure the trucking industry, and by making incorrect assertions about the Department’s audit conduct

and legal standards for those claims. System's attempts to avoid the legislative choice to cover this type of employment relationship in the Act lack merit. The Court should affirm the Commissioner's order.

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

To qualify as an employer under the Employment Security Act, an entity must have persons in "employment." RCW 50.04.080. The definition of "employment" in the Employment Security Act is "exceedingly broad." *W. Ports*, 110 Wn. App. at 458. It is specifically broader than at common law or for other legal purposes and includes service in interstate commerce. RCW 50.04.100. "Employment" exists if the worker performs personal services for the alleged employer or for its benefit and receives wages for those services. *W. Ports*, 110 Wn. App. at 451; *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." *Penick*, 82 Wn. App. at 40. This reasoning applies regardless of whether the drivers own their trucks. When a worker meets these criteria for being in employment, the burden shifts to the employer to prove the independent contractor exception from coverage. RCW 50.04.140, *Penick*, 82 Wn. App. at 42; *W. Ports*, 110 Wn. App. at 451.

Here, the Commissioner properly concluded that the work performed by System's owner-operators constitutes "employment" as it is broadly defined under the Employment Security Act. ARST2 370-80. System does not assign error to this conclusion and makes no argument about it. Br. Appellant 2, 14, 29. Thus, System 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. System Failed to Meet Its Burden of Proving That 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. Therefore, 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). System failed to carry its burden of proving exception from coverage.

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. This is because RCW 50.04.100 explicitly provides coverage for services performed by persons who, under other laws, may be treated as independent contractors.

“Employment” is “unlimited by the relationship of master and servant as known the common law or any other legal relationship.” RCW 50.04.100).

There are two methods to establish an independent contractor exception under RCW 50.04.140. System only sought to establish the elements of subsection (1). Br. Appellant 29-45; ARST1 71-119, 144-61. 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) (emphasis added); *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 in order for its workers to be exempt).

The Commissioner properly concluded that System failed to prove exception under 50.04.140(1)(a) and (1)(c). ARST2 371-75, 378-80.

**1. System failed to prove owner-operators' freedom from System's control or direction over their performance of services under RCW 50.04.140(1)(a)**

To satisfy the first element of the exception test, System needed to prove its drivers are free from control or direction during 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 (emphasis added). System failed to prove such freedom.

**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. Similarly, a truck

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.

The trier of fact can properly consider federally mandated controls—including those under 49 C.F.R. § 376.12—in applying the statutory exception test. *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’ truck-driving and freight-hauling services). 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—and, as discussed below, that same degree of control is required regardless of whether such drivers are designated as employees or independent contractors.

*Id.* Indeed, the more highly regulated an industry is, the less likely workers performing personal services for a putative employer in that industry will be free from that employer’s control or direction, and thus the more likely they are to be employees. System 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 defeat the purposes of the Act by creating the potential to carve out workers in many industries from unemployment insurance coverage, at least as to this element of the independent contractor statute.

**b. The Commissioner properly applied the law concerning freedom from control or direction to the facts of the case**

The Commissioner properly found control or direction over owner-operators' services. ARST2 370-80. The Commissioner adopted the ALJ's findings from the Initial Order, ARST2 319-32, which include:

- System may immediately terminate the agreement if it determines an owner-operator committed an act of misconduct detrimental to System or its business (FF 10);
- owner-operators may not assign or subcontract to another party without System's written consent (FF 11);
- all drivers must meet System's minimum qualifications, and System may disqualify drivers found to be unsafe or unqualified or in violation of any of System's customer's policies (FF 12);
- third persons may not be transported without System's prior approval (FF 13);
- owner-operators must comply with System's drug and alcohol policy, including random drug and alcohol testing (FF 14);
- System can take physical control or possession of the truck at its discretion (FF 15);
- System has exclusive control and possession of the owner-operator's equipment (FF 16);

- owner-operators must receive written consent from System prior to trip leasing equipment to another motor carrier (FF 17);
- owner-operators must submit certain delivery paperwork and receipts (FF 18) and must immediately notify System of accidents (FF 19);
- owner-operators must operate the equipment in compliance with the rules and regulations of System (FF 20); and,
- owner-operators may not disclose information about System's customer list without System's prior written consent (FF 21).

ARST2 319-32. The Commissioner further noted that "owner-operators must maintain their equipment in a safe and prudent manner at all times and must ensure their drivers comply with System's policies and procedures and any subsequent revisions thereto;" "owner-operators are expected to cooperate fully with System regarding any legal action, regulatory hearing, or other proceeding arising from the operation of the equipment, the relationship created by the agreement, or the services performed under the agreement;" that "owner-operators are also required to assist in investigation, settlement, or litigation of any accident, claim, or potential claim by or against System;" and more. ARST2 372-73.

The Commissioner correctly found that these requirements "are generally inconsistent with freeing the owner-operators from its control and direction; in other words, System 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 owner-operators." ARST2 373-74. The concern over how transporting

goods is to be performed amounts to control over the “methods and details” of the services. ARST2 372-75. This conclusion deserves 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). And System has not challenged any of the findings, which are based on the contractual provisions. See ARST1 23-38. Substantial evidence supports that the owner-operators were not free from System’s control or direction over the methods and details of their performance.

Some, but not all, of these factors are federal requirements. But *Western Ports* permits consideration of federally required factors. 110 Wn. App. at 453-54. But even if the federal lease requirements could not be considered, multiple contract provisions require owner-operators to comply with System’s and/or its customers’ policies and procedures beyond those required by federal law or pertaining only to the equipment. See, e.g., ARST1 25-26 (paraphrasing provisions, emphasis added):

- ¶ 14: owner-operator shall immediately notify System of any accident involving equipment and/or cargo and shall cooperate fully with System in any legal action or regulatory hearing;
- ¶ 15: owner-operator shall be fully qualified to operate equipment in compliance with rules and regulations of *System* and regulatory agencies;
- ¶ 17: owner-operator shall maintain equipment in good operating condition and shall be equipped with all safety devices required by *System* and the law;
- ¶ 20: if, in System’s judgment, owner-operator has subjected it to liability because of owner-operator’s acts or omissions, System may

take possession of the shipment and complete performance, and owner-operator shall waive any recourse against System and reimburse System for all costs incurred as a result of completing performance;

- ¶ 21: the commission of an illegal act or other misconduct considered detrimental to System or System's business shall be grounds for termination of the agreement;
- ¶ 22: if for any reason owner-operator shall fail to timely complete delivery or otherwise subject System to liabilities, System shall have the right to complete performance using the same or other equipment and hold owner-operator liable for the cost, and owner-operator waives any recourse against System;
- ¶ 23.D: owner-operator shall comply with System's drug and alcohol policy and participate in its random drug and alcohol testing program; and,
- ¶ 23.E: owner-operator must comply with System's policies and procedures and any revisions thereto.
- ARST1 28: "Contractor agrees to provide and to operate the Equipment as the dispatchers of the Carrier deems necessary to conduct the Carriers business in a successful manner."

Perhaps most important of these is ¶ 23.E (noted at FF20). Because the contract obligates owner-operators to comply with System's policies and procedures, System has the *right to control* their performance, which is the "crucial issue" under case law. *W. Ports*, 110 Wn. App. at 452. Thus, while System's argument that the Court should not consider federally mandated controls is incorrect under Washington case law, it is also immaterial under the facts of this case because of these additional controls.

**c. *Western Ports* is good law and should be applied, not overruled**

System asserts various reasons why this Court should depart from *Western Ports*, Br. Appellant 30-36, but none of the arguments has merit.

System's argument that *Western Ports* is inconsistent with *other states'* decisions is unavailing for two reasons. See Br. Appellant 30-32. First, most of those decisions are distinguishable. For example, the contractual relationship in *Hammond v. Department of Employment*, 480 P.2d 912 (Idaho 1971), involved "a series of trip-by-trip contracts with the drivers doing little more than renting trailers from" the carrier, and the drivers were "entirely free from any control whatsoever in the performance of their work." *A Nu Transfer, Inc. v. Department of Labor & Employment Security*, 427 So. 2d 305 (Fla. Dist. Ct. App. 1983), was specifically acknowledged and distinguished in the *Western Ports* decision. *W. Ports*, 110 Wn. App. at 461. In *Wisconsin Cheese Service, Inc. v. Department of Industry, Labor & Human Relations*, 340 N.W.2d 908 (Wis. Ct. App. 1983), the *only* showing of control was the power to terminate the leases. In *Hough Transit, Ltd. v. Harig*, 373 N.W.2d 327 (Minn. Ct. App. 1985), Minnesota had a different definition of "employment" than Washington, and non-employee milk drivers were specifically excluded from the unemployment law. And *Moba v. Total Transportation Services, Inc.*, 16 F. Supp. 3d 1257 (W.D. Wash. 2014), involved the definition of "employee" under the Fair Labor Standards Act and Washington Minimum Wage Act, which employs a balancing of a number of factors and asks, under the totality of the circumstances,

whether the individual is dependent on the business he or she is serving “as a matter of economic reality.” *Moba*, 16 F. Supp. 3d at 1264. This is not the test under Washington’s Employment Security Act, so the case does not apply here. Indeed, the *Western Ports* court acknowledged that other states had found carriers not liable for unemployment compensation for its owner-operators, yet it still found that they are covered in Washington. *W. Ports*, 110 Wn. App. at 461.

Second, *Western Ports* has been controlling precedent for over 14 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). Stare decisis fosters parties’ reliance on judicial decisions, *id.*, and “assures that the same rules will apply to each citizen’s case and that those rules may be known and relied upon.” *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 423, 150 P.3d 545 (2007). “[W]ithout the stabilizing effect of stare decisis, ‘law could become subject to . . . the whims of current holders of judicial office.’” *Id.* (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). Here, the carriers disagree with the law, but they have 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 *Western Ports*’

holding and paid their fair share of taxes, instead rewarding carriers who failed to follow this precedent with an unfair competitive advantage.

Importantly, the Legislature has declined to modify the employment coverage provisions of the Act since the *Western Ports* decision in 2002, which indicates legislative acquiescence in that decision. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 346-47, 217 P.3d 1172 (2009). Notably, the Legislature has 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.

Moreover, the *Western Ports* decision is not an outlier. *See, e.g., Claim of Short*, 649 N.Y.S.2d 955 (N.Y. App. Div. 1996); *C.R. England, Inc. v. Dep't of Emp't Sec.*, 7 N.E. 3d 864, 876-77 (Ill. App. Ct. 2014); *SZL, Inc. v. Indus. Claim Appeals Office*, 254 P.3d 1180, 1183-84 (Colo. Ct. App. 2011). The *Western Ports* court acknowledged that courts “in various states having unemployment statutes similar to Washington’s have found owner/drivers to be covered employees for purposes of unemployment compensation” under similar facts. *Id.* at 460-61. At most, System shows that different states have applied their own laws differently, not that *Western Ports* is incorrect.

System incorrectly suggests that *Western Ports* conflicts with the interpretation of the Interstate Commerce Commission (ICC). See Br. Appellant 35. 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 made clear that the control regulation should not be deemed “prima facie evidence of an employer-employee relationship,” it also 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 consideration of federal lease requirements when making employment determinations under state law, then it could have said so. Instead, its regulation says only that nothing in 49 C.F.R. § 376.12(c)(1), which provides for a carrier’s exclusive possession, control and use of equipment during the lease, is “intended to affect” whether the owner-operator is an independent contractor or employee of the carrier. 49 C.F.R. § 376.12(c)(4). Neither the regulation nor the ICC’s guidance say anything about *barring consideration* of the numerous federal leasing requirements under the state law inquiry. System overstates the ICC’s guidance.<sup>10</sup>

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<sup>10</sup> The 1994 statement by the ICC also does not “reinforce” the position advanced by System, as it suggests. Br. Appellant 35 (citing Fed. Carr. Cas. P 3821 (I.C.C.), 1994 WL 70557 (1994)). Rather, that statement merely clarified that the ICC did

System also suggests that *Western Ports* is inconsistent with *Penick v. Employment Security Department*, 82 Wn. App. 30, 917 P.2d 136 (1996). Br. Appellant 39-40. This is not so. The court's holding in *Penick* was about company drivers, not owner-operators, and the language in *Penick* about owner-operators was dicta. *Penick*, 82 Wn. App. at 41-44. And the fact that the Commissioner had earlier decided in *Penick* that owner-operators were exempt is of no consequence. The Commissioner's decision is not precedential, and the Court of Appeals later "*decidedly held* [in *W. Ports*] that an owner-operator was not exempt from coverage under RCW 50.04.140." ARST2 368 (emphasis added). There is no conflict between *Western Ports* and *Penick*; but in any event, *Western Ports* has been the law since 2002.

**d. The common law test for control does not apply**

This is a statutory case. Therefore, System'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

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not "intend the leasing regulations to create additional causes of action under state law. These regulations are merely intended to make clear that when a vehicle is under a carrier's control through a lease, it is responsible for the safe operation of the vehicle. . . . [C]ourts should be deciding suits . . . by applying the ordinary principles of state tort, contract, and agency law. . . . [O]ur rules are not intended to influence, in any fashion, a court's liability determination." 1994 WL 70557 at \*6.

P.3d 472 (2002), is off-base. Br. Appellant 36-37 and n.45. *Seattle Aerie* was decided before the Legislature specified that “employment” under the Employment Security Act is broader than the common law test, and thus has no relevance here.<sup>11</sup> And *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. *Id.* at 119. It is not an unemployment case and did not discuss Title 50 RCW. Unlike under common law, the exceptions to coverage under the Employment Security Act must be narrowly construed. *Penick*, 82 Wn. App. at 36; *W. Ports*, 110 Wn. App. at 451. The Commissioner properly rejected System’s invitation to apply a “common law definition” of the term “control or direction” under RCW 50.04.140(1)(a) that would somehow trump examples of control or direction in case law under the Act. ARST2 374-75.

The Court should affirm the ruling that System failed to prove freedom from control or direction under RCW 50.04.140(1)(a).

**2. System failed to prove that the owner-operators were engaged in independently established businesses under RCW 50.04.140(1)(c)**

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<sup>11</sup> *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.

The Commissioner properly ruled that System failed to prove 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); ARST2 378-80. 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 v. Emp’t Sec. Dep’t*, 69 Wn. App. 810, 815, 850 P.2d 1345 (1993) (quotation omitted). 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, Inc. v. Indus. Claim Appeals Office*, 254 P.3d 1180, 1183 (Colo. Ct. App. 2011) (interpreting nearly identical language in Colorado’s employment security act, favorably citing *Western Ports*).

With respect to trucking, having separate motor carrier authority from the Federal Motor Carrier Safety Administration is important to whether an owner-operator is engaged in an independent business. See *Stafford Trucking, Inc. v. Dep’t of Indus., Labor & Human Rel.*, 206 N.W.2d 79, 84 (Wis. Ct. App. 1981) (because owner-operators depended

on carrier's operating authority to haul freight, if they "were terminated by [the carrier], in all likelihood they would be out of work until they could make similar arrangements with another carrier"). To be truly independent, owner-operators would need their own motor carrier authority so they could haul freight for others besides System. ARST2 397 (Commissioner's recognition of this as a paramount factor in the trucking industry). System offered no evidence to show that any owner-operators had independent motor carrier authority. ARST1 197; ARST3 329-30, 380, 411 (Stewart deposition).

Besides, even if an owner-operator had independent motor carrier authority, under the contract, he or she would need to seek System's written permission to use it and would need to provide proof of "adequate liability and cargo insurance" and would need to "remove or cover-up Carrier's identification devices from the equipment." ARST1 23 ¶ 2; ARST3 325 (Stewart deposition). While owner-operators own their trucks, their exclusive lease with System prohibits them from operating the trucks to haul freight for anyone other than System during the lease term without written permission of System. This demonstrates lack of independence.

The lack of motor carrier authority is not a mere paperwork formality. It shows that System's owner-operators did not carry on independent businesses during the audit period. A true independent

contractor performs work for him or herself, not just for one company on whom the supposed independent contractor is entirely economically dependent. *See Jerome*, 69 Wn. App. at 815-16. System did not present evidence that any owner-operators included in the audit actually performed any services for other carriers during the periods at issue. While the owner-operators can go work for another carrier under that carrier's authority if their relationship with System terminates, this is no different than any at-will employee's ability to work for another employer.

Independence can potentially be established by showing that workers solicited, advertised, or held themselves out as a separate business to the public; had individual business cards; were subject to risks of loss from customer nonpayment; were registered as independent businesses with the State; and more. *See Penick*, 82 Wn. App. at 44. As the Commissioner noted, System did not even prove the owner-operators were registered as independent businesses during the audit period:

The record is devoid of any business registration, business license, UBI number, and account with the Department of Revenue tending to show the existence of an established business entity. As such, it matters not that the owner-operators owned their trucks and were responsible for the costs of operating those trucks; or that the costs of the trucks or trailers were significant; or that the owner-operators maintained their own financial books reflecting their income and expenses. . . . The fact remains that the owner-operators had no established business entities that

were separate and apart from their own individuals *in the first place*.

ARST2 379.

Further, there is no evidence that System's owner-operators ever advertised their services, and there is evidence they did not. *See* ARST3 211 (Stewart deposition). The owner-operators did not have individual business cards. ARST2 380 n.4. Also, the contract required the owner-operators to display System's logo on their trucking equipment to show it was being operated by System. *See* ARST1 23 ¶¶ 1, 2. This effectively prohibited the owner-operators from expressing business independence. System also protected owner-operators from risks of loss from non-payment because it paid them for their work regardless of whether customers paid System. ARST2 380 n.4 (citing ARST1 4 (Stipulations ¶ 6)). The Commissioner properly ruled that owning a truck alone does not prove exception under RCW 50.04.140(1)(c). ARST2 379-80.<sup>12</sup>

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<sup>12</sup> While System may argue that its contract with owner-operators permits them to hire employees, this does not establish independence of the owner-operators whose wages are at issue in the Commissioner's order. As the parties have stipulated, the owner-operators who are themselves employers were excluded from the audit. ARST1 5 (Stipulations ¶ 10).

System's discussion of an employer's ability to self-elect unemployment compensation coverage, Br. Appellant 29 n.38, 42 n.52, is also a red herring because the owner-operators at issue are *not* employers, and if they are in System's employment (as they are) and System fails to prove exception (as it did), then *System* is responsible for the cost of coverage.

Substantial evidence supports the Commissioner's determination that System did not meet its burden to prove the supposed independent contractors' independence, and this determination is free of legal error.

**C. The Assessment is Not Preempted by Federal Law Because It Imposes Only Minor Increased Costs 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) (federal Service Contract Act did not preempt overtime provisions of Washington's Minimum Wage Act), *review denied*, 161 Wn.2d 1025 (2007)). System fails to overcome this strong presumption.

Washington case law has already rejected System's argument that the Federal Aviation Administration Authorization Act (FAAAA) preempts the application of 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 Employment Security Act). And the Washington Supreme Court recently 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 Employment Security Act is not preempted.

### **1. Background on preemption**

In 1978, Congress enacted the Airline Deregulation Act (Airline act), which 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 with preemption language 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), *cert denied*, 526 U.S. 1060 (1999). 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) (emphasis added). 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) (quoting *Columbus v. Ours Garage & Wrecker Service, Inc.*, 563 U.S. 424, 449, 440 S. Ct. 2226, 153 L. Ed. 2d 430 (2002) (Scalia, J., dissenting)).

**2. Generally applicable state laws—like the Employment Security Act—are not preempted by the FAAAA**

System relies almost exclusively on First Circuit cases to argue that applying the Employment Security Act to a carrier is preempted. Br. Appellant 19-20, 26-28. This reliance is misplaced for two reasons.

First, System ignores case law from other courts, including Washington’s, with analysis that is applicable to the Employment Security Act. For example, the Ninth Circuit held that generally applicable “background” laws are not preempted by the FAAAA. *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (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 it raises the overall cost of doing business or requires 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,” just as are prevailing wage laws or safety regulations. *Id.* at 646. 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.

Second, the First Circuit cases are easily distinguished because the state law is so different. The Massachusetts' Independent Contractor Statute first determines whether individuals are employees or independent contractors. *Massachusetts Delivery Ass'n v. Coakley*, 769 F.3d 11, 15 (1st Cir. 2014). Then, for "employees," the law triggers additional legal requirements on the employers under various wage and employment laws, such as providing days off, parental leave, work-break benefits, and a minimum wage.<sup>13</sup> *Id.* The definition of "employment" in the Employment Security Act, in contrast, affects worker classification only for purposes of Title 50 RCW, which is specifically acknowledged to be 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 *Compensation & Placement v. Hunt*, 22 Wn.2d 897, 899, 158 P.2d 98 (1945)); RCW 50.04.100. The witnesses' declarations

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<sup>13</sup> 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. Lazership*, 937 F. Supp. 2d 730 (E.D. Va. 2013).

referenced by System, Br. Appellant 16 n.22, 24-25, state erroneous legal conclusions concerning the effect of the Department's assessment, as they falsely assume that reclassifying owner-operators for purposes of Title 50 RCW results in their transformation to employees for all purposes or requires System to provide services only using employees driving company-owned trucks.

System misreads *Remington v. J.B. Hunt Transport, Inc.*, 2016 WL 4975194 (D. Mass. 2016), which involved the Massachusetts Independent Contractor Statute and the Massachusetts Wage Act. Br. Appellant 20. There, the plaintiffs claimed that the carrier improperly deducted expenses from their wages in violation of the state statutes. 2016 WL 4975194 at \*4. But the deductions are permitted under the federal Truth-in-Leasing regulations, so the court held the claims were preempted. *Id.* That is why the court stated: "What is explicitly permitted by federal regulations cannot be forbidden by state law." *Id.* The case has no application here. The Employment Security Act does not forbid or make illegal the use of owner-operators. It only imposes a tax. System and other carriers can continue to use owner-operators and classify them as independent for other purposes.

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. American Airlines, Inc.*, 646 F.3d 81, 87 (1st Cir. 2011) (emphasis added). And in *Schwann v. FedEx Ground Package System*, 813 F.2d 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).

The Washington Supreme Court has essentially adopted the Ninth Circuit’s “generally applicable background law” framework with respect to a similar preemption provision found in the Employee Retirement Income Security Act of 1974 (ERISA). *W.G. Clark Constr. v. Pac. Nw. Reg’l Council of Carpenters, et al.*, 180 Wn.2d 54, 322 P.3d 1207 (2014). 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 thus includes the same “related to” language as in the Airline act and FAAAA. At issue in *W.G. Clark* was whether ERISA preempts claims made under two Washington laws, one that requires public works general contractors to execute and deliver a bond to protect workers, and another that requires the public agency to retain a

percentage of the money earned by the general contractor for payment of claims under the contract. *W.G. Clark*, 180 Wn.2d at 60-61; RCW 60.28.011. The court held that the statutes were not preempted because they “apply generally to all workers on public projects, regardless of the type of work they perform or how they are paid.” 180 Wn.2d at 64.

More recently, the Washington Supreme Court agreed 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. This too shows agreement with the Ninth Circuit’s “generally applicable background law” analysis, which precludes finding preemption here.

Like the meal and rest break laws in *Dilts* and the public works laws in *W.G. Clark*, the Employment Security Act is a generally applicable background law for all employers doing business in Washington. *See Dilts*, 769 F.3d at 647. The Act does not aim at motor carriers. The requirement that System pay unemployment taxes for its owner-operators has at most a “tenuous, remote, or peripheral” relationship to its prices, routes, or services, not the kind of connection preempted by the FAAAA. *Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. 364, 371, 128 S. Ct. 989, 169 L. Ed. 2d 933 (2008). It has less impact on routes and services than meal and rest break laws, which the FAAAA does

not preempt. *Dilts*, 769 F.3d at 646-47. And, unlike the laws applicable to public works at issue in *W.G. Clark*, the Employment Security Act applies to all employers in all industries. Any impact is too remote or tenuous to precipitate preemption under the FAAAA. *W.G. Clark*, 180 Wn.2d at 64; *Rowe*, 552 U.S. at 371.

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

Airline act or FAAAA preemption occurs only where the state law aims directly at transportation, or where 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’n 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)).

Our Court of Appeals 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. The 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 Washington overtime requirements as applied to interstate truck drivers).

Similarly, *Filo Foods, LLC v. City of SeaTac* held that the 2013 SeaTac ballot proposition establishing a \$15-per-hour minimum wage and other benefits and rights for employees in the hospitality and transportation industries was not preempted by the Airline act, “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; it does not directly regulate airline prices and services. *Id.* The fact that the proposition “may impose costs on airlines and therefore affect fares is inconsequential.” *Id.*

**a. An increase in operating costs does not trigger preemption**

Here, System is a company with more than 630 drivers, yet it complains that \$58,300.99 in unemployment insurance tax liability over a three year period would increase its operating costs. Br. Appellant 5, 24, 27-29. That fact is as “inconsequential” as the claim rejected in *Filo Foods, LLC*, 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, System 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 System’s customers. *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1055-56 (7th Cir. 2016). Minor additional costs do not trigger preemption under FAAAA. *See id.*

Put simply, System’s argument goes too far and would put a cloud over everything from fuel taxes, to business and occupation taxes, to property tax assessments for increased value of its real property, and more, because each can be attacked like the unemployment insurance tax. 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 seek to “restructure” the trucking industry, and that is not the effect of paying unemployment taxes**

To claim FAAAA preemption, System 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. Br. Appellant 1, 2, 19, 22-23, 26, 29. 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 “deprive an entire industry of the right to use the owner/operator business model,” as System dramatically claims. Br. Appellant 22. The Act only requires employers’ payment of unemployment taxes without impacting the classification of workers as employees or independent contractors under other laws. Unlike the Massachusetts Independent Contractor Statute and Wage Act in the First Circuit cases, the definition of “employment” in the Act references no other law employers must comply with. RCW

50.04.100. The Commissioner ordered System to pay taxes, nothing more.

ARST2 380. The potential for a small increase in taxes is far removed from a nearly 100% 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.<sup>14</sup>

System protests that it is “unrealistic” to think that “carriers can restructure their businesses to treat owner/operators as employees in some contexts and independent contractors in others.” Br. Appellant 25. The Court of Appeals 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. . . . Thus, the question is not whether [an owner-operator] may be an independent contractor under federal motor carrier law or under common law. Instead, the question is whether he meets all three prongs of the exemption test contained in the act, regardless of common law definitions.

*W. Ports*, 110 Wn. App. at 458-59. “All that the Employment Security Act

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<sup>14</sup> Under RCW 50.29.025, the *highest* unemployment insurance tax rates are 6-6.5% of payroll. Because approximately 40% of System’s drivers are owner-operators, ARST3 147, the maximum impact of the Department’s assessment is a 2.4-2.6% tax on payroll, but in reality, it would be less because not all wages are taxed, as there is a cap per worker per RCW 50.24.010, and System will not necessarily be taxed at the highest rates.

requires of the carrier is payment of the employment insurance tax.”  
ARST2 409.

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*, 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*, 7 N.E.3d at 880.

Like the laws at issue in these cases, the Employment Security Act does not require System to choose one business model over another. “Conspicuously absent from [System’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 System'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. The Act 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 (1st Cir. 2012). This impact is to "tenuous, remote, or peripheral" to warrant FAAAA preemption. *Rowe*, 552 U.S. at 371.

**4. *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**

System asserts that *Western Ports* did not consider express preemption under the FAAAA and, even if it did, *Rowe* overruled it. Br. Appellant 21 n.30. System is mistaken.

*Western Ports* involved an owner-operator who was discharged and applied for unemployment benefits. 110 Wn. App. at 445-48. The court considered and rejected two federal 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 454-57; Br. Appellant 33-36. System makes both arguments here. Noting that Congress makes it clear when it intends to

prohibit taxing authorities from burdening interstate commerce, the court “decline[d] to infer that Congress, in enacting federal motor carrier law, intended to preempt state unemployment law.” *Id.*

While the *Western Ports* court did not discuss carriers’ prices, routes, and services, the court was mindful of the FAAAAA 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 the *Western Ports* court had believed that owner-operator coverage under the Employment Security Act “related to” a carrier’s prices, routes, or services and thus triggered preemption under 49 U.S.C. § 14501(c), it obviously would not have ruled that federal law does not preempt the Employment Security Act. *Id.* at 454-57.

In fact, a Colorado court followed the “persuasive” analysis in *Western Ports* to hold the FAAAAA “does not preempt the determination that claimant [truck driver] was in covered ‘employment’ for unemployment tax liability purposes.” *SZL*, 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*, 7 N.E. 3d at 880-81. System cites no case that holds the FAAAAA preempts any state’s employment security law. There is none.

System also incorrectly argues that *Rowe v. New Hampshire Motor Transportation Association* overruled *Western Ports*. Br. Appellant 20-21. *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). But even the two Maine tobacco laws at issue in *Rowe* had a “direct ‘connection with’ motor-carrier services.” *Rowe*, 522 U.S. at 368, 371. The effect of one law was to require 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 thereby 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 were preempted, the Court emphasized that “the state law is not general, it does not affect truckers solely in their capacity as members of the 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 and other motor carrier services, it does not require 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 the Department’s application of the Employment Security Act to interstate motor carriers. *Western Ports* is good law.

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

**D. The Commissioner Properly Declined to Dismiss the Assessment Based on Alleged Audit Conduct**

System’s final argument claims that the audit and assessment should have been excluded or dismissed for alleged faulty conduct. The Commissioner properly declined to dismiss the assessment under RCW 50.32.050 and .080 because the audit and assessment were not arbitrary and capricious and did not violate System’s due process rights. ARST2 324 (CL 14), 364-69.

In the context of agency action, arbitrary and capricious has been defined as action that is “willful and unreasoning and taken without regard to the attending facts or circumstances.” *Wash. Indep. Tel. Ass’n v. Wash. Utils. & Transp. Comm’n*, 148 Wn.2d 887, 904, 64 P.3d 606 (2003). If there is room for two opinions, a decision is not arbitrary and capricious

even though one may believe an erroneous conclusion has been reached. *Id.* A party seeking to demonstrate an agency action is arbitrary and capricious bears a heavy burden. *Keene v. Bd. of Accountancy*, 77 Wn. App. 849, 859, 894 P.2d 582 (1995). System fails to note these standards.

**1. System's theories about the manner in which it was audited do not establish arbitrary and capricious action**

System disparages the Department and its employees for the way in which it was audited. *See* Br. Appellant 45-54. It complains that the auditor lacked sufficient education and training, did not follow the Department's internal manuals, and was not impartial. *Id.* But *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 110 P.3d 812 (2005), holds that when the statute does not require any particular investigative process, and where a party is afforded a de novo hearing to challenge the agency's decision, an allegation of faulty investigation does not, on its own, show arbitrary and capricious action. *Id.* at 78-79.

In *Motley-Motley, Inc.*, a property owner (Motley) sought judicial review of a final order of the Pollution Control Hearings Board that its water rights had been relinquished, which affirmed a tentative decision of the Department of Ecology. *Id.* at 66. The superior court had reversed the PCHB ruling because the investigator did not visit the property, contact Motley, review Motley's records, or examine aerial photographs before

the Department commenced the relinquishment action. *Id.* at 78. The court reversed the superior court, noting:

The statute does not require DOE to use any particular process to investigate the possible relinquishment of a water right. . . . Moreover, even if DOE's investigation of Motley's water right was inadequate and incomplete, there was no actual prejudice to Motley. The relinquishment proceedings before PCHB were de novo, without deference to DOE's tentative decision. At the PCHB hearing, Motley had the right, opportunity, and obligation to present evidence rebutting DOE's proof of the alleged relinquishment of Motley's water right.

*Id.* at 78-79.

These same factors are present here. The Employment Security Act does not require the Department to use any particular process to investigate misclassification of workers or reporting errors. *Id.* at 78; ARST2 367. System had a de novo hearing to present evidence showing the Department's decision was incorrect. The Commissioner correctly rejected all of System's arguments on these subjects. ARST2 324, 367.

Regarding the allegation that the audit results were "predetermined" because of performance requirements, Br. Appellant 47, 50-51, the Commissioner weighed the evidence and concluded System showed no arbitrary and capricious action on this point. ARST2 365-66. The Commissioner found that the auditor conducted pre-audit research, which suggested that the employers selected for audit had most likely

erred in classifying its workers as independent contractors under the Act. *Id.* at 366; ARST3 193 (Stewart deposition). The Commissioner also reasoned that “[e]xpecting that the auditors almost always find errors may be nothing more than a statistical reality that most employers make mistakes.” ARST2 366. Without any allegation—let alone proof—that the auditor “intentionally fabricated or otherwise manipulated the audit result,” the Commissioner properly rejected System’s attempt to ignore the legality of the tax, which “was consistent with the W. Ports decision.” *Id.*

Finally, System argues that the auditor “ignored” certain elements of the carrier/owner-operator relationship that it believes should change the outcome or would have “limit[ed] the assessment amounts.” Br. Appellant 52-53. Of course, System had a de novo hearing to demonstrate these very issues, yet it still focuses on the auditor’s conduct. In attempting to tie the merits of its tax liability back to what the auditor considered, System focuses on how the owner-operators “make a profit or loss, decide their own routes, decide their working hours,” etc., and claims the auditor “ignored” or “never researched” whether an owner-operator happened to have a unified business identifier (UBI) or a corporate form. *Id.* Even if this were relevant, the portions of the auditor’s deposition

testimony System cites do not support the allegations.<sup>15</sup> But more importantly, it is irrelevant here. That System may have offered *some* facts tending to show *some parts* of *some* elements is not enough to prove the owner-operators are independent contractors, and emphasizing those elements now is an invitation for this Court to reweigh the evidence. Simply put, the existence of contrary evidence does not make the Commissioner's decision arbitrary and capricious. *Motley-Motley, Inc.*, 127 Wn. App. at 80.

System's inordinate focus on what the auditor considered in reaching her conclusions is misplaced, given that courts review final decisions, not the mental processes of decision makers. *McDonald v. Dep't of Labor & Indus.*, 104 Wn. App. 617, 623, 17 P.3d 1195 (2003) (deliberative process an agency employs in reaching its ultimate decision is irrelevant in determining correctness of that action); *Ledgering v. State*, 63 Wn.2d 94, 101, 385 P.2d 522 (1963) (courts should not probe mental processes of decision makers). And here, the auditor is not even the final decision maker.

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<sup>15</sup> The auditor testified she "did a lot of research" and "did not recall" which owner-operators she investigated for corporate form. ARST3 336-37. She further testified she could not recall which owner-operators she researched for UBIs, but that whether or not an owner-operator happened to have a UBI would not change the outcome if the contract formed an employer-employee relationship. ARST3 451-52; *see also* ARST3 211 (several owner-operators did not have UBIs). The auditor did not ignore certain contractual elements in reaching her determination. Rather, she considered the entire contract. ARST3 346-47.

**2. System cannot show procedural or substantive due process violations**

System's complaints about the audit conduct also fail to show any due process violations.

Procedural due process requires notice and an opportunity to be heard prior to final agency action. *Motley-Motley, Inc.*, 127 Wn. App. at 81. With respect to the specific allegation that the auditor did not adequately follow the Department's internal manuals, Br. Appellant 47-49, "an agency's failure to comply with its own procedures does not establish a procedural due process violation. Instead, to constitute a violation, the party must be prejudiced. Prejudice relates to the inability to prepare or present a defense." *Motley-Motley, Inc.*, 127 Wn. App. at 81 (internal citation omitted).<sup>16</sup> The Commissioner properly concluded that "internal policies, directives, and standards do not generally create law that binds the agency," and that "the Department's failure to adhere to its

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<sup>16</sup> The Department's Status Manual and Tax Audit Manual contain guidelines that are for internal use only and, as such, do not represent the official agency 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."); *Mgmt. Recruiters Int'l, Inc., v. Bloor*, 129 P.3d 851, 856 (6th Cir. 1997) (noting that where an agency has the choice between binding rules and an advisory interpretive statement, the agency's choice to do the latter indicates its interpretation is not binding through judicial deference); see also *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). Here, the Status Manual and Tax Audit Manual do not even rise to the level of an interpretive statement, which itself would be afforded no deference. See *id.*

own internal nonbinding standards or manuals is not an arbitrary and capricious action *per se*.” ARST2 365 (citing *Joyce v. Dep’t of Corrections*, 155 Wn.2d 306, 323, 119 P.3d 825 (2005)). System had notice of the assessment and an opportunity to be heard prior to the Department’s final order. *See Motley-Motley, Inc.*, 127 Wn. App. at 81. System can hardly be said to have been prejudiced in its ability to prepare or present its challenge to the assessment when it had a *de novo* hearing, particularly when it stipulated to the record. ARST1 3-5.

Nor has System established a substantive due process violation. Substantive due process generally asks whether the government abused its power by arbitrarily depriving a person of a protected interest, or by basing the decision on an improper motive. *Nieshe v. Concrete School Dist.*, 129 Wn. App. 632, 640-41, 127 P.3d 713 (2005). As a threshold matter, System must establish it was deprived of a constitutionally protected liberty or property interest. *Id.* at 641. “[T]he protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.” *Id.* at 642 (quoting *Nunez v. City of L.A.*, 147 F.3d 867, 871 n.4 (9th Cir. 1998)). Substantive rights can only be created by fundamental interests derived from the Constitution. *Id.* at 642.

System has not claimed any liberty or property interest is implicated here, because there is none. It merely argues that “ESD’s audits were tainted by an improper motive” because of the auditor’s performance criteria. Br. Appellant 47.<sup>17</sup> This does not implicate substantive due process. *Motley-Motley* reached the substantive due process question (holding there was no violation) because that case involved property rights, and the cases it cites were land use decisions. *Motley-Motley, Inc.*, 127 Wn. App. at 82 (analyzing when a *land use decision* violates substantive due process, and citing *Dykstra v. Skagit County*, 97 Wn. App. 670, 673, 985 P.2d 424 (1999) and *Cox v. City of Lynnwood*, 72 Wn. App. 1, 9, 863 P.2d 578 (1993)). Those cases do not apply here. System has no fundamental right to be audited in a particular way, especially where a *de novo* hearing and judicial review are available to challenge the assessment.<sup>18</sup>

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<sup>17</sup> In its Introduction, System also asserts that the Department’s audit was a “politically-motivated effort to restructure Washington’s trucking industry.” Br. Appellant 1. But it does not raise this as a basis to set aside the assessment in the argument section. *See id.* at 45-54. Nor does any evidence or finding support the claim.

<sup>18</sup> System makes a passing reference to its claim that “ESD imposed taxes, penalties, and interest on System that it knew were incorrect.” Br. Appellant 47. But “[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” *Brownfield v. City of Yakima*, 178 Wn. App. 850, 876, 316 P.3d 520 (2014). Even if the Court were to consider the issue—which presumably relates to a contention that the Department’s original assessment taxed certain costs for equipment lease—the Commissioner noted System’s statutory and regulatory obligations to keep and produce records showing workers’ gross wage payments, and the Commissioner correctly ruled that “System did not provide all necessary information during the audit for the Department to make an accurate assessment,” thereby authorizing the Department to calculate its assessment on the information available. ARST2 366-67. Hence, the

System's arguments are thus revealed as hollow litigation strategies that ignore that the Department took a position consistent with *Western Ports*. Taking a position that is consistent with binding case law cannot be arbitrary and capricious or unconstitutional action. *See* ARST2 366. System failed its burden of proving arbitrary and capricious or unconstitutional action.

Contrary to System's suggestion, Br. Appellant 46 n.55, the fact that the Court of Appeals recently held that audited carriers *may* state a claim for relief based on *alleged* constitutional violations does not amount to a finding that their rights were actually violated, and the Commissioner correctly concluded that neither the record nor System's legal arguments supported such a finding. ARST2 368-69; *see Wash. Trucking Ass'ns, et al. v. Emp't Sec. Dep't, et al.*, 192 Wn. App. 621, 647, 369 P.3d 170, *review granted*, 186 Wn.2d 1016 (2016) ("They will be able to invalidate the assessments *if* they can show that . . . imposing the assessments based on ESD's audit procedures violated the constitution" (emphasis added)). The court ruled only that the carriers *may* state a claim, not that they established anything. *Id.* at 646-47, 649-50.

**3. The Commissioner properly declined to exclude the assessment or declare it "void"**

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Department's original assessment was not knowingly incorrect but instead was based on the circumstances of the case.

Because System cannot establish any constitutional violations, the Commissioner properly declined to exclude the audit and assessment.<sup>19</sup> ARST2 411. And System's reliance on RCW 34.05.452 is off-base. See Br. Appellant 48. Under that provision, an administrative tribunal "shall exclude evidence *that is excludable* on constitutional or statutory grounds[.]" (Emphasis added). But System asserts no basis on which evidence of the Department's audit is *excludable*.<sup>20</sup>

System makes passing assertions that the Department's assessment is "void" because it exceeded statutory authority. Br. Appellant 46, 54. System misuses the term, as the Commissioner properly ruled. ARST2 364 (discussing *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 542, 886 P.2d 189 (1994)), and other cases distinguishing an allegedly erroneous decision from one exceeding the type of controversy an agency may decide). The assessment is not void.

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<sup>19</sup> System's argument that the Department's audit should have been excluded from evidence is waived below. The parties stipulated to the evidentiary record. ARST1 5 (Stipulations ¶ 12).

<sup>20</sup> The cases on which System relies are inapposite. See Br. Appellant 47 n.56 (citing *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961) (extending exclusionary rule to state criminal prosecutions); *State v. Miles*, 160 Wn.2d 236, 156 P.3d 864 (2007) (state agency's search of personal banking records obtained from a third party without a judicially authorized warrant or subpoena violated article I, section 7 of Washington Constitution); *McDaniel v. City of Seattle*, 65 Wn. App. 360, 828 P.2d 81 (1992) (knife obtained illegally through a warrantless search and suppressed in criminal trial admissible in defendant's subsequent civil suit); and *Barlindal v. City of Bonney Lake*, 84 Wn. App. 135, 925 P.2d 1289 (1996) (Fourteenth Amendment exclusionary rule prohibited law enforcement agency in a civil forfeiture action from using evidence obtained without probable cause for the search and seizure).

## VI. CONCLUSION

System failed to prove that the owner-operators are excepted from coverage. System's arguments that the assessment is preempted or must be dismissed due to alleged faulty audits were properly rejected by the Commissioner. The Court should affirm the Commissioner's order.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of January, 2017.

ROBERT W. FERGUSON  
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**PROOF OF SERVICE**

I, Dianne S. Erwin, declare that I sent a copy of this document, **Brief of Respondent RE: System-TWT Transport** for service on all parties or their counsel of record via US Mail Postage Prepaid, and by electronic mail per electronic service agreement on the date below as follows:

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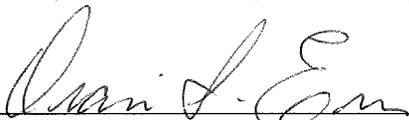
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 30 day of January 2017 at Olympia, Washington.

  
DIANNE S. ERWIN, Legal Assistant

# SYSTEM - TWT- JAMES J. WILLIAMS

PO BOX 3456 SPOKANE, WA 99220 1-800-762-3776 (FAX) 509-625-3912

NAME: \_\_\_\_\_

DATE: \_\_\_\_\_

## DRIVERS RIGHTS

### **BY COMPLETING AND SUBMITTING THIS PERSONAL HISTORY/BACKGROUND SUMMARY**

I understand that in accordance with **SYSTEM TRANSPORT - TW TRANSPORT - JAMES J. WILLIAMS** policy, all prospective employees and lease or contract drivers must successfully complete a blood or urine drug screen analysis as a condition of employment or certification as a driver as required by the Federal Motor Carrier Safety Regulations.

Further, I understand that an invitation to attend orientation on behalf of **SYSTEM TRANSPORT - TW TRANSPORT - JAMES J. WILLIAMS** does not constitute an offer of employment or contract services and that there can be no employer/employee relationship or contract services until such time as I have successfully completed the orientation process and been offered a position with **SYSTEM TRANSPORT - TW TRANSPORT - JAMES J. WILLIAMS**.

Further, I understand and acknowledge that my submission to a blood or urine drug screen analysis is required to be administered by **SYSTEM TRANSPORT - TW TRANSPORT - JAMES J. WILLIAMS**. The unsatisfactory results of said test shall prevent any further consideration of my prospective employment or contract services with **SYSTEM TRANSPORT - TW TRANSPORT - JAMES J. WILLIAMS**.

Hereby agree to submit to a blood or urine drug screen analysis and authorize the release of the results of my drug screen to representatives of **SYSTEM TRANSPORT - TW TRANSPORT - JAMES J. WILLIAMS**.

Authorize or its agent to investigate my background, character, general reputation and prior employment by contacting my prior employers or lessors, references or any other individuals **SYSTEM TRANSPORT - TW TRANSPORT - JAMES J. WILLIAMS** considers necessary. This gives **SYSTEM TRANSPORT - TW TRANSPORT - JAMES J. WILLIAMS** the authorization to release all employment or contract service information to prospective employers with or without written authorization.

Acknowledge that this is a summary only and that final proposal for employment or contract services must be completed upon arrival at corporate office and agree that providing false, misleading, or incomplete statements in this summary or in connection with **SYSTEM TRANSPORT - TW TRANSPORT - JAMES J. WILLIAMS** evaluation of me as a candidate for employment or contract services is grounds for immediate termination of my employment or contract services, regardless of when such information is discovered.

Agree that my employment relationship or lease contract (if any) with **SYSTEM TRANSPORT - TW TRANSPORT - JAMES J. WILLIAMS** shall be construed according to the laws of the state of Washington.

The Civil Rights Act of 1964 prohibits discrimination because of race, religion, sex, age, or national origin.

In accordance with FMCSR §391.21, **SYSTEM TRANSPORT - TW TRANSPORT - JAMES J. WILLIAMS** must inform all applicants that the information he/she provides in accordance with paragraph (b)(10) of this section may be used, and the applicant's previous employers will be contacted, for the purpose of investigating the applicant's safety performance history information as required by paragraphs (d) and (e) of §391.23. The prospective employer must also notify the driver in writing of his/her due process rights as specified in §391.23(i) regarding information received as a result of these investigations. Prospective applicants have the right to review information provided by previous employers; the right to have errors in the information corrected by the previous employer and for that previous employer to re-send the corrected information to the prospective employer; the right to have a rebuttal statement attached to the alleged erroneous information, if the previous employer and the driver cannot agree on the accuracy of the information.

**This certifies that this application was completed by me, in my own handwriting, and that all entries on it and information in it are true and complete to the best of my knowledge.**

Signature \_\_\_\_\_

Date \_\_\_\_\_

APPENDIX A  
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Exhibit A  
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Name \_\_\_\_\_ Date \_\_\_\_\_  
FIRST MIDDLE LAST Phone \_\_\_\_\_  
Msg. Phone \_\_\_\_\_

# SYSTEM - TWT- JAMES J. WILLIAMS

PO BOX 3456 SPOKANE, WA 99220 1- 800 - 762 - 3776 (FAX) 509-625-3912

## Personal History/Background Summary

Social Security # \_\_\_\_\_ Date of Birth \_\_\_\_\_  
Month Day Year

Address for Past Three Years

Street City State Zip  
Present \_\_\_\_\_ How Long \_\_\_\_\_  
\_\_\_\_\_ How Long \_\_\_\_\_  
\_\_\_\_\_ How Long \_\_\_\_\_

In Case of Emergency Notify:

Name (Relation)	Address	Phone
Name of Your Closest Relative:		
(Not Living With You) Name (Relation)	Address	Phone
Name of Spouse's Closest Relative:		
(Not Living With You) Name (Relation)	Address	Phone

Position Applied For \_\_\_\_\_

Have You Worked For this Company Before \_\_\_\_\_ Where \_\_\_\_\_  
Dates: From \_\_\_\_\_ To \_\_\_\_\_ Position \_\_\_\_\_  
Reason for Leaving \_\_\_\_\_  
Names of Relatives in Our Employ \_\_\_\_\_  
Who Referred You \_\_\_\_\_

REFERENCES (Someone able to verify personal history, such as a close friend, neighbor, or relative not living with you other than above).

Name	City	State	Relationship	How Long Known
Telephone ( ) _____				
Name _____	City _____	State _____		
Telephone ( ) _____				
Name _____	City _____	State _____		
Telephone ( ) _____				

### MILITARY STATUS

Branch of Service \_\_\_\_\_ Dates: From \_\_\_\_\_ To \_\_\_\_\_  
Rank at Discharge \_\_\_\_\_ Date of Discharge \_\_\_\_\_  
Draft Status \_\_\_\_\_ Reserve Status \_\_\_\_\_

### EDUCATION

Circle Highest Grade Completed: 1 2 3 4 5 6 7 8 High School: 1 2 3 4 College: 1 2 3 4  
Last School Attended \_\_\_\_\_  
Last Certificates, Degrees, Diplomas, Etc \_\_\_\_\_

**10 YEAR EMPLOYMENT RECORD**

Begin with your present employer and work backward in order, listing ALL your employers, driving school and other training programs, periods of military service, self-employment, and unemployment for at least 10 years.

**Federal Motor Carrier Safety Regulations (FMCSR'S) requires ALL time to be accounted for last 10 years.**

May we contact your present employer (if any) to verify your work record? Yes \_\_\_\_\_ No \_\_\_\_\_

Company \_\_\_\_\_  
 City \_\_\_\_\_ ST \_\_\_\_\_  
 Telephone ( ) \_\_\_\_\_  
 Dates: From \_\_\_\_\_ To \_\_\_\_\_  
 A. Were you subject to the FMCSRs under this employer?  
 B. Did you perform a safety-sensitive function for this employer?

Position Held \_\_\_\_\_  
 Type of Equip. Driven \_\_\_\_\_  
 Type of Trailer Pulled \_\_\_\_\_  
 Reason For Leaving \_\_\_\_\_  
 YES \_\_\_\_\_ NO \_\_\_\_\_  
 YES \_\_\_\_\_ NO \_\_\_\_\_

Company \_\_\_\_\_  
 City \_\_\_\_\_ ST \_\_\_\_\_  
 Telephone ( ) \_\_\_\_\_  
 Dates: From \_\_\_\_\_ To \_\_\_\_\_  
 A. Were you subject to the FMCSRs under this employer?  
 B. Did you perform a safety-sensitive function for this employer?

Position Held \_\_\_\_\_  
 Type of Equip. Driven \_\_\_\_\_  
 Type of Trailer Pulled \_\_\_\_\_  
 Reason For Leaving \_\_\_\_\_  
 YES \_\_\_\_\_ NO \_\_\_\_\_  
 YES \_\_\_\_\_ NO \_\_\_\_\_

Company \_\_\_\_\_  
 City \_\_\_\_\_ ST \_\_\_\_\_  
 Telephone ( ) \_\_\_\_\_  
 Dates: From \_\_\_\_\_ To \_\_\_\_\_  
 A. Were you subject to the FMCSRs under this employer?  
 B. Did you perform a safety-sensitive function for this employer?

Position Held \_\_\_\_\_  
 Type of Equip. Driven \_\_\_\_\_  
 Type of Trailer Pulled \_\_\_\_\_  
 Reason For Leaving \_\_\_\_\_  
 YES \_\_\_\_\_ NO \_\_\_\_\_  
 YES \_\_\_\_\_ NO \_\_\_\_\_

Company \_\_\_\_\_  
 City \_\_\_\_\_ ST \_\_\_\_\_  
 Telephone ( ) \_\_\_\_\_  
 Dates: From \_\_\_\_\_ To \_\_\_\_\_  
 A. Were you subject to the FMCSRs under this employer?  
 B. Did you perform a safety-sensitive function for this employer?

Position Held \_\_\_\_\_  
 Type of Equip. Driven \_\_\_\_\_  
 Type of Trailer Pulled \_\_\_\_\_  
 Reason For Leaving \_\_\_\_\_  
 YES \_\_\_\_\_ NO \_\_\_\_\_  
 YES \_\_\_\_\_ NO \_\_\_\_\_

Company \_\_\_\_\_  
 City \_\_\_\_\_ ST \_\_\_\_\_  
 Telephone ( ) \_\_\_\_\_  
 Dates: From \_\_\_\_\_ To \_\_\_\_\_  
 A. Were you subject to the FMCSRs under this employer?  
 B. Did you perform a safety-sensitive function for this employer?

Position Held \_\_\_\_\_  
 Type of Equip. Driven \_\_\_\_\_  
 Type of Trailer Pulled \_\_\_\_\_  
 Reason For Leaving \_\_\_\_\_  
 YES \_\_\_\_\_ NO \_\_\_\_\_  
 YES \_\_\_\_\_ NO \_\_\_\_\_

Company \_\_\_\_\_  
 City \_\_\_\_\_ ST \_\_\_\_\_  
 Telephone ( ) \_\_\_\_\_  
 Dates: From \_\_\_\_\_ To \_\_\_\_\_  
 A. Were you subject to the FMCSRs under this employer?  
 B. Did you perform a safety-sensitive function for this employer?

Position Held \_\_\_\_\_  
 Type of Equip. Driven \_\_\_\_\_  
 Type of Trailer Pulled \_\_\_\_\_  
 Reason For Leaving \_\_\_\_\_  
 YES \_\_\_\_\_ NO \_\_\_\_\_  
 YES \_\_\_\_\_ NO \_\_\_\_\_

Company \_\_\_\_\_  
 City \_\_\_\_\_ ST \_\_\_\_\_  
 Telephone ( ) \_\_\_\_\_  
 Dates: From \_\_\_\_\_ To \_\_\_\_\_  
 A. Were you subject to the FMCSRs under this employer?  
 B. Did you perform a safety-sensitive function for this employer?

Position Held \_\_\_\_\_  
 Type of Equip. Driven \_\_\_\_\_  
 Type of Trailer Pulled \_\_\_\_\_  
 Reason For Leaving \_\_\_\_\_  
 YES \_\_\_\_\_ NO \_\_\_\_\_  
 YES \_\_\_\_\_ NO \_\_\_\_\_

*\*Attach separate sheet if necessary for complete 10 year employment/background history.*

**DRIVING EXPERIENCE**

Type of Equipment: No of Miles: Van Flat Refer Etc.: Snow/Ice No of Years: Mountain No of Years:

Straight Truck

Tractor & Semi Trailer

Tractor Two Trailers

Other

Describe Experience in Regard To: (Miles, States, Years, Etc.)

Mountain Driving

Flatbed Operation

Refer Operation

List Safe Driving Awards You Hold & From Whom

**MOTOR VEHICLE RECORD QUALIFICATIONS**

List ALL Drivers Licenses Held in The Past 10 Years:

State License Number Type Expiration Date

**ACCIDENT RECORD**

List ALL Accidents Involvement With ANY Motor Vehicle For The Past 10 Years

Date Vehicle Nature of Accident Injuries/Fatalities Were You at Fault?

\*Include Copy(s) Of Accident Report and/or Written Explanation for the last 3(three) years

**TRAFFIC CONVICTIONS**

List ALL Traffic Convictions and Forfeitures For The Past 10 Years

Date Location (State) Violation Type Vehicle Fine?

**RECORD OF CONVICTIONS**

List ALL Misdemeanors or Felonies that you have pled "guilty" to, been convicted of, or pled "no contest" to (if none write "none")

Date City/State/County Charges Felony/Misd. Sentence

1. Have you EVER had your personal or commercial driver's license suspended, revoked, or denied? Yes  No
2. Have you EVER been convicted, or are any charges pending for reckless or careless operation of a motor vehicle? Yes  No
3. Have you EVER been convicted, or are any charges pending for driving under the influence of alcohol, a narcotic drug, amphetamines, or derivatives thereof? Yes  No
4. Have you EVER been convicted of any criminal charges? Yes  No
5. Have you EVER tested positive or refused to test for drugs or alcohol? Yes  No
6. Are you authorized for employment in the United States? Yes  No
7. Have you EVER been terminated from a job? Yes  No
8. Have you EVER had an alcohol test with a result of 0.04 or higher alcohol concentration? Yes  No
9. Have you EVER had a verified positive drug test result? Yes  No
10. Have you EVER refused to be tested (including verified adulterated or substituted drug test result)? Yes  No
11. Have you EVER committed other violation of DOT agency drug & alcohol testing regulation? Yes  No   
If yes, (#11), do you have documentation of the successful completion of DOT return-to-duty requirements, including follow-up tests? Yes  No
12. Have you in the past ten (10) years been found civilly liable for causing personal injuries in a motor vehicle accident? Yes  No

If you answered Yes to any of the above, please explain on a separate sheet of paper!

### PHYSICAL HISTORY

Are you physically capable of heavy manual labor? Yes  No

Are you physically able to do the following?

- |                              |                             |   |
|------------------------------|-----------------------------|---|
| Yes <input type="checkbox"/> | No <input type="checkbox"/> | Get in and out of a truck.  |
| Yes <input type="checkbox"/> | No <input type="checkbox"/> | Climb on and off a trailer.   |
| Yes <input type="checkbox"/> | No <input type="checkbox"/> | Get under unit to perform duties, such as checking brakes and visual inspection of vehicle. |
| Yes <input type="checkbox"/> | No <input type="checkbox"/> | Raise and lower hood of tractor.  |
| Yes <input type="checkbox"/> | No <input type="checkbox"/> | Tarp and untarp loads (flatbed division).   |
| Yes <input type="checkbox"/> | No <input type="checkbox"/> | Load and unload cargo.  |
| Yes <input type="checkbox"/> | No <input type="checkbox"/> | Apply enough pressure to release fifth wheel pin.   |
| Yes <input type="checkbox"/> | No <input type="checkbox"/> | Work frequently in severe cold or extreme heat.   |
| Yes <input type="checkbox"/> | No <input type="checkbox"/> | Repeatedly lift and carry cargo weighing up to 100 lbs. per item.                           |
| Yes <input type="checkbox"/> | No <input type="checkbox"/> | Sit stationary in a driver's seat for long periods of time.                                 |
| Yes <input type="checkbox"/> | No <input type="checkbox"/> | Apply enough pressure to trailer tandem lever to release locking pins when sliding tandems. |
| Yes <input type="checkbox"/> | No <input type="checkbox"/> | Be on duty the maximum allowed by D.O.T. Hours of Service Regulations.                      |

Are you admissible to Canada? Yes  No

Do you have a valid passport? Yes  No

Do you have a current Transportation Workers Identification Card (TWIC)? Yes  No

Date of last D.O.T. Physical Examination \_\_\_\_\_

Doctor \_\_\_\_\_

Address \_\_\_\_\_

Date \_\_\_\_\_

Have you ever been granted a waiver under section 391.49 of the Federal Motor Carrier Safety Regulations pertaining to the loss of foot, leg, hand, or arm? Yes  No

This certifies that this application was completed by me, in my own handwriting, and that all entries on it and information in it are true and complete to the best of my knowledge.

Signature \_\_\_\_\_

Date \_\_\_\_\_

APPENDIX A  
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Exhibit A  
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**DISCLOSURE AND RELEASE**

In connection with my application for employment (including contract for services) with you, I understand that consumer reports which may contain public records information may be requested from USIS Commercial Services. These reports may include the following types of information: names and dates of previous employers, reason for termination of employment, work experience, accidents, etc. I further understand that such reports may contain public record information concerning my driving record, worker's compensation claims, credit, bankruptcy proceedings, criminal records, etc.; from federal, state and other agencies which maintain such records, as well as information from USIS Commercial Services concerning previous driving record requests made by others from such state agencies, and state provided driving records.

**I AUTHORIZE, WITHOUT RESERVATION, ANY PARTY OR AGENCY CONTACTED BY DAC TO FURNISH THE ABOVE-MENTIONED INFORMATION.**

I have the right to request from USIS Commercial Services, upon proper identification, the nature and substance of all information in its files on me at the time of my request, including the sources of information and the recipients of any reports on me, which USIS Commercial Services, has previously furnished within the two years preceding my request. I hereby consent to your obtaining the above information from USIS Commercial Services, and I agree that such information which USIS Commercial Services, has or obtains, and my employment (contract services) history with you if I am hired or (contracted), will be supplied by USIS Commercial Services, to other companies whom subscribes to USIS Commercial Services.

I hereby authorize procurement of consumer report(s). If hired (or contracted), this authorization shall remain on file and shall serve as ongoing authorization for you to procure consumer reports at any time during my employment (or contract) period.

If hired (or contracted), I consent to TRANS-SYSTEM, INC. and/or its subsidiaries: SYSTEM TRANSPORT, INC., T.W. TRANSPORT, INC. and JAMES J. WILLIAMS (BULK SERVICES TRANSPORT, INC.) supplying information on my employment history (or contract services) to a third party reporting service. I agree to release, hold harmless, and indemnify TRANS-SYSTEM, INC. and its subsidiaries, their officers, directors, agents, employees, independent contractors, third party reporting services, and previous employers, from all liability, claims or damages resulting from obtaining or supplying verification information on me.

\_\_\_\_\_  
PRINT FULL NAME

\_\_\_\_\_  
SOCIAL SECURITY NUMBER

\_\_\_\_\_  
APPLICANT'S SIGNATURE

\_\_\_\_\_  
DATE

**TRANS-SYSTEM, INC.** a subsidiary of  
 System Transport, Inc. T.W. Transport, Inc. James J. Williams  
 P.O. BOX 3456 SPOKANE WA 99220 800-762-3776  
**(FMCSR §391.23) INVESTIGATION and INQUIRIES.**

Applicant \_\_\_\_\_, has applied for a driving position with  
**TRANS-SYSTEM, INC.** The applicant has authorized the release of any information you may have in regard to applicant's past  
 employment record and character **RELEASE:** I hereby authorize **TRANS-SYSTEM, INC.** to investigate my past record and to  
 ascertain any and all information which may concern my record, and I release my present and past employers, any and all references,  
 and all persons whomsoever from all liability for furnishing said information.

Signature: \_\_\_\_\_ SSN: \_\_\_\_\_

**APPLICANT DO NOT WRITE BELOW THIS LINE**

\*\*\*\*\*

Applicant \_\_\_\_\_ states he/she was employed by you,  
 Company name \_\_\_\_\_ From \_\_\_\_\_ To \_\_\_\_\_

1. Has applicant ever been employed by your company? Yes No  
 2. If yes, do dates agree with those shown above? Yes No  
 If no, starting date \_\_\_\_\_ Termination date \_\_\_\_\_

3. What position(s) did applicant hold with your company?  
 OTR Driver Regional Local Other \_\_\_\_\_

4. Did applicant drive? Tractor/Trailer Straight Truck Bus Other \_\_\_\_\_

5. What type of trailer pulled? Flatbed Refer Van Tank Other \_\_\_\_\_

6. What kind of freight was hauled? Explain \_\_\_\_\_

7. Was driver required to complete a Daily Log Sheet per FMCSR 395? Yes No

8. Was applicant? Layed off Discharged Resigned  
 Please explain \_\_\_\_\_

9. a. Has this person had an alcohol test with a result of 0.04 or higher alcohol concentration? Yes No  
 b. Has this person had a verified positive drug test result? Yes No  
 c. Has this person refused to be tested (including verified adulterated or substituted drug test result)?  
 Yes No  
 d. Has this person committed other violation of DOT agency drug & alcohol testing regulation?  
 Yes No  
 e. If this person has violated a DOT drug and alcohol regulation, do you have documentation of the  
 employee's successful completion of DOT return-to-duty requirements, including follow-up tests?  
 Yes No  
 f. Have you received information from any previous employers that this individual violated  
 DOT drug and alcohol regulations? Yes No

10. Was applicant involved in any vehicular accidents while in your employ? Yes No  
 If yes, please explain preventable or non-preventable & dates \_\_\_\_\_

11. Did applicant have any cargo claims while in your employ? Yes No  
 If yes, please explain \_\_\_\_\_

12. Would he/she be eligible for re-hire? Yes No

Signature \_\_\_\_\_ Title \_\_\_\_\_  
 Phone \_\_\_\_\_ Date \_\_\_\_\_

**FAX NUMBER 509-625-3912**

2297

ACCOUNT NUMBER

EMPLOYEE or PROSPECTIVE EMPLOYEE REQUEST

That, I, \_\_\_\_\_ am an employee or

PRINT NAME

prospective employee of the company named below and that I request a copy of my official Driving Record be released to my employer or prospective employer or their agent.

Authorization of employee or prospective employee for release of abstract of driving record.

SIGNATURE

EMPLOYER ATTESTATION

- (A) That the company named below is an employer or prospective employer of the above named individual and that I am a representative authorized to bind said company.
- (B) That TOTAL INFORMATION SERVICES, INC., D/B/A/ DAC SERVICES is acting as agent on our behalf to obtain the abstract of driver records of the above named individual.
- (C) That abstracts of driver shall be used exclusively to determine whether the above named individual should be employed to operate a school bus or commercial vehicle upon the public highways, and that no information contained therein shall be divulged, sold, assigned, or otherwise transferred to a third person or party. A commercial vehicle is defined as any vehicle the principal use of which is the transportation of commodities, merchandise, produce, freight, animals, or passengers for hire.
- (D) That the information contained in the abstracts of driver records obtained from the Washington State Department of Licensing shall be used in accordance with the requirements and in no way violate the provisions of RCW 46.52.130, attached in part for easy reference.

TRANS-SYSTEM, INC  
COMPANY NAME

P.O. BOX 3456 SPOKANE WA 99220  
ADDRESS

JEFF BENESCH  
NAME (PRINT)

VICE PRESIDENT, PERSONNEL  
TITLE

Signature

THIS RECORD MUST BE MAINTAINED BY THE EMPLOYER OR PROSPECTIVE EMPLOYER FOR A PERIOD OF NOT LESS THAN TWO (2) YEARS FROM THE LAST DATE ABOVE. FAILURE TO OBTAIN ALL SIGNATURES OR MISUSE OF RECORDS OBTAINED FROM THE STATE OF WASHINGTON MAY RESULT IN PROSECUTION UNDER RCW 46.52.130.

G:\WORDDATA\BREN\BAMASTERS

# TRANS-SYSTEM, INC.

## THE LEADER IN TRANSPORTATION SOLUTIONS

### Online Employment Application

#### Position Applying For

**System Transport**

**T.W. Transport**

**James J. Will**

Flatbed

Van/Refrigerated

Tanker/Bulk Commo

- Solo/Team OTR
- Regional-California
- Regional-Phoenix, AZ
- Regional-Chicago
- Student Driver/Apprentice
- Owner/Operator

- Solo/Team
- Owner/Operator
- Student Driver/Apprentice

- Solo Driver

#### Personal Information

Last Name:

First Name:

MI:

Home Phone:

Cell Phone:

E-Mail:

Social Security No:

Date of Birth: mm/dd/yyyy

Street Address:

City:

State:

Zip:

Drivers License Number:

State:

Best time to reach you?

What is the best way to contact you?

- Home Phone
- Cell Phone
- E-Mail

#### Background

*Please Read through and answer the following questions carefully.  
Have you Ever...*

- Been denied a license, permit, or privilege to operate a motor vehicle? Y  N  O  IF
- Had your motor vehicle operator's license, permit, or privilege suspended or revoked? Y  N  O  IF
- Been disqualified from driving a motor vehicle under D.O.T. regulations? Y  N  O  IF
- Been convicted for driving under the influence of alcohol or drugs? Y  N  O  IF
- Been convicted for possession, sale, or use of narcotic drugs, amphetamines, or a derivative? Y  N  O  IF

<http://www.systemtrans.com/application.html>

2/22/2011

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Been convicted of a serious traffic violation, such as careless or reckless driving or willful reckless driving, ect?  YES  NO  IF

Been convicted of, found not guilty by reason of insanity, or imprisoned for, a felony (as defined by any U.S. or state law) at any time during the ten years before the date of this application?  YES  NO

Are you wanted or under indictment for a felony (as defined by any U.S. or state law)?  YES  NO

Have you, within the two (2) years preceding the date of application:

(1) Undergone an alcohol test in which a concentration of 0.04 or greater has been indicated?  YES  NO

(2) Undergone a controlled substance test in which a positive result has been verified?  YES  NO

(3) Refused to undergo either an alcohol or drug test or had an adulterated or substituted drug test verified?  YES  NO

(4) Had any other violations of Federal Motor Carrier Safety Administration drug or alcohol testing regulations?  YES  NO

(5) Successfully completed return-to-duty requirements following violation of a DOT drug or alcohol regulation?  YES  NO

How many accidents have you been charged with in the past 3 years?

Do you have a valid Class A, Commercial Driver's License?  YES  NO

Please check off additional endorsements held: Tank  Hazardous Materials

**Education**

Choose the highest grade completed: 10  11  12

Trade School? Yes  No

If Yes, When did you graduate?

Please List Any Certificates, Degrees, Diplomas, Etc:

Spoken Languages: English  Spanish

Other Technical Training:

Last School Attended:

**Recent Employment History**

Begin with your present employer and work backward in order, listing ALL your employers, driving school and other training programs, periods of military service, self-employment, and unemployment for at least 10 years. Use supplementary sheet if necessary. Fill in all blanks.

May we contact your present employer to verify your work record?  Yes  No

Employer	Length of Term	From:	To:	Employer	Length of Term	From:	To:
Phone Number				Phone Number			
Address				Address			
City:		State:		City:		State:	
Position Held:				Position Held:			
Type of Equipment:				Type of Equipment			
Type of Trailer:				Type of Trailer:			

States Driven In:

States Driven In:

Reason for Leaving:

Reason for Leaving:

Employer

Employer

Length of Term From: / To: /

Length of Term From: /

Phone Number

Phone Number

Address

Address

City: State:

City: S

Position Held:

Position Held:

Type of Equipment:

Type of Equipment:

Type of Trailer:

Type of Trailer:

States Driven In:

States Driven In:

Reason for Leaving:

Reason for Leaving:

Total Years of Driving Experience:

I understand that the information in this form will be used and that prior employers will be contacted for purposes of investigation as required by 391.23 of the Motor Carrier Safety Regulations. I authorize release of any information, including all information related to my alcohol and controlled substances testing and training records, by any former employers and hold them harmless of any liability from release of said information.

I agree

Submit Application

ABOUT US  
LOCATIONS  
IN-HOUSE EMPLOYMENT  
DRIVER EMPLOYMENT  
FOR CUSTOMERS  
SERVICES & EQUIPMENT  
INDUSTRIES SERVICED  
ADVANTAGES  
HOME

We address our customers' needs through several distinct business segments and service dimensions:

- Truckload & LTL
- Dedicated
- Specialized
- Long Haul
- Regional
- Local

#### Our Equipment

Flatbeds  
Step-deck  
Maxi Flatbed  
Multi-axle RGN  
Conastoga  
Wind Energy  
Over-Dimensional

ABOUT US  
LOCATIONS  
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DRIVER EMPLOYMENT  
FOR CUSTOMERS  
SERVICES & EQUIPMENT  
INDUSTRIES SERVICED

## Driver Employment

System Transport Pays for Experience! Call us today to discuss our pay packages at 800-762-3776

Fill out our [Online Application](#) or [Print a PDF Application](#).

You may also fax a resume to Human Resources at 509-625-3912.

System Transport wouldn't be here today if it weren't for our invaluable drivers. Our entire team works closely to provide high quality service to our customers. We expect a lot from our drivers and in return, we treat them with the utmost respect.

We are currently hiring qualified drivers for all of our positions:

#### Company

- Flatbed OTR Division
- Midwest/Chicago Regional
- California Regional
- Phoenix Regional
- Colorado Regional
- Kansas City Regional
- Pole Division
- Maxi Division
- Northwest Regional
- Wind Energy Division

#### Owner Operators

- Mileage Contracts
- Percentage Contracts

**Why Choose System Transport?** Our company prides itself on its family-oriented culture and we pay attention to the unique needs of our drivers. We are committed to delivering the highest level of service to our customers and that can only be accomplished with talented and experienced drivers. We offer competitive pay as well as a full benefits package.

**Pay/Benefits** Our drivers receive some of the best pay in the industry. Our pay scale and benefits package are detailed in the company section. Click on the logos for more information.

**Terminal Locations** We have terminals across the nation so you can choose a work location that is close to home.

**Equipment** System Transport has over 800 late model power units and

<http://www.systemtrans.com/driver-employment?cd18162989b71ff6af43c6e8824cccbe=e61c42a&M4=595e...> 2/22/2010

ADVANTAGES

HOME

over 1,200 trailers on the road.

Need training..... Drivers Training School

<http://www.systemtrans.com/driver-employment?cd18162989b71ff6af43c6e8824cccb-e61c42a5f0dc595c...> 2/22/2011

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DRIVER EMPLOYMENT  
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SERVICES & EQUIPMENT  
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ADVANTAGES  
HOME

We address our customers' needs through several distinct business segments and service dimensions:

- Truckload & LTL
- Dedicated
- Specialized
- Long Haul
- Regional
- Local

**Our Equipment**

Flatbeds  
Step-deck  
Maxi Flatbed  
Multi-axle RGN  
Conastoga  
Wind Energy  
Over-Dimensional

**Percentage Contracts**

System Transport operates dedicated, regional, and over the road (OTR) divisions.

We have an industry leading pay package for all of our Owner Operators.

**We Pay**

- 82% of Gross Revenue (contractor owns truck and trailer)
- 72% of Gross Revenue (contractor uses a company trailer)
- 100% Fuel Surcharge
- 100% Tarping
- 100% Pick-up and Drop charges
- 100% Detention (paid by customer)

And Much More!

Online Application

Application PDF

Or Call Recruiting at 800-762-3776 7 AM to 5 PM (PST)

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- DRIVER EMPLOYMENT
- FOR CUSTOMERS
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- Over-Dimensional

**Locations**

System Transport maintains offices across the country to better serve our customers. No matter where your load originates or where it needs to go, System Transport has the team and equipment to get it there safely and efficiently.

Contact System Transport for a review of your current transportation needs. Our specialists will create a flexible shipping strategy that will quickly and dependably move your product.

[custservice@trans-system.com](mailto:custservice@trans-system.com)

**Office Locations**

**Headquarters:**

Physical Address  
7405 S Hayford Road  
Cheney, WA 99004  
[Click here to view map](#)

Mailing Address  
PO Box 3456  
Spokane, WA 99220  
Phone 800-541-4213  
Fax 509-625-3979

Phoenix, AZ  
1820 W Broadway Rd  
Phoenix, AZ 85041  
Phone 800-214-8167  
Fax 602-243-2910  
[Click here to view map](#)

Bloomington, CA  
2549 S Willow Ave.  
Bloomington, CA 92316  
Phone 909-877-4404  
Fax 909-877-4558  
[Click here to view map](#)

Stockton, CA  
707 E Roth Road  
French Camp, CA 95231  
Phone 800-624-2900  
Fax 209-983-8659  
[Click here to view map](#)

Denver, Co  
5501 Brighton Blvd  
Commerce City, CO 80022  
Phone 866-403-4760  
Fax 303-287-9790  
[Click here to view map](#)

Gary, Indiana  
6515 E Melton Ave  
Gary, IN 46403  
Phone 800-323-9362  
Fax 219-938-3453  
[Click here to view map](#)

Kansas City, KS  
804 N Meadowbrook Dr, Ste 112  
Olathe, KS 66062  
Phone 866-519-5773  
Fax 913-764-2070  
[Click here to view map](#)

Houston, TX - Pipe Yard  
8901 Manchester  
Houston, TX 77012  
Phone 713-928-6144  
Fax 713-928-6146  
[Click here to view map](#)

<http://www.systemtrans.com/locations>

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**Our Equipment**

Flatbeds  
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Maxi Flatbed  
Multi-axle RGN  
Conastoga  
Wind Energy  
Over-Dimensional

**Services & Equipment**

System Transport operates a growing fleet of 800 trucks and 1,200 trailers to get your freight to where it needs to go.

Our late model equipment is outfitted with the latest safety and sat technology to ensure secure, efficient delivery of each load. Your shipment is satellite-tracked at each point and over every mile of the road.

System Transport services are geared to address your specific shipping needs from the initial order to a safe, on-time delivery.

**System Transport divisions include:**

- Over the Road - Nationwide including Alaska and Canada
- Regional and Local Service - Pacific Northwest, Arizona, California, Colorado, Kansas, and Midwest
- Dedicated and specialized services to a variety of industries
- Maxi - 65,000 lb capacity in the Pacific Northwest and Canada
- Poles/Specialized - nationwide, Alaska and Canada
- Logistics services

**Trailer Types:**

Flatbed, Step Deck, Maxi Flatbed, Multi-axle RGN, Conastoga, Wind Energy Component Trailers, Over-Dimensional applications

**SYSTEM TRANSPORT, INC.  
INDEPENDENT CONTRACTOR AGREEMENT**

THIS AGREEMENT entered into this \_\_\_ day of \_\_\_ by and between SYSTEM TRANSPORT, INC. HEREINAFTER REFERRED TO AS "Carrier", and \_\_\_ (hereinafter referred to as "Contractor"). WITNESSETH:

WHEREAS, the Carrier is a motor carrier by motor vehicle, holding authority from the Federal Motor Carrier Safety Administration, and;

WHEREAS, Contractor now owns or controls certain motor vehicles and is desirous of leasing same to Carrier, and;

WHEREAS, Carrier desires to enter into a contract with Contractor for the lease of said equipment to be used in the transportation of various commodities under the authority of the Carrier, and in exempt transportation, together with any replacement motor vehicles (the "equipment") that Contractor may rent, lease or borrow during any period of time that the equipment described in Appendix "A" is temporarily out of service due to repairs.

NOW THEREFORE, IN CONSIDERATION OF THE MUTUAL PROMISES CONTAINED HEREIN, THE CARRIER AND CONTRACTOR HEREBY AGREE AS FOLLOWS:

1. **Term and Termination.** Contractor shall furnish to Carrier, exclusively and continuously, during the term of this contract, the equipment described under the receipt for possession of motor vehicle equipment, attached as Appendix "A". This agreement shall be for a minimum period of thirty (30) days and shall continue in effect from month to month thereafter, until terminated by either party. This agreement may be terminated by either party without cause by ten (10) days written notice from one party to the other of intention to terminate. The ability of either party to terminate this Agreement shall in no way be interpreted as an at-will employment provision and shall not otherwise affect Contractor's status as an independent contractor under this Agreement. The effective date and time of termination shall be as set forth in the written notice or the receipt for Equipment issued by Contractor, whichever date is earlier. Contractor shall, upon the termination of this Agreement, remove all Carrier identification from the Equipment and return it to Carrier, via hand delivery or certified mail, together with all of Carrier's property, including trailers, paperwork, load securement equipment, satellite equipment and freight, to Carrier's nearest terminal. If Contractor fails to return Carrier's property or freight to Carrier or remove and return all Carrier identification from the Equipment upon termination of this Agreement, Contractor shall pay Carrier, all collections costs incurred by Carrier, including reasonable attorney fees, and Carrier may pursue all other remedies allowed by law or authorized in the Agreement against Contractor.

2. **Exclusive Possession and Responsibilities.** The Carrier shall have exclusive possession, control, and use of the equipment specified in this contract for the duration of the contract, and the Carrier shall assume complete responsibility for the operation of said equipment during the term of the contract. This subparagraph is set forth solely to conform with DOT regulations and shall not be used for any other purposes, including any attempt to classify Contractor as an employee of Carrier. Nothing in the provisions required by 49 C.F.R. § 376.12(c)(1) is intended to affect whether Contractor or its drivers are an independent contractor or an employee of Carrier. An independent contractor relationship may exist when a carrier complies with 49 U.S.C. § 14102 and attendant administrative requirements. The Contractor is responsible for loading and unloading the property onto and from the equipment specified in this contract for the duration of the contract. The parties further agree that the Carrier shall be considered the owner of said equipment for the purpose of subleasing the equipment to other authorized carriers while the contract is in effect, and the Contractor agrees to properly and correctly identify the equipment described herein. Contractor may trip lease the equipment to other authorized motor carriers upon first receiving written authorization from Carrier. Before such written authorization will be given, Contractor must ensure that the other authorized motor carrier provides proof of adequate liability and cargo insurance to Carrier, and Contractor must remove or cover-up Carrier's identification devices from the equipment. Contractor shall defend, indemnify and hold Carrier harmless against any claim, damage, personal injury (including death) or expense, including reasonable attorney fees, incurred by Carrier during the term of such trip lease.

3. **Compensation.**

A. The Carrier shall pay Contractor in accordance with the schedule attached as Appendix "A" for hauling such commodities for the Carrier as requested by the Carrier utilizing the equipment described in this contract. Although Carrier shall use reasonable efforts to make shipments available to Contractor for transportation during the term of this Agreement, Contractor acknowledges and agrees that Carrier does not guarantee any specific number of shipments or amount of revenue to Contractor.

B. The Carrier shall pay Contractor in accordance with the schedule attached as Appendix "A" for loading and unloading the property onto and from the vehicle.

C. Revenue is defined as the applicable tariff charge billed by the carrier, less:

1. Charges deducted by interline/augmenting carriers.
2. Pick up, transfer and delivery fees for services not performed by the contractor or his employees or agents.
3. All accessorial charges not earned by the line haul equipment or driver.
4. Any portion of the line haul revenue not transported by the contractor's line haul equipment.

4. **Responsibility for Charges.** The contractor shall furnish and pay all costs of operation, including, but not limited to the following:

- A. All motor fuel, tires (including repairs) and lubricants, or in accordance with the schedule attached as Appendix "A".
- B. All maintenance costs and repairs.
- C. All equipment, accessories or devices required for the operation of said equipment.
- D. All taxes and assessments including but not limited to fuel, road, mileage and Gross Revenue Taxes, or in accordance with the schedule attached as Appendix "A".
- E. License and Tax payments required of, or on the equipment or on the use or operation thereof, including temporary permits, base plates and licenses, or in accordance with the schedule attached as Appendix "A".
- F. Wages or other remuneration of drivers not employees of carrier.
- G. Public liability and property damage insurance while not being operated in the service of carrier, including hospital/deadhead coverage. The amount of insurance coverage required to be maintained by Contractor will be in accordance with the schedule attached as Appendix "B".

- H. Bodily injury and property damage insurance deductibles as set forth in Paragraph 12 of this contract.
- I. Workmen's compensation insurance for all employees, agents, or servants employed by Contractor in the performance of this agreement, including filing necessary returns and/or reports in a timely manner.
- J. Federal and state payroll taxes must be paid on all drivers (other than Contractor) operating Contractor's equipment and necessary returns must be filed in a timely manner.
- K. Tolls, scale fees, ferries, detention, accessorial services, and empty mileage, or in accordance with the schedule attached as Appendix "A".
- L. Any other fine or fees imposed against or assessed against equipment, cargo, or carrier by any state or provincial authority as a result of an act or omission by the contractor, his employee, or his agents. Contractor shall have the duty to determine that all shipments are in compliance with the size and weight laws of the states in which or through which the Equipment will travel and to notify Carrier if the vehicle is overweight, oversized or in need of permits before commencing the haul. Except when the violation results from the acts or omissions of Contractor, Carrier shall assume the risks and costs of fines for overweight and oversize trailers when such trailers are preloaded and sealed, or the load is containerized, or for improperly permitted oversized and overweight loads, or the trailer or lading is otherwise outside of Contractor's control. Contractor shall pay, or reimburse Carrier, for any costs or penalties due to Contractor's failure to weigh each shipment or to notify Carrier that the vehicle is overweight, oversized or in need of permits.
- M. All over dimensional permits, escorts, flagmen, and other such charges.
- N. Any or all of the above items may be initially paid for by the Carrier, by mutual agreement between Contractor and Carrier, but ultimately deducted from Contractor's compensation at the time of settlement payment. The charge-back will be the amount originally paid by the Carrier on behalf of the Contractor unless otherwise stated in Appendix "C". In the event of cancellation of this Agreement, any unused portions of cost of the foregoing shall be refunded to Contractor by the Carrier.
5. **Payment Period-Time of Settlement.** Settlement and payment shall be made by Carrier to Contractor for transportation services performed within fifteen (15) days after submission of the following required documents:
- Original of the driver's daily log
  - Any and all documents necessary for the Carrier to secure payment from the shipper.
6. **Documents Required.** In addition to the documents required for payment listed above, the Contractor must submit necessary delivery documents and other paperwork concerning a trip in the service of the Carrier as set forth below.
- Copies of fuel purchases made showing Carrier as purchaser.
  - Daily vehicle condition report, one (1) for each day.
  - Mileage sheet (shows State, Highways, Miles, and Equipment Unit Number).
  - Delivery receipt copy of bill of lading signed and dated by Shipper, driver and consignee.
  - Maintenance Reports (monthly).
7. **Copies of Freight Bills.** In all cases where the Contractor's revenue is based on a percentage of the gross revenue of a shipment, the Carrier shall provide a copy of the rated freight bill to the Contractor at the time of settlement referred to in Paragraph 6. The Carrier shall make available for examination by the Contractor, copies of all Carrier's applicable tariffs, regardless of the method of compensation.
8. **Charge Back Items.** The Carrier shall charge back and deduct from payment on settlement, the following items:
- All advances made by Carrier to Contractor, Contractor's employees or agents
  - Charges for telephone calls made by the Contractor or his employees or agents that are not authorized by the Carrier.
  - Insurance Deductibles. As specified in paragraph 12 of this agreement and in accordance with Appendix "A" or "B" attached hereto.
- D. Upon specific written authorization by the Contractor, and agreed to by the Carrier, the Carrier may provide the service of remitting certain payments on behalf of the Contractor as set forth in Appendix "C" attached hereto.
- E. Any costs specified in Paragraph 4 above incurred by the Contractor, his employees or agents, assessed to the Carrier.
- F. Any or all of the above items may be initially paid for by the Carrier, by mutual agreement between Contractor and Carrier, but ultimately deducted from Contractor's compensation at the time of settlement payment. The charge-back will be the amount originally paid by the Carrier on behalf of the Contractor unless otherwise stated in Appendix "C".
9. **Products, Equipment or Services Furnished by Carrier.** Contractor is not required to purchase or rent any equipment or services from the carrier as a condition of entering into this Contract Agreement. In the event Contractor elects to purchase or rent equipment from Carrier or from any third party, for which the purchase or rental contract gives Carrier the right to make deductions from Contractor's settlement, then the parties mutually agree to attach and incorporate each such contract, specifying all terms thereof, to this Agreement as a separate addendum.
10. **Insurance and Indemnification.**
- Carrier has the legal obligation to provide liability, property damage, and cargo insurance for the protection of the public, pursuant to 49 USC 13908. Contractor will be charged back the deductible amount set forth in Appendix "B".
  - Contractor's insurance obligations will be as set forth in Appendix "B".
  - Except to the extent Contractor's acts or omissions are covered under the parties' respective insurance policies as set forth in Appendix B with no expense to Carrier, Contractor agrees to defend, indemnify and hold harmless Carrier from any direct, indirect and consequential loss, damage, fine, expense, including reasonable attorney's fees, action, claim for injury to persons, including death, and damage to property which Carrier may incur arising out of or in connection with the operation of the Equipment, Contractor's obligations under this Agreement, or any breach by Contractor of the terms of this Agreement. This provision shall remain in full force and effect both during and after the termination of this Agreement.
11. **Carrier Claims and Property Damage.** Contractor shall reimburse carrier for the cost of any claim for property loss and/or for damage of cargo occurring while same is in Contractor's custody or control under the provision of the contract, not to exceed One Thousand (\$1,000.00) dollars per occurrence. Claims that are not covered and paid by Carrier's insurance and are caused by the negligence, action or inaction of Contractor or Contractor's driver, employee or agent will be borne entirely by Contractor. Carrier shall provide contractor prior to deduction from monies due, written explanation and itemization of any deductions for cargo or property damage made from any compensation to Contractor.

12. **Reserve Funds.** Contractor shall make a Three Hundred (\$300.00) Dollar deposit with the carrier to insure financial performance under this Contract Agreement and to cover the regular operating expenses of Keaning, Federal Highway Use Tax and Insurance deductibles. In the event this agreement is terminated, this deposit will be increased to and maintained at Two Thousand Five Hundred (\$2,500.00) Dollars or such higher amount as determined by Contractor by a revenue deduction of 5% per settlement. The Contractor shall have the right to an accounting for transactions involving the Reserve funds at any time. Carrier shall pay interest to the Contractor at least quarterly, at a rate equal to the average yield in 91 day, 13 week Treasury Bills. If at any time the Contractor's Earned Account Balance draws advances from carrier which cause either Reserve Fund to result in a negative amount, Carrier shall charge Contractor interest on the negative amount at a rate equal to the average yield in 91 day, 13 week Treasury Bills. For purposes of calculating the balance of the Reserve Fund on which interest is paid, Carrier may deduct a sum equal to the average advance (including all charge-backs and other deductions) made to Contractor during the period of time for which interest is paid. The Reserve Funds shall be returned to the Contractor by the Carrier within forty-five (45) days of the termination of this Contract provided all terms and conditions of this Contract have been complied with by Contractor, subject to deductions for all unpaid charges under this Agreement.

13. **Operation.** Contractor shall operate the equipment covered by the terms of this Agreement himself or shall furnish sufficient employees to operate said equipment. All employees furnished by the contractor shall be at contractor's expense. Said employees shall be hired, paid, directed, controlled and discharged by the Contractor. Contractor shall be responsible to pay all his employees, make such deductions as may be necessary by Government regulations and make contributions as may be required to appropriate Government agencies. It is agreed that these responsibilities shall be the sole and total responsibility of the Contractor and not the Carrier including but not limited to, withholding taxes, FICA taxes, highway use taxes, unemployment compensation and the workmen's compensation insurance.

14. **Accident Notification.** Contractor shall immediately notify Carrier regarding the occurrence of any accident involving equipment covered by the terms of this Agreement, and/or cargo transported by said equipment. Contractor and its drivers shall cooperate fully with Carrier with respect to any legal action, regulatory hearing or other similar proceeding arising from the operation of the Equipment, the relationship created by this Agreement or the services performed hereunder. Contractor shall, upon Carrier's request and at Contractor's sole expense, provide written reports or affidavits, attend hearings and trials and assist in securing evidence or obtaining the attendance of witnesses. Contractor shall provide Carrier with any assistance as may be necessary for Carrier or Carrier's representatives or insurers to investigate, settle or litigate any accident, claim or potential claim by or against Carrier.

15. **Driver Qualifications.** Contractor certifies that the driver shall be fully qualified to operate the equipment at all times in compliance with the rules and regulations of the Carrier, the Federal Motor Carrier Safety Administration, the Department of Transportation, and the Motor Transportation Agency of any state or other Governmental unit having jurisdiction for the use of the equipment described herein during the existence of the Contract. At no time will the Contractor allow a passenger or a driver to occupy or operate the vehicle (including the Contractor) who has not been certified and/or approved by the Carrier.

16. **Violation of Law.** Contractor agrees to be liable for, and promptly pay, any fines or penalties assessed because of a violation of any law, ordinance, rule or safety regulation, which fine or penalty is incurred while the equipment is being operated, under the terms of this Contract. The Carrier will pay fines and penalties in accordance with 49 C.F.R. Part 378.12(a).

17. **Contractor-Owner.** Contractor represents that he is the lawful owner or has lawful possession of the equipment described in this Agreement, which shall at all times during the term of this Contract, be maintained by the Contractor in good operating condition and be equipped with all of the safety devices required by the Carrier and the law, and in every way meeting all the equipment requirements of the Federal Motor Carrier Safety Administration, Department of Transportation and the regulatory bodies of any State in which the equipment may be operated.

18. **Authority of Contractor.** If the driver is not the contractor, he represents that he is authorized to enter into this Agreement by the contractor, or as a specifically authorized agent of the contractor, and he agrees to the terms and conditions and will comply fully therewith. Neither the Contractor nor its employees are to be considered employees of the Carrier at any time, under any circumstances or for any purpose. Neither party is the agent of the other, and neither party shall have the right to bind the other by contract or otherwise, except for signing bills of lading, entering trip lease agreements when specifically authorized and to secure applicable state and federal permits in the carrier's name or as specifically provided.

19. **Duties on Termination.** The Contractor agrees upon termination of this contract to immediately return to the Carrier's office in Spokane, Washington all permits, equipment, plates, decals, door signs, fuel cards, toll cards, toll & scale transponders, satellite equipment, copies of operating authorities, or any other items of documentation issued by the Carrier. In the event the Contractor's account is negative at the time of termination Contractor will make payment in full to Carrier or make satisfactory arrangements to pay any monies owed to Carrier.

20. **Termination on Breach.** In the event either party commits a material breach of any term of this agreement the other party shall have the right to terminate this agreement immediately and hold the party committing the breach liable for damages. If, in Carrier's judgment, Contractor has subjected Carrier to liability because of Contractor's acts or omissions, Carrier may take possession of the shipment entrusted to Contractor and complete performance. In such event, Contractor shall waive any recourse against Carrier for such action and Contractor shall reimburse Carrier for all direct or indirect costs, expenses, or damages, including attorney's fees, incurred by Carrier as a result of Carrier's taking possession of the shipment and completing performance.

21. **Termination for Illegal Acts or Other Misconduct.** The commission of an illegal act or other misconduct considered detrimental to Carrier or Carrier's business shall be grounds for immediate termination of this agreement.

22. **Delay in Transit.** If, for any reason, including mechanical breakdown, Contractor shall fail to complete timely transportation of commodities in transit, abandon a shipment or otherwise subjects Carrier to liabilities to shipper or governmental agencies on account of the acts or omissions of Contractor or Contractor's employees, agents, or servants in route, Contractor expressly agrees that Carrier shall have the right to complete performance, using the same or other equipment, and hold Contractor liable for the cost thereof and for any other damages. Contractor hereby waives any recourse against Carrier for such action and agrees to reimburse Carrier for any cost and expenses arising out of the completion of such trip and to pay Carrier any damages sustained.

23. **Compliance With Pertinent Laws and Regulations by Contractor**

A. **Drivers.** Contractor shall provide competent drivers who meet Carrier's minimum driver qualification standards and all of the requirements of the DOT and FMCSA, including but not limited to, familiarity and compliance with state and federal motor carrier safety laws and regulations. The parties agree that Carrier shall have the right to disqualify any driver provided by Contractor in the event that the driver is found to be unsafe, unqualified pursuant to federal or state law, in violation of Carrier's minimum qualification standards, in violation of any policies of Carrier's customers. Upon a driver's disqualification by Carrier, Contractor shall be obligated to furnish another competent, reliable and qualified driver that meets the minimum qualification standards established by Carrier.

B. **Paperwork Requirements.** Contractor shall submit to Carrier, on a timely basis, all driver logs and supporting documents (including original toll receipts for Carrier's reproduction), physical examination certificates, accident reports, and any other required data, documents or reports. As required by 49 C.F.R. § 376.12(f), Carrier will keep the original of this Agreement with a copy to be maintained by Contractor, and a second copy to be carried in the Equipment during the term of this Agreement.

C. **Shipping Documents.** Contractor agrees that all bills of lading, waybills, freight bills, manifests, or other papers identifying the property carried on the Equipment shall be those of Carrier, or as authorized by Carrier, and shall indicate that the property transported is under the responsibility of Carrier or a carrier with which the Equipment has been subcontracted.

D. **Drug and Alcohol Testing.** Contractor and its drivers shall, as required by 49 C.F.R. § 382.103, comply with Carrier's Drug and Alcohol Policy, including participation in Carrier's random drug and alcohol testing program, and any addendums or revisions thereto.

E. **Safe Operations.** Contractor agrees to operate the Equipment in a safe and prudent manner at all times in accordance with the laws of the various jurisdictions in which the Equipment will be operated and pursuant to the operating authorities of Carrier, and in accordance with all rules related to traffic safety, highway protection and road requirements. Moreover, Contractor agrees that all drivers and/or workers employed by Contractor will comply with the terms of this Agreement, including the requirement of safe operations, while operating the Equipment on behalf of Contractor. Contractor agrees that any driver utilized by Contractor will comply with Carrier's policies and procedures and any subsequent revisions thereto, which will be provided by Carrier.

24. **Contractor, Not Employee, Of Carrier.** It is expressly understood and agreed that Contractor is an independent contractor for the Equipment and driver services provided pursuant to this Agreement. Contractor agrees to defend, indemnify and hold Carrier harmless for any claims, suits, or actions, including reasonable attorney's fees in protecting Carrier's interests, brought by employees, any union, the public or state or federal agencies, arising out of the operation of the Equipment or the providing of driver services under this Agreement. Contractor also agrees to provide necessary documentation and apply for certification of its independent contractor status where mandated by applicable state law. Contractor hereby assumes full control and responsibility for the selection, training, hiring, testing of upcoming and dress standards, disciplining, discharging, setting of hours, wages and salaries, providing for unemployment insurance, state and federal taxes, fringe benefits, workers' compensation, adjustment of grievances, all acts and omissions, and all other matters relating to or arising out of Contractor's employment or use of drivers and laborers, and any and all other employees or agents of Contractor that Contractor may provide or use to perform any aspect of this Agreement. Contractor shall be solely responsible for complying with any and all state and federal laws, rules and regulations that may be applicable to the terms and conditions of employment of Contractor's employees or applicants for employment, including, without limitation, compliance with the Federal Fair Credit Reporting Act; verification of immigration and naturalization status, proof of proper taxpayer identification number; proof of highway use tax being currently paid when the Contractor purchases its license; proof of payment of income, unemployment, Medicare and other state and federal payroll taxes; and, other required withholdings for Contractor's employees. Contractor's performance of these responsibilities shall be considered proof of its status as an independent contractor in fact. Proof of such control and responsibility shall be submitted by Contractor to Carrier as required by Carrier and may include, but not be limited to, proof of highway use tax being currently paid, proof of income tax being currently paid, and proof of payment of payroll tax for Contractor's drivers. For the purposes of this section, the term Contractor refers to the owner of the Equipment as well as drivers that may be operating the Equipment on behalf of the owner. As required by law, Carrier agrees to file information tax returns (Form 1099) on behalf of Contractor if Contractor is paid more than the statutory amount in compensation during a calendar year.

25. **Use Of Carrier's Trailer.** Contractor agrees to return any trailer provided for its use by Carrier in the same good condition as received by Contractor, reasonable wear and tear excepted, along with any and all other equipment and property belonging to Carrier immediately upon Carrier's request or upon termination of this Agreement. In the event the trailer is not in as good as condition as it was delivered by Carrier, Contractor hereby authorizes Carrier to restore the trailer to proper condition and to charge back to Contractor the costs of such repairs or reconditioning. In the event Contractor for any reason fails to comply with this provision and return Carrier's trailer, Contractor agrees to reimburse Carrier for all reasonable expense and costs, including attorney fees, incurred by Carrier in recovery of its trailer or property from Contractor or its drivers. Contractor agrees that in the event it is necessary for Carrier to enter upon private property or remove private property in order to recover its trailer and property, Contractor does hereby irrevocably grant Carrier or its duly authorized agents, permission to do so and further agrees to indemnify and hold harmless Carrier, and its duly authorized agents, from any form of liability whatsoever in connection with such repossession. Contractor shall be liable for, and pay, the entire amount for each incident involving direct, indirect and consequential damage, including but not limited to, towing charges; replacement costs for a total loss, arising out of, or in connection with, Contractor's use of Carrier's trailers, Carrier's customer's trailers, other Carrier equipment, or equipment of any other carrier. Before deducting any such damage from Contractor's compensation, Carrier shall provide Contractor with a written explanation and itemization of such damage. Contractor agrees and warrants that any trailer provided for use by Carrier will only be used by Contractor and its drivers to transport shipments tendered to Contractor by Carrier.

26. **Tax Reporting Payment Obligations.** Carrier will be responsible for filing the following tax returns and submissions on behalf of Contractor, and will charge back to Contractor any amounts due in connection therewith:

- A. Fuel Tax Returns;
- B. Mileage Tax Returns;
- C. Federal Heavy Vehicle Use Tax Returns (at Contractor's discretion, Contractor may file and pay its own Federal Heavy Highway Use Tax Return and furnish Carrier with proof of such payment), and

- D. Truck and Trailer Licensing Submissions
- E. Contractor (whether a sole proprietorship, partnership, corporation or limited liability company) will be responsible for filing and paying all other applicable federal and state tax returns, including, but not limited to, the following:
  - F. State and Federal income tax returns, including provision for self-employment tax
  - G. Federal and state employment tax returns
  - H. Unemployment Tax Returns
  - I. Workers' compensation insurance submissions

With respect to Contractor's fuel and mileage tax obligations, Carrier shall issue Contractor a fuel card that may be used by Contractor for all fuel purchases. Contractor is not required to use Carrier's fuel card. Contractor agrees to cooperate fully with Carrier by providing Carrier with all necessary information and documentation needed to complete the quarterly fuel and mileage tax returns. Any net fuel or mileage tax owed at that time with respect to Contractor's operations will be deducted from Contractor's compensation, and any net fuel or mileage tax credits or refunds due Contractor with respect to Contractor's operations will be credited to Contractor. In the event Contractor opts not to use Carrier's fuel card, Contractor shall be responsible for providing Carrier with an accurate accounting of all fuel purchases and miles traveled for the purposes of computing state fuel tax liability, and Contractor shall provide Carrier with all original fuel receipts.

27. Confidentiality. Contractor hereby recognizes and acknowledges that any list of Carrier's customers, as it may exist now or from time to time, is a valuable, special and unique asset of the business of Carrier. Contractor agrees during and after the term of this Agreement, not to disclose this list of Carrier's customers or any part thereof to any person, firm, corporation, association, or other entity for any reason or purpose whatsoever without Carrier's prior written consent. Contractor agrees to preserve as "Confidential Matters", all trade secrets, know how and information relating to Carrier's business, forms, processes, developments, sales and promotional systems, prices and operations, which information may be obtained from tariffs, contracts, freight bills, letters, reports, disclosures, reproductions, books, records, or other contractors, and other sources of any kind resulting from this Agreement. Contractor agrees to regard such Confidential Matters as the sole property of Carrier, and shall not publish, disclose or disseminate the same to others without the written consent of Carrier. In the event of any breach or threatened breach by Contractor of the provisions of this paragraph, Carrier shall be entitled to an injunction, restraining Contractor from disclosing, in whole or in part, the list of Carrier's customers, and all other Confidential Matters. Nothing hereunder shall be construed as prohibiting Carrier from pursuing any remedies available to Carrier at law or in equity for such breach, including the recovery of monetary damages from Contractor.

28. Benefit And Assignment. This Agreement shall be binding upon and inure to the benefit of the parties to this Agreement and their respective successors. Contractor may not assign or subcontract all or a portion of its obligations to another party without the prior written consent of Carrier.

29. Notice. All notice provisions of this Agreement shall be in writing delivered personally, by postage prepaid first class mail, or by facsimile machine to the addresses or fax number shown at the end of this Agreement.

30. Non-Waiver. The failure or refusal of either party to insist upon the strict performance of any provision of this Agreement, or to exercise any right in any one or more instances or circumstances shall not be construed as a waiver or relinquishment of such provision or right, nor shall such failure or refusal be deemed a customary practice contrary to such provision or right.

31. Severability. If any Agreement or its appendices is deemed invalid for any reason whatsoever, the Agreement shall be void only as to such provision, and this Agreement shall remain otherwise binding between the parties. Any provision voided by operation of the foregoing shall be replaced with provisions which shall be as close as the parties' original intent as permitted under applicable law.

32. Entire Agreement. This Agreement constitutes the entire Agreement and understanding between the parties and shall not be modified, altered, changed or amended in any respect, unless in writing and signed by both parties.

33. Applicable Law. This Agreement shall be governed by the laws of the State of Washington both as to interpretation and performance. This contract has been executed in the State of Washington and shall be deemed to have been drawn in accordance with the statutes and laws of the State of Washington and in the event of any disagreement or litigation arising under this contract, such disagreement or litigation shall be decided in accordance with the statutes and laws of the State of Washington. Each party agrees that the proper venue for any court action involving this agreement shall be in Spokane County, Washington.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first written above.

By \_\_\_\_\_  
 CONTRACTOR  
 Fed. SSN # \_\_\_\_\_

\_\_\_\_\_ CARRIER  
 \_\_\_\_\_ Date

**CONTRACT TERMINATION**

This is to certify that I have given the necessary ten (10) days notice of termination and am effecting final termination by the return of all documents and issuances.

By \_\_\_\_\_  
 CONTRACTOR  
 \_\_\_\_\_ Date

\_\_\_\_\_ CARRIER  
 \_\_\_\_\_ Date

**APPENDIX "A"  
PERCENTAGE LEASE  
RECEIPT FOR EQUIPMENT**

Whereas Contractor is the owner of (or leases with right to sublease) the following described motor vehicles (the "Equipment") which is/are suitable for the transportation of property in Carrier's business:

TRACTOR	MAKE	YEAR	SERIAL#	UNIT#
TRAILER	MAKE	YEAR	SERIAL#	UNIT#

For the use of the above equipment and the driver(s), the loading and unloading of the property onto and from the vehicle, and other services to be provided by the Contractor in this agreement, when under Carrier's dispatch instructions the combined total compensation to be paid by Carrier to Contractor for the above services shall be computed and paid as follows:

1. 82% of the gross revenue derived from loading, transportation and unloading when Contractor furnishes both tractor, trailer, loading and unloading in transporting lumber and wood products, lime, bentonite, and wall board.  
72% of the gross revenue when Contractor uses Carrier's trailer.
2. 82% of the gross revenue derived from loading, transportation and unloading when Contractor furnishes both tractor, trailer, loading and unloading in transporting all other regulated commodities.  
72% of the gross revenue when Contractor uses Carrier's trailer.
3. 82% of the gross revenue derived from loading, transportation and unloading when Contractor furnishes both tractor, trailer, loading and unloading in transporting exempt commodities.  
72% of the gross revenue when Contractor uses Carrier's trailer.
4. 100% of all drop and pickup charges, tarp charges, fuel surcharge, lean request charges, as well as demurrage charges, which are chargeable to the customer, will be passed on to the Contractor in full.

The Contractor shall furnish the above equipment to the Carrier for the Carrier's exclusive possession, control and use.

The Contractor, by signing below, agrees to provide and to operate the above Equipment as the dispatchers of the Carrier deems necessary to conduct the Carrier's business in a successful manner.

Effective:

INITIALS

\_\_\_\_\_  
CONTRACTOR

\_\_\_\_\_  
CARRIER

\_\_\_\_\_  
DATE

\_\_\_\_\_  
DATE

*Trans-System, Inc.*

System Transport, Inc.  
TW Transport, Inc.

CONTRACT ADDENDUM

I, \_\_\_\_\_ do hereby authorize *Payment* and *Credit* of fuel surcharge compensation in accordance with the contracts negotiated with TW Transport and/or TW Transport, Inc. and/or System Transport and its customers.

Unit No. \_\_\_\_\_

Contractor Signature \_\_\_\_\_

Date \_\_\_\_\_

Acceptance/ Declined on this day of \_\_\_\_\_

\_\_\_\_\_  
Witness

wp/addfuel.rpd/8/6/99

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Exhibit B  
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**APPENDIX B  
PERCENTAGE LEASE  
INSURANCE**

1. **CARRIER'S INSURANCE OBLIGATIONS.** It shall be CARRIER's responsibility, pursuant to DOT regulations promulgated under 49 U.S.C. § 13906 and pursuant to applicable state laws, to provide public liability, property damage, and cargo liability insurance for the Equipment at all times while the Equipment is being operated on behalf of CARRIER. However, CARRIER's possession of such insurance shall in no way affect CARRIER's rights of indemnification against CONTRACTOR as provided for in this Agreement.

2. **CONTRACTOR'S INSURANCE OBLIGATIONS.** CONTRACTOR shall maintain, at its sole cost and expense, the following minimum insurance coverages during this Agreement:

(a) **NON-TRUCKING LIABILITY** - CONTRACTOR shall procure, carry, and maintain public liability and property damage insurance which shall provide coverage to CONTRACTOR whenever the Equipment is not being operated on behalf of CARRIER in a combined single limit of not less than One Million Dollars (\$1,000,000) for injury or death to any person or for damages to property in any one occurrence. Such coverage shall be no less comprehensive than the coverage CARRIER will facilitate on CONTRACTOR's behalf if CONTRACTOR so chooses, as provided in Section 5 of this Appendix. In addition, such coverage shall be primary to any other insurance that may be available from CARRIER. CONTRACTOR shall be responsible for all deductible amounts and for any loss or damage in excess of the policy limit.

(b) **WORKERS' COMPENSATION/OCCUPATIONAL ACCIDENT INSURANCE.** CONTRACTOR shall provide workers' compensation insurance coverage for CONTRACTOR (if a natural person), all of its employees and agents, anyone driving the Equipment, and any other persons required to be covered under the worker's compensation law of any state that is reasonably likely to have jurisdiction over CONTRACTOR's business operations and in amounts not less than the statutory limits required by such applicable state law. The worker's compensation insurance policy shall provide principal coverage in the CONTRACTOR's state of domicile (if such state is Washington, CONTRACTOR shall provide evidence of participation in the state fund) and the state in which the work is principally localized if different and shall provide "other states coverage" that excludes only North Dakota, Ohio, Washington, West Virginia, and Wyoming. As evidence of such coverage, CONTRACTOR shall provide CARRIER with a copy of the insurance policy declarations page for CARRIER's verification before operating the Equipment under this Agreement. Such coverage shall be no less comprehensive than the coverage CARRIER will facilitate on CONTRACTOR's behalf if CONTRACTOR so chooses, as provided in Section 5 of this Appendix. If (a) CONTRACTOR is the sole owner and the sole and exclusive operator of the Equipment and (b) the state in which the work is principally localized is not Nevada, New Jersey, New York, or North Carolina, then CONTRACTOR is not required to maintain statutory workers' compensation insurance, but is encouraged to obtain an occupational accident insurance policy that includes either an endorsement or a separate policy provision whereby the insurer provides, or agrees to provide, workers' compensation coverage that becomes effective for a claim by CONTRACTOR alleging employee status. Such occupational accident insurance coverage shall be no less comprehensive than the coverage CARRIER will facilitate on CONTRACTOR's behalf if CONTRACTOR so chooses, as provided in Section 5 of this Appendix.

(c) **OTHER INSURANCE.** In addition to the insurance coverages required under this Agreement, it is CONTRACTOR'S responsibility to procure, carry and maintain any fire, theft, uninsured and/or underinsured motorist, and physical damage (collision), or other insurance coverage that CONTRACTOR may desire for the Equipment or for CONTRACTOR's health care or other needs. As provided in this Agreement, CONTRACTOR holds CARRIER harmless with respect to loss of or damage to CONTRACTOR's Equipment, trailer, or other property, and CARRIER has no responsibility to procure, carry,

or maintain any insurance covering loss of or damage to CONTRACTOR's Equipment, trailer, or other property. CONTRACTOR acknowledges that CARRIER may, and CONTRACTOR hereby authorizes CARRIER to, waive and reject no-fault, uninsured, and underinsured motorist coverage from CARRIER's Insurance policies to the extent allowed under Washington law (or such other state law where the Equipment is principally garaged), and CONTRACTOR shall cooperate in the completion of all necessary documentation for such waiver, election, or rejection.

3. **REQUIREMENTS APPLICABLE TO ALL OF CONTRACTOR'S INSURANCE COVERAGES.** CONTRACTOR shall procure insurance policies providing the above-described coverages solely from insurance carriers that are A.M. Best "A"-rated, and CONTRACTOR shall not operate the Equipment under this Agreement unless and until CARRIER has determined that the policies are acceptable (CARRIER's approval shall not be unreasonably withheld). CONTRACTOR shall furnish to CARRIER written certificates obtained from CONTRACTOR'S insurance carriers showing that all insurance coverages required above have been procured from A.M. Best "A" rated insurance carriers, that the coverages are being properly maintained, and that the premiums thereof are paid. Each insurance certificate shall specify the name of the insurance carrier, the policy number, and the expiration date; list CARRIER as an additional insured with primary coverage; and show that written notice of cancellation or modification of the policy shall be given to CARRIER at least thirty (30) days prior to such cancellation or modification.

4. **CONTRACTOR'S LIABILITY IF REQUIRED COVERAGES ARE NOT MAINTAINED.** In addition to CONTRACTOR's hold harmless/indemnity obligations to CARRIER under the Agreement, CONTRACTOR agrees to defend, indemnify, and hold CARRIER harmless from any direct, indirect, or consequential loss, damage, fine, expense, including reasonable attorney fees, actions, claim for injury to persons, including death, and damage to property that CARRIER may incur arising out of or in connection with CONTRACTOR'S failure to maintain the insurance coverages required by this Agreement. In addition, CONTRACTOR, on behalf of its insurer, expressly waives all subrogation rights against CARRIER, and, in the event of a subrogation action brought by CONTRACTOR'S insurer, CONTRACTOR agrees to defend, indemnify, and hold CARRIER harmless from such claim.

5. **AVAILABILITY OF INSURANCE FACILITATED BY CARRIER.** CONTRACTOR may, if it so chooses by initialing one or more boxes in the right-hand column of the attached "CERTIFICATE OF INSURANCE," authorize CARRIER to facilitate, on CONTRACTOR'S behalf, the insurance coverages required or made optional by this Agreement. In any such case, CARRIER shall deduct, from CONTRACTOR settlement compensation, amounts reflecting all of CARRIER's expense and cost in obtaining and administering such coverage. In addition, if CONTRACTOR fails to provide proper evidence of the purchase or maintenance of the insurance required above, then CARRIER is authorized but not required to obtain such insurance at CONTRACTOR'S expense and deduct, from CONTRACTOR'S settlement compensation, amounts reflecting all of CARRIER'S expense in obtaining and administering such coverage. CONTRACTOR recognizes that CARRIER is not in the business of selling insurance, and any insurance coverage requested by CONTRACTOR from CARRIER is subject to all of the terms, conditions, and exclusions of the actual policy issued by the insurance underwriter. CARRIER shall ensure that CONTRACTOR is provided with a certificate of insurance (as required by 49 C.F.R. § 376.12(j)(2)) for each insurance policy under which the CONTRACTOR has authorized CARRIER to facilitate insurance coverage from the insurance underwriter (each such certificate to include the name of the insurer, the policy number, the effective dates of the policy, the amounts and types of coverage, the cost to CONTRACTOR for each type of coverage, and the deductible amount for each type of coverage for which CONTRACTOR may be liable), and CARRIER shall provide CONTRACTOR with a copy of each policy upon request.

6. **CHANGES IN COST OR OTHER DETAILS OF COVERAGES.** If CARRIER is facilitating any insurance coverages for CONTRACTOR pursuant to Section 5 of this Appendix and the cost to CONTRACTOR for, or other details of, a coverage changes from the information listed in the attached "CERTIFICATE OF INSURANCE," CONTRACTOR will be so notified by personal delivery, fax, or other written notice. In any event, CONTRACTOR shall not be subject to any such change until ten (10) calendar days after such notice or such later time as is set

forth in the notice. CONTRACTOR's failure, by the end of ten (10) calendar days after such notice, to notify CARRIER of any objection to the change shall constitute CONTRACTOR's express consent and authorization to CARRIER to implement the change and modify accordingly the deductions from CONTRACTOR's settlement compensation, beginning immediately after the 10-day period. Such modified amounts shall replace and supersede those shown in the Certificate of Insurance and CARRIER shall not have an obligation to also provide a revised Certificate of Insurance. If CONTRACTOR fails to notify CARRIER of any objection within the 10-day period — or if CONTRACTOR notifies CARRIER of its objection within the 10-day period and CONTRACTOR and CARRIER are then unable to resolve the matter to their mutual satisfaction — CONTRACTOR and CARRIER shall each have the right to terminate this Agreement effective immediately upon the change becoming effective (although CONTRACTOR shall remain subject to the change until CONTRACTOR's termination's effective date and time).

7. **DEDUCTIBLE BUY DOWN PROGRAM.** CONTRACTOR may (but is not required to) enroll in CARRIER's Deductible Buy Down Program, in which case CONTRACTOR will not be liable for the higher deductible amounts set forth in the Agreement for cargo and trailer damage claims. Instead, if CONTRACTOR elects to participate in this Program, CONTRACTOR's liability for each cargo and/or trailer damage claim shall be limited to \$250 per occurrence. In addition, upon such election by CONTRACTOR, CARRIER is authorized to charge back to CONTRACTOR \$16.50 per month for the cargo deductible buy down and an additional \$16.50 per month for the trailer damage buy down deductible. CONTRACTOR agrees and acknowledges that participation in the Deductible Buy Down Program does not constitute the purchase of insurance coverage through CARRIER, but rather is a program self-administered by CARRIER to allow CONTRACTOR to limit its contractual liability for cargo and trailer damage claims.

THIS APPENDIX is agreed to by the undersigned parties as of the latest date set forth below.

\_\_\_\_\_  
CONTRACTOR

\_\_\_\_\_  
CARRIER

\_\_\_\_\_  
DATE

\_\_\_\_\_  
DATE

APPENDIX A  
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Exhibit B  
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**CERTIFICATE OF INSURANCE**

Contractor hereby requests Carrier, through its insurer, to facilitate on Contractor's behalf (if they are available) the insurance coverage's Contractor has selected by placing Contractor's initials in the right-hand column below:

TYPE OF COVERAGE	INITIAL "YES" TO REQUEST COVERAGE
<p><b>1. <u>Non-Trucking (Bobtail) Liability Insurance:</u></b></p> <p><i>Name of Insurer:</i> <u>Risk Retention Group agent: American Trucking and Transportation Insurance Company</u></p> <p><i>Policy No:</i> <u>ATTSTJ105</u></p> <p><i>Effective Date(s) of Coverage:</i> <u>Coverage applicable while permanently Leased to System Transport &amp;/or TW Trans.</u></p> <p><i>Amount of Coverage:</i> <u>\$1,000,000 combined single limit</u></p> <p><i>Current Cost to Contractor:</i> <u>\$40.00</u> per unit of Equipment per month</p> <p><i>Deductible for Which Contractor Is Liable:</i> <u>\$ -0-</u> per occurrence</p>	<p>____ YES</p> <p>____ NO</p>
<p><b>2. <u>Occupational Accident Insurance:</u></b></p> <p><i>Name of Insurer (2 Choices):</i> <u>1. Zurich American Insurance CO/ OOIDA</u> <u>2. AIG Life Insurance/ Specialty Risk</u></p> <p><i>Policy No:</i> <u>1. OCA2852836 2. TRK9054672-Plan A-ITA</u></p> <p><i>Effective Date(s) of Coverage:</i> <u>12:01 AM the day after application received</u> <u>By OOIDA</u></p> <p><i>Amount of Coverage:</i> \$ _____ per _____</p> <p><i>Current Cost to Contractor:</i> <u>See Representative for current rates</u></p> <p><b>[COVERAGE IS AVAILABLE ONLY TO A SOLE-PROPRIETOR Contractor WHO IS EXCLUSIVE DRIVER OF THE EQUIPMENT.]</b></p> <p><i>Deductible for Which Contractor Is Liable:</i> <u>\$ -0-</u> per</p>	<p>____ YES</p> <p>____ NO</p>

TYPE OF COVERAGE	INITIAL "YES" TO REQUEST COVERAGE
<p><b>3. Physical Damage Insurance on Tractor/ Trailer(s)</b></p> <p>Name of Insurer: <u>Lexington Insurance agent: Maloney, O'Neil, Corkery, &amp; Jones, Inc.</u></p> <p>Policy No: <u>8754469</u></p> <p>Effective Date(s) of Coverage: <u>See policy on file</u></p> <p>Amount of Coverage: Insured value, as specified by Contractor, of            \$ _____ \$ _____ \$ _____  <u>Tractor</u>      <u>Trailer (1)</u>      <u>Trailer (2)</u></p> <p>Current Cost to Contractor: <u>4% of Stated Value per month (based on model year of unit of Equipment covered)</u></p> <p>Deductible for Which Contractor is Liable: <u>\$1,000.00 per occurrence</u></p>	<p>_____ YES</p> <p>_____ NO</p>

THIS APPENDIX is agreed to by the undersigned parties as of the latest date set forth below.

<p><b>Carrier:</b></p> <p>By: <u>Candy Haack</u></p> <p>Printed Name: _____</p> <p>Dated: _____</p>	<p><b>Contractor:</b></p> <p>By: _____</p> <p>Printed Name: _____</p> <p>Dated: _____</p>
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APPENDIX "C"  
PERCENTAGE LEASE  
CHARGE-BACK ITEMS

I, \_\_\_\_\_ Contractor, hereby authorize System Transport, Inc., Carrier, to deduct from my settlement of earnings on Unit # \_\_\_\_\_ described in Appendix "A" of this agreement, and remit to proper parties the following items:

- (1) Fuel purchased from Carrier, or any of Carrier's sister companies, at \$0.05 gallon (rack price) above Carrier's purchase price.
- (2) Physical Damage, Bobtail/Deadhead Liability, Cargo Deductible Trailer Deductible, Medical/Health and Disability Insurance at the rate stated in Appendix "B".
- (3) Vehicle Payments, for the vehicle(s) described in Appendix "A" of this document, to \_\_\_\_\_ amount of \_\_\_\_\_ (tractor) and (trailer). If sufficient monies are not available in Contractor's settlement at payment time, Carrier will not make vehicle payment(s). Contractor remains responsible for his/her payment obligations at all times. A copy of the applicable equipment purchase or rental contract with N/A (finance company) is attached hereto and incorporated herein by reference.
- (4) Repair and Maintenance Bills may, on occasion, be paid for by Carrier and charged back to Contractor on the next regular settlement. Carrier will not pay any Repair and/or Maintenance Bills on Contractor's equipment without proper Purchase Order authorization. Carrier and Contractor must agree on settlement deduction procedure at time of repair or maintenance. The amount of deduction will be the amount of repair or maintenance cost. An annual interest rate of 18% will be charged on time payments.
- (5) Advances, made to Contractor or Contractor's employee, driver or agent, by Carrier will be deducted from Contractor's next regular settlement in full. If and when Carrier is obligated to pay a service charge on electronic money transfer, a charge of 100% will be added to that charge.
- (6) Vehicle Tax & Licensing Payments, on and for the vehicle(s) described in Appendix "A" of this agreement, made by Carrier will be deducted from Contractor's reserve fund described in #13 of this Contract Agreement. Monthly fuel tax payments will be deducted from Contractor's next regular settlement. The deduction will be equal to the amount paid by Carrier.
- (7) Trailer Rental. In the event Contractor rents a trailer from Carrier, or in Carrier's name for Contractor's use, the rental payment will be deducted from Contractor's settlement. Contractor understands that any damage deemed negligence will be his/her responsibility financially.

- (B) I, \_\_\_\_\_ Contractor, agree that:
- A. System Transport, Inc. will be responsible for forwarding payments to parties indicated only when monies are available in my settlement account;
  - B. I will be responsible for making payments to the parties indicated when monies are not available in my settlement account;
  - C. System Transport, Inc. will not be responsible for making past due payments.

Contractor: \_\_\_\_\_ Date: \_\_\_\_\_

The undersigned agrees to deduct amounts itemized above from the settlement of earnings of contractor named herein and remit to parties indicated, subject to the terms and conditions outlined above.

System Transport, Inc.

By: \_\_\_\_\_ Date: \_\_\_\_\_

APPENDIX D  
SATELLITE COMMUNICATION EQUIPMENT

i) Contractor, hereby authorize SYSTEM TRANSPORT, INC., Carrier, to deduct from my settlement of earnings on Unit # \_\_\_\_\_ described in Appendix "A" of this agreement, \$35.00 per month to help cover the messaging costs of the satellite communication equipment.

ii) It is further agreed that Contractor, upon termination of this lease is to make available subject tractor at the Spokane shop (or mutually agreed upon alternative site) Monday thru Friday 8:00 am to 5:00 pm for the purpose of removal of the satellite communication equipment. Contractor further agree to return in reasonable condition the satellite communication equipment installed on subject tractor. To the extent the satellite communication equipment is not returned in reasonable condition, Contractor agrees to reimburse System Transport, Inc. for costs incurred necessary to return equipment to reasonable condition. If the satellite communication equipment is not returned, Contractor agrees to reimburse System Transport, Inc. for the cost of replacement, approximately \$3,000.00

Serial number of satellite communication equipment:

Terminal #	Keyboard #	Antenna #
Contractor: _____		Date: _____
By: _____		Date: _____

TO: ALL OWNER OPERATORS  
FROM: THE INSURANCE DEPARTMENT

As an owner operator, please be aware that the deductible on your tractor is \$1,000.00, this includes towing and equipment such as tarps, chains and binders. There is no buy down on your tractor deductible at this time.

On each company owned trailer there is a \$1,000.00 deductible for damages and a \$1,000.00 deductible on cargo claims.

A plan is available whereby you can reduce your deductible on the company owned trailers and/or the cargo from \$1,000.00 to \$250.00 at a cost to you of \$16.50 per month or \$198.00 per year, for each. This does not apply to cargo losses that are not covered and paid by insurance and are caused by the negligence, action or inaction of Contractor or Contractor's driver, employee or agent. The deductible on the tractor remains at \$1,000.00.

Please X the applicable boxes.

Please enroll me in the reduced deductible program for cargo at a cost of \$16.50 per month.

Please enroll me in the reduced deductible program for 1 company owned trailer at \$16.50 per month.

Please enroll me in the reduced deductible program for 2 (doubles) company owned trailers at \$33.00 per month.

I have been offered this plan and do not wish to enroll at this time.

I understand my cost will be \$ \_\_\_\_\_ Monthly or \_\_\_\_\_ Yearly.

Signature \_\_\_\_\_

Unit# \_\_\_\_\_ Effective Date: \_\_\_\_\_

Witness \_\_\_\_\_

APPENDIX A  
32 of 33

Exhibit B  
Page 15 of 16

DATE: \_\_\_\_\_

Truck Number: # \_\_\_\_\_

### Physical Damage Insurance

I Hereby Authorize Trans-System, Inc And It's Subsidiaries To Place The Value Of My Tractor# \_\_\_\_\_ Valued At \_\_\_\_\_ For Physical Damage Insurance.

With A Premium Of \$ \_\_\_\_\_ Per Month (4% Of Value) And Deductible Of \$1,000.

I Hereby Authorize Trans-System, Inc. And It's Subsidiaries To Place The Value Of My Trailer# \_\_\_\_\_ Valued At \$ \_\_\_\_\_ For Physical Damage Insurance.

With A Premium Of \$ \_\_\_\_\_ Per Month (4% Of Value) And Deductible Of \$1,000.

I Hereby Authorize Trans-System, Inc. And It's Subsidiaries To Place The Value Of My Additional Trailer. Trailer \_\_\_\_\_ Valued At \$ \_\_\_\_\_

With A Premium Of \$ \_\_\_\_\_ Per Month (4% Of Value) And Deductible Of \$1,000.

\* I understand that if any of the above vehicles are totaled as a result of an accident, the maximum amount my insurance will pay is the value I have stated above, or the actual cash value of the vehicle at the time of the accident whichever is less.

(Print Name) \_\_\_\_\_ (Signature) \_\_\_\_\_

OR

I have Been Offered Physical Damage Insurance Coverage Through Trans-System, Inc. And It's Subsidiaries At A Cost Of 4% Of The Value Of My Equipment Per Year And I Do Not Wish To Enroll At This Time.

(Print Name) \_\_\_\_\_ (Signature) \_\_\_\_\_

### Bobtail Insurance

I Understand I Am Required To Carry Bobtail Insurance Naming Trans-System, Inc. And It's Subsidiaries As Additional Insured. The Cost Of This Insurance Through Trans-System, Inc. And It's Subsidiaries Is \$40.00 per Month. Please Select One Of The Following:

- I Wish To Be Enrolled For Bobtail Coverage With Trans-System, Inc. And It's Subsidiaries.
- I Will Provide My Own Bobtail insurance Coverage And Name Trans-System, Inc. And It's Subsidiaries As additional Insured And Provide A Copy Of This Coverage To Trans-System, Inc. And It's Subsidiaries. I Will Also Make Sure Each Year At Renewal A Copy Of This Coverage Is Provided.

(Print Name) \_\_\_\_\_ (Signature) \_\_\_\_\_

STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS

In re

SYSTEM- TWT TRANSPORT

Petitioner

DOCKET NO: 122014-00336

INITIAL ORDER

EMPLOYER ID: 575493-00-2

**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 March 23, 2015, after notice to all interested parties.

**Persons Present:** The Petitioner was present and represented by Thomas Fitzpatrick and Aaron P. Riencshe. The Employment Security Department was present and represented by Eric Peterson, Assistant Attorney General, observing was Assistant Attorney General, Leah Harris. Court reporter, Pamela Dalthorp, from Capital Pacific Reporting was also present.

**Exhibits:** The Administrative Law Judge admitted stipulated facts 1 through 13 and all addendums including: all documents filed together with the Petitioner's Motion for Summary Judgment; the Department's Response to the Petitioner's Motion; the Petitioner's Response in Support of the Motion for Summary Judgment; Order Denying Consolidated Motion for Summary Judgment; Petitioner's Hearing Brief; Department's Brief Upon Stipulated Facts and the Petitioner's Response to Department's Brief Upon Stipulated Facts.

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 \$58,300.99.

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 4, 2010, the Employment Security Department (Department) issued a written Order and Notice of Assessment which found System TWT Transport (Petitioner) liable for unemployment tax contributions, penalties, and interest for

failing to pay employment taxes for owner-operators that the Department found employed by Petitioner. The parties have stipulated that the accurate amount of the unemployment tax contributions, penalties, and interest at issue is \$58,300.99.

2. Petitioner filed a timely appeal of the Department's Notice and Order of Assessment.
3. Petitioner is a common for-hire general freight carrier and its headquarters is in Cheney, Washington. The Petitioner operates in multiple states including Washington.
4. Petitioner moves freight for its customers from one location to another location. Petitioner receives an order to move freight for its customer. Petitioner then moves the freight and the customer pays Petitioner.
5. Petitioner uses two different freight hauling methods: (1) "company drivers" who drive Petitioner owned freight trucks to move the freight and (2) "owner-operators" who drive Petitioner leased freight trucks to move the freight.
6. The owner-operators own their own truck.
7. Petitioner pays the owner-operators compensation for transporting Petitioner's customer's freight from one location to another location. Petitioner pays the owner-operators for the transportation of the freight whether or not the Petitioner's client pays the Petitioner.
8. The owner-operators use Petitioner's motor carrier authority to transport the freight. The motor carrier authority is required to haul freight.
9. The owner-operators enter into a contract with Petitioner to transport the freight as assigned by Petitioner for compensation.
10. The contract states the Petitioner may immediately terminate the agreement if it determines an owner-operator committed an act of misconduct detrimental to Petitioner or the Petitioner's business.
11. The contract prohibits the owner-operator from assigning or subcontracting to another party without the written consent of the Petitioner.
12. The contract requires all driver's to meet the Petitioner's minimum qualifications and gives the Petitioner the right to disqualify any driver who does not meet its minimum qualifications or if Petitioner finds the driver to be unsafe or unqualified or is in violation of any of the Petitioner's customer's policies.
13. The contract prohibits an owner-operator from transporting a third person without the prior approval of the Petitioner.

14. The contract requires the owner-operator to comply with the Petitioner's drug and alcohol policy including random drug and alcohol testing.
15. The contract states Petitioner can take physical control/possession of the owner-operator's truck at the discretion of Petitioner.
16. The contract states the Petitioner has the exclusive control and possession of the owner-operator's equipment.
17. The contract states the owner-operator must receive written consent from the Petitioner prior to trip leasing the equipment to other authorized motor carriers.
18. The contract requires the owner-operator to submit delivery paperwork to the Petitioner including, copies of fuel purchases, mileage sheets, maintenance reports and delivery receipts.
19. The contract requires the owner-operator to immediately notify the Petitioner in the event of an accident.
20. The contract requires the owner-operators or their drivers to operate the equipment in compliance with the rules and regulations of the Petitioner.
21. The contract prohibits the owner-operators from publishing, disclosing or disseminating any information regarding Petitioner's customer list without the prior written consent of the Petitioner during and after termination of the agreement.
22. On February 24, 2011 a hearing before Administrative Law Judge Todd Gay was held concerning Petitioner's Motion for Summary Judgment based on federal preemption and an improper/faulty audit
23. On March 22, 2011 Judge Gay issued an Order denying Petitioner's Motion for Summary Judgment.

#### **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 Petitioner'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 Petitioner 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. 30, 42, 917 P.2d 136 (1996); *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*, 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 Petitioner 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 Petitioner 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.3<sup>rd</sup> 510 (2002); *Penick*, 82 Wn.App at 42 (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, Petitioner bears the burden of proof of showing that an exemption to paying taxes applies.
7. RCW 50.04.140(1) excludes individuals from the definition of employment 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.*, 110 Wn. App. at 451.
9. Applying the foregoing to the facts of this case the undersigned concludes that Petitioner 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, Petitioner 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, Petitioner exhibited significant control over the performance of service including, but not limited to: ability of Petitioner to immediately terminate the agreement if it determines an owner-operator committed an act of misconduct detrimental to Petitioner or the Petitioner's business; prohibiting the owner-operator from assigning or subcontracting to another party without the written consent of the Petitioner; requiring all driver's to meet the Petitioner's minimum qualifications; Petitioner's right to disqualify any driver who does not meet its minimum qualifications or if Petitioner finds the driver to be unsafe or unqualified or in violation of any of the Petitioner's customer's policies; Petitioner prohibiting an owner-operator from transporting a third person without the prior approval of the Petitioner; requiring the owner-operator to comply with the Petitioner's drug and alcohol policy including random drug and alcohol testing, Petitioner's ability to take physical control/possession of the owner-operator's truck at Petitioner's discretion; Petitioner's exclusive control and possession of the owner-operator's equipment; the owner-operator must receive written consent from the Petitioner prior to trip leasing the equipment to other authorized motor carriers, Petitioner requires the owner-operator to submit delivery paperwork to the Petitioner including, copies of fuel purchases, mileage sheets, maintenance reports and delivery receipts; owner-operators are required to immediately notify the Petitioner in the event of an accident; Petitioner requires the owner-operators or their drivers to operate the equipment in compliance with the rules and regulations of the Petitioner; finally Petitioner prohibits the owner-operators from publishing, disclosing or disseminating any information regarding Petitioner's customer list without the prior written consent of the Petitioner during and after termination of the agreement. Thus, the Petitioner has failed to establish the first prong of the test under RCW 50.04.140.
10. Therefore, without addressing the second and third prongs, Petitioner has failed to meet the requirements of RCW 50.04.140, as Petitioner must satisfy all of the prongs of the test in the conjunctive. Thus, Petitioner has not met the requirements of RCW 50.04.140 and is subject to the assessed tax, interest and penalties.
11. Petitioner requests the undersigned dismiss the proceedings based on the issue of federal preemption. Judge Gay denied this motion in his March 22, 2011 Order. The

undersigned will not disturb Judge Gay's Order. The appropriate venue for Petitioner to challenge Judge Gay's order is through the appellate process.

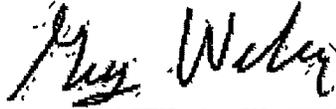
12. If, however, the undersigned ruled on the federal preemption issue, the undersigned would conclude that *Western Ports* is controlling law. *Western Ports* flowed from a claim for unemployment benefits by a former owner-operator and independent contractor. The Washington State Division I Court of 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). 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.
13. Applying the foregoing, the undersigned would have concluded that unemployment insurance taxation, including characterizing owner-operators as employees for the purposes of such taxation, is not subject to federal preemption and would have denied the Petitioner's motion to dismiss.
14. Finally, Petitioner requests the undersigned void, dismiss and/or exclude the Department's Order and Notice of Assessment based on the audit allegedly being "rigged." Petitioner alleges the auditor failed to follow procedure, failed to demonstrate professional care and questions the auditor's objectivity, competence, and ethics. The undersigned finds the Petitioner's arguments without merit and denies the request to void, dismiss and/or exclude the Department's Order and Notice of Assessment.

**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 4, 2010 Order and Notice of Assessment issued pursuant to RCW 50.24.070 properly holds Petitioner liable for unemployment tax contributions, interest and penalties in the amount of \$58,300.99

Dated and mailed July 1, 2015 from Spokane Valley, Washington.

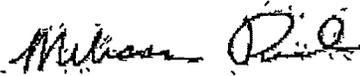


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Greg Weber  
Administrative Law Judge  
Office of Administrative Hearings

**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.



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Melissa Paul  
Delivery Specialist

**Mailed to:**

SYSTEM- TWT TRANSPORT  
DBA SYSTEM-TWT  
PO BOX 3456  
SPOKANE, WA 99220

Employer

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

Agency

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

Agency

TALMADGE & FITZPATRICK  
TALMADGE & FITZPATRICK  
THOMAS FITZPATRICK  
2775 HARBOR AVE SW, 3RD FLOOR-SUITE C  
SEATTLE, WA 98126

Employer Representative

OGDEN MURPHY WALLACE, PLLC  
AARON P. REINSCHÉ  
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 **July 31, 2015**.

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

**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 December 18, 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 2015-2142

In re

**SYSTEM – TWT TRANSPORT**  
Tax ID No. 575493-00-2

Docket No. 122014-00336

**DECISION OF COMMISSIONER**

This is an unemployment insurance tax dispute between the Employment Security Department ("Department") and the interested employer, System-TWT Transport ("System"). The Department conducted an audit of System for the period of the second quarter of 2007 through the fourth quarter of 2009. As a result of the audit, certain individuals (i.e. owner-operators) hired by System were reclassified as employees of System and their wages were deemed reportable to the Department for unemployment insurance tax purposes. On May 4, 2010, the Department issued an Order and Notice of Assessment, assessing System contributions, penalties, and interest in the amount of \$264,057.40. System filed a timely appeal from the Order and Notice of Assessment.

The case then went through an extensive procedural history. Suffice it to say that after several years of litigation before the Office of Administrative Hearings ("OAH"), two state superior courts, and one state appellate court, this case was eventually remanded to the OAH for a hearing on the System's administrative appeal from the Department's tax assessment. See Stipulation and Order of Dismissal and Order to Disburse Funds in the Registry of the Court. After the remand, the parties entered into stipulated findings of fact agreeing, among other things, that the correct amount of contributions, penalties, and interest in dispute should be \$58,300.99 for the

audit period in question. *See* Stipulated Finding of Fact No. 11 The OAH heard oral argument from the parties on March 23, 2015 and, thereafter, issued an Initial Order on July 1, 2015 ruling in favor of the Department on all issues involved On July 30, 2015, System 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. The Commissioner's Review Office acknowledged System's Petition for Review on August 26, 2015; and, on September 10, 2015, the Commissioner's Review Office received a reply filed by the Department. Having reviewed the entire record (including the audio recording of the hearing) 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.<sup>1</sup> 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, § 19(g)(1)<sup>2</sup>; and a three-prong "independent contractor" or ABC test. See Laws of 1937, ch 162, § 19(g)(5).<sup>3</sup>

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<sup>1</sup> 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 CB 296.

<sup>2</sup> 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).

<sup>3</sup> 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 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); Skrivanich 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 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, 52<sup>nd</sup> 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

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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)

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), *Skriverich*, 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, System, 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). *See* Declaration of Rehwald in Support of Consolidated Motion for Summary Judgment ("Decl. of Rehwald") ¶ 3 at Administrative Record ("AR") 146. System hires approximately 381 company drivers to operate equipment that it owns. In addition, System leases approximately 254 trucks from third parties commonly referred to in the trucking industry as owner-operators. According to Rehwald, the use of owner-operators is common in the industry because of the fluctuating demand for trucking services. System is able to reduce overhead costs and simplify its operations by contracting with owner-operators because

the owner-operators own their equipment and lease it to System via a written equipment lease agreement *Id* ¶ 5 at AR 147. System uses two different types of leases to lease motor vehicle equipment from an owner-operator. First, it uses a mileage lease on a very limited and infrequent basis, which only affects a small percentage of the owner-operators leasing equipment to System; second, System uses a percentage lease that compensates an owner-operator based on a percentage of the gross revenue generated by his or her equipment. *Id* ¶ 6 at AR 148. System's principal office is located in Cheney, Washington; it also has terminals in a number of different states, including California, Arizona, Indiana, Colorado, and Kansas. Both System's company drivers and its owner-operators are dispatched regionally, from regional fleets that serve certain geographic areas. *Id*. ¶ 9 at AR 149. System's load coordinators are responsible for planning and coordinating freight hauling. The load coordinator matches available loads with available trucks and trailers. The loads are hauled by either company drivers or owner-operators. *See* Stipulated Finding of Fact No. 4. System does not dispute that the company drivers are its employees, however, System contends that the owner-operators are not its employees, but independent contractors, for unemployment insurance tax purposes. *See* Stipulated Finding of Fact No. 2.

As discussed above, the Department conducted an audit of System for various quarters in 2007, 2008, and 2009, and, subsequently, reclassified the owner-operators as employees of System and deemed their wages to be reportable for unemployment insurance tax purposes. System 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 are preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"). The crux of System'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 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 Ameritrust 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 lower federal courts do not seem to agree 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 (9<sup>th</sup> Cir. 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 (9<sup>th</sup> Cir. 2014), *cert denied*, 135 S. Ct. 2049 (2015) (internal citations omitted).

In contrast, the Ninth Circuit have held that a complete ban on the use of independent contractors could not survive the FAAAA preemption. See Am Trucking Ass'ns, Inc. v. City of Los Angeles, 559 F.3d 1046, 1056 (9<sup>th</sup> Cir. 2009) (the independent contractor phase-out provision in Port of Los Angeles' concession agreement was "one highly likely to be shown to be preempted"); see also Am. Trucking Ass'ns, Inc. v. City of Los Angeles, 660 F.3d 384, 407-08 (9<sup>th</sup> Cir. 2011) (the employee-driver provision was preempted by FAAAA as related to rates, routes, and services; and it did not fall under either the safety exception or market participant exception). Furthermore, in considering whether a Massachusetts statute, restricting the second prong (i.e. prong B) of the traditional independent contractor test to only one alternative (i.e. the "outside the usual course of the business" alternative), was preempted by FAAAA, the First Circuit stated that:

First, a statute's "potential" impact on carriers' prices, routes, and services can be sufficient if it is significant. . . . We have previously . . . allowed courts to "look[ ] to the logical effect that a particular scheme has on the delivery of services or the setting of rates." Second, this logical effect can be sufficient even if indirect. . . . Far from immunizing motor carriers from all state economic regulations, we are following Congress's directive to immunize motor carriers from state regulations that threaten to unravel Congress's purposeful deregulation in this area.

See Mass. Delivery Ass'n v. Coakley, 769 F.3d 11, 21 (1<sup>st</sup> Cir. 2014) (internal citation omitted). Following a remand from the First Circuit, the lower district court held that prong B of the Massachusetts' independent contractor statute was preempted by the FAAAA. See Mass. Delivery Ass'n v. Healey, 2015 WL 4111413 (D. Mass. July 8, 2015).

It is against the backdrop of the U.S. Supreme Court's decisions in Morales, Rowe, and Pelkey as well as a plethora of seemingly conflicting decisions of the lower federal courts, that we now confront System's federal preemption argument. System 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. System introduced two declarations in support of its contention: a declaration by Larry Pursley, Executive Vice President of Washington Trucking Association, and a declaration by Joe

Rajkovacz, Director of Regulatory Affairs for the Owner-Operator Independent Drivers 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. Motor carriers contract with owner-operators to obtain the owner-operators' equipment to haul freight on an as-needed basis. See Declaration of Pursley in Support of Consolidated Motion for Summary Judgment ("Decl. of Pursley") ¶ 6 at AR 93. With the economic deregulation of the interstate trucking industry, the vast majority of trucking business are small businesses, and nearly 96 percent of those businesses operate fewer than 20 trucks and nearly 88 percent operate six trucks or less. Consequently, the trucking industry is a highly diverse industry, resulting in intense competition and low profit margins. *Id.* ¶ 5 at AR 92. 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 prohibit carriers from using independent owner-operators. According to Pursley, requiring carriers to use employees rather than independent contractors will force carriers to establish and maintain an employee workforce in order to meet peak demand and to considerably build the related infrastructure such as trucks, administrative staff, and garages. Moreover, requiring carriers to convert independent owner-operators into employees will compel carriers to take on additional employment-related costs, including state and federal social security taxes, unemployment insurance taxes, and medical and retirement costs. As a result, carriers would need to raise their prices in order to defray the additional expenses. *Id.* ¶ 10 at AR 94. Finally, Pursley asserts that the Department's effort will lead to diminished economic choices and reduced income for owner-operators by forcing them to get their own motor carrier authority if they are to maintain their independence. *Id.* ¶ 11 at AR 95.

Additionally, System 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. System 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 System's Petition for Review at 3.

While System'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 Supremacy 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 two declarations filed on behalf of System) 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 System 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 FAAAAA preemption clause. *See* adopted Conclusions of Law Nos. 11 – 13 in Initial Order.

#### Void Assessment

In its Petition for Review, System requests that we dismiss the assessment in question as void on various grounds. *See* System's Petition for Review at 5. We consider each of the grounds below and decline to dismiss the assessment as void.

#### I

First, System contends that the assessment is void because the Department lacked statutory authority to issue the assessment. We disagree. Generally speaking, a Departmental order is void only when the Department lacks either personal or subject matter jurisdiction. *See Marley v. Dep't of Labor & Indus.*, 125 Wn 2d 533, 542, 886 P.2d 189 (1994). The type of controversy over which an agency has subject matter jurisdiction refers to the general category of controversies it has authority to decide, and is distinct from the facts of any specific case. *See Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774, 782, 271 P.3d 356 (2012). Obviously, the power to decide a type of controversy includes the power to decide wrong, and an incorrect decision is as binding as a correct one. *See Marley*, 125 Wn.2d at 543. "If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction." *Id.* at 539. As such, the assessment in question is void only if System can show that the Department lacked personal or subject matter jurisdiction to issue the assessment. Here, System has not challenged the Department's personal jurisdiction. Moreover, issuing tax assessments to Washington employers, putative or otherwise, for unemployment insurance tax purposes is precisely within the subject matter jurisdiction delegated to the Department by the Washington state legislature. Consequently, we may not void the assessment in question for want of personal or subject matter jurisdiction.

#### II

System next argues that the assessment is a result of arbitrary or capricious action on the part of the Department. System's argument is not well-taken. In general, courts should not probe the mental processes of administrative officials in making a decision. *See Nationscapital Mortg. Corp. v. Dep't of Fin. Insts.*, 133 Wn. App. 723, 762-763, 137 P.3d 78 (2006) (*citing United States*

v. Morgan, 313 U.S. 409, 422 (1941)). In the absence of evidence to the contrary, courts should “presume public officers perform their duties properly, legally, and in compliance with controlling statutory provisions.” *Id.* at 763 (citing Ledgering v. State, 63 Wn 2d 94, 101, 385 P.2d 522 (1963)) When a court conducts a judicial review of matters of agency discretion, its role is limited to ensuring that the agency has exercised its discretion in accordance with the law and has not abused its discretion. See RCW 34.05.574(1); see also NW Sportfishing Indus. Ass’n v. Dep’t of Ecology, 172 Wn. App. 72, 91, 288 P.3d 677 (2012) (a reviewing court should avoid exercising discretion that our legislature has placed in the agency). An agency abuses its discretion when it exercises its discretion in an arbitrary and capricious manner. See Conway v. Dep’t of Soc & Health Servs., 131 Wn. App. 406, 419, 120 P.3d 130 (2005). An agency action is arbitrary and capricious if it is “willful and unreasoning and taken without regard to the attending facts or circumstances.” See Wash. Indep. Tel. Ass’n v. Wash. Utils. & Transp. Comm’n, 148 Wn.2d 887, 905, 64 P.3d 606 (2003). An agency action is not arbitrary and capricious if the decision is exercised honestly and upon due consideration, even where there is room for two opinions. *Id.* (“[W]here there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous”), see also DeFelice v. State, 187 Wn App. 779, 787-88, 351 P.3d 197 (2015). The scope of review under an arbitrary and capricious standard is extremely narrow, and the party challenging the agency action carries a heavy burden. See Keene v. Bd. Of Accountancy, 77 Wn App 849, 859, 894 P.2d 582 (1995); Ass’n of Wash. Spirits & Wine Distrib. v Wash State Liquor Control Bd., 182 Wn.2d 342, 359, 340 P.3d 849 (2015).

In the instant case, System asserts that the Department acted arbitrarily and capriciously when it failed to follow its own internal audit standards and manuals, such as Tax Audit Manual, Status Manual, and Generally Accepted Audit Standards. However, internal policies, directives, and standards do not generally create law that binds the agency, unless they are formally promulgated pursuant to legislative delegation. See Joyce v Dep’t of Corrections, 155 Wn.2d 306, 323, 119 P.3d 825 (2005). Accordingly, the Department’s failure to adhere to its own internal, nonbinding standards or manuals is not an arbitrary and capricious action *per se*.

More troubling is the fact that the Department expected the tax specialist in this case to find errors, errors of omitting employees, and errors of omitting remuneration. System asserts that such performance expectations violated the audit standards of independence, objectivity, and

impartiality, resulting in predetermined liability. We can agree with System this much. The goal of an audit is to determine the accuracy of the material audited, no more and no less. However, an auditing target or quota may be nothing more than assuring that the auditor is conducting the audits thoroughly and adequately. Expecting that the auditors almost always find errors may be nothing more than a statistical reality that most employers make mistakes. Or, as explained by the tax specialist in this case, the pre-audit research by the auditor already established that the employers selected for audit had most likely erred in treating employees as independent contractors. Consequently, performance expectations imposed on an auditor do not in and of themselves make the assessment arbitrary and capricious, unless it can be shown that the auditor intentionally fabricated or manipulated the audit result to meet the performance quota or that the assessment was utterly baseless. In this case, System has not alleged that the tax specialist intentionally fabricated or otherwise manipulated the audit result to meet her performance quota; furthermore, the assessment was certainly not baseless, especially when its result was consistent with the W. Ports decision (finding an owner-operator was in employment of a motor carrier under the Employment Security Act). See W. Ports, 110 Wn. App. at 459. Accordingly, we are not persuaded that the Department acted arbitrarily and capriciously in issuing the assessment in question.

System further asserts that the Department deliberately inflated the assessment by including payments for equipment rental, payments to owner-operators with no situs connection to Washington State, and payments to owner-operators with corporate form. This argument fails on its merits. The Department is required to conduct audits with information provided by the employer or with the best information available if the employer fails to provide necessary information. See WAC 192-340-020. Employers are under an obligation to provide reports or returns to the Department, and to make payroll and accounting records available to the Department. See RCW 50.12.070, WAC 192-310-050(1). The employer records are required to be accurate. See RCW 50.12.070(1)(a). When an employer fails to provide sufficient and accurate information to the Department, the Department is authorized to *arbitrarily* make a report on behalf of such employer, and the arbitrary report is deemed *prima facie* correct. See RCW 50.12.080. Here, System did not provide all necessary information during the audit for the Department to make an accurate assessment. Instead, System would like us to focus on what the tax specialist could or should have done in reducing the assessment. Based on our review of the record, we are satisfied

that the Department acted within the bounds of its statutory authority, as the Department was only required to make an arbitrary report on the basis of knowledge available to it pursuant to RCW 50.12.080. Because the burden is on System to provide necessary information to the Department, the Department cannot then be faulted for an "inflated" assessment. Regardless, System has now stipulated to the correct amount of the assessment (i.e. \$58,300.99), which is less than a quarter of the original assessed amount (i.e. \$264,057.40). See Stipulated Finding of Fact No. 11. The Department has excluded all items disputed by System in order to reach an agreement with System. See Stipulated Findings of Fact Nos. 9, 10. As such, any grounds for System's attack on the validity of the assessment no longer exist, because the amount is no longer "inflated" pursuant to the parties' stipulation.

In any event, any misdeeds on the part of the Department in conducting the audit and issuing the assessment, do not warrant a dismissal or exclusion of the assessment in this case. After all, the statutes (i.e. Title 50 RCW) and regulations (i.e. Title 192 WAC) do not require the Department to follow any particular process or abide by any particular standard in conducting tax audits. To the extent that the Department's audit was inadequate, incomplete, or lack of professional due care, System has the right to appeal the assessment and request a hearing before the OAH, and it did so in this case. See RCW 50.32.030, see, e.g., Motley-Motley, Inc. v. State, 127 Wn. App. 62, 78-79, 110 P.3d 812 (2005) (even if Department of Ecology's investigation of Motley's water right was inadequate, incomplete, and secret, Motley still had the opportunity to request a hearing before the Pollution Control Hearings Board; and the proceedings before the Pollution Control Hearings Board were *de novo*, without deference to Department of Ecology's initial/tentative decision). Accordingly, we concur with the OAH that System's request to dismiss or exclude the assessment in question shall be denied. See adopted Conclusion of Law No. 14.

### III

Additionally, System argues that the Department should be "equitably estopped from changing its longstanding position that owner/operators are independent contractors, as evidenced by the *Penick* case and [its] own manuals." System's argument in this regard is not persuasive. A party asserting equitable estoppel must establish: (1) an admission, statement, or act that is inconsistent with a later claim; (2) a reasonable reliance on the admission, statement, or act; and (3) injury that would result to the relying party if the first party is allowed to contradict or repudiate the prior act, statement, or admission. See Robinson v. Seattle, 119 Wn.2d 34, 82, 830 P.2d 318

(1992). Equitable estoppel is based on the principle that a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon. See Wilson v. Westinghouse Elec. Corp., 85 Wn.2d 78, 81, 530 P.2d 298 (1975). Equitable estoppel against the government is not favored. See Finch v. Matthews, 74 Wn.2d 161, 169, 443 P.2d 833 (1968). Consequently, when a party asserts the doctrine against the government, two additional requirements must be met: equitable estoppel must be necessary to prevent a manifest injustice, and the exercise of governmental functions must not be impaired as a result of the estoppel. See Shafer v. State, 83 Wn 2d 618, 622, 521 P.2d 736 (1974). Finally, a party asserting equitable estoppel must prove each element of estoppel by clear, cogent, and convincing evidence See Kramarevcky v. Dep't of Soc. & Health Servs., 122 Wn 2d 738, 744, 863 P.2d 535 (1993)

Without commenting on other elements of equitable estoppel, we conclude that System has failed to prove the second element, in that its reliance on the Commissioner's decision in the Penick case and the Department's own manuals is not reasonable. As discussed above, the Commissioner's Review Office did not publish the Penick decision and, thus, its holding with regard to the owner-operators in that case is not binding. See RCW 50.32.095; see also W. Ports, 110 Wn App. at 459. Moreover, System has not pointed out any affirmative statements in the Department's manuals that owner-operators are carrier's independent contractors, and we are aware of none. Even if there were such statements in the internal manuals, those statements are not binding on the Department. See Joyce, 155 Wn.2d at 323. Accordingly, System's reliance on the Commissioner's decision in the Penick case and the Department's internal manuals is not reasonable, and such unreasonableness becomes even more palpable in light of a subsequent appellate decision where the court decidedly held that an owner-operator was not an independent contractor, but an employee of the motor carrier, under the Employment Security Act. See W. Ports, 110 Wn. App. at 459.

#### IV

Finally, System contends that the assessment in this case somehow violated its constitutional due process right. System relies on two U.S. Supreme Court cases, United States v. Powell, 379 U.S. 48 (1964) and United States v. LaSalle Nat'l Bank, 437 U.S. 298 (1978), for the general proposition that the IRS must use its summons authority in good faith. Those two cases, however, did not address whether and how the taxpayers' due process rights were violated by the

IRS-issued summons and, thus, they are not helpful to this tribunal in adjudicating System's due process claim. Without any substantive legal arguments that are supported by citations to the record and legal authorities, we obviously cannot conclude the assessment in this case has violated System's due process right, procedural or substantive

#### Employment

System 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 System as defined in RCW 50.04.100. See RCW 50.04.080; RCW 50.24.010. If the owner-operators' employment is not established, System is not liable for the assessed items. If employment is established, System 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, 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, System is a common, for-hire motor carrier engaged in the business of transporting various freight in interstate commerce for its customers. See Decl. of Rehwald ¶¶ 3, 4 at AR 146-47. System is considered a flatbed company using primarily flatbed, step-deck, and specialty trailers to haul heavy equipment, steel and aluminum coils, wallboard, lumber, and other construction and building materials. *Id.* ¶ 4 at AR 147. The owner-operators performed freight hauling services for System, which consisted of accepting freight onto the truck, covering the freight with tarps as necessary, driving the truck containing the freight to a delivery location, and delivering the freight to System's customer. See Stipulated Finding of Fact No. 5. As such, the owner-operators' personal services directly benefited System's business. Moreover, it is beyond dispute that System paid wages for the services provided by the owner-operators. See Stipulated Finding of Fact No. 6 (System collects payment from the customers and pays the owner-operators remuneration for hauling the freight); see also Independent Contractor Agreement, Appendix "A" at AR 632. Consequently, the administrative law judge correctly concluded that the owner-operators were in employment of System 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).

#### Independent Contractor Exemption

The services performed by the owner-operators are taxable to System 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 and freight-hauling 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 independent contractor agreements referred to the owner-operators as independent contractors:

It is expressly understood and agreed that Contractor is an independent contractor for the Equipment and driver services provided pursuant to this Agreement . . . Contractor also agrees to provide necessary documentation and apply for certification of its independent contractor status where mandated by applicable state law . . . Contractor's performance of these responsibilities shall be considered proof of its status as an independent contractor in fact. Proof of such control and responsibility shall be submitted by Contractor to Carrier as required by Carrier . . .

See Independent Contractor Agreement ¶ 24 at AR 630. This contractual language, however, is not dispositive of the issue of whether the services in question 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, System entered into standard independent contractor agreements with the owner-operators governing the relationship between the parties. On the one hand, the owner-operators enjoy some autonomy with regard to the performance of their freight-hauling and truck-driving services. For example, the owner-operators are responsible for the costs of operating their equipment, including motor fuel, tires, lubricants, maintenance, repairs, taxes, assessments, licenses, permits, tolls, and scale fees. The owner-operators maintain their own liability and property damage insurance while not operating for System, and are responsible for any insurance deductibles. The owner-operators are also responsible for any other fine or fees imposed against the equipment and cargo. See Independent Contractor Agreement ¶ 4 at AR 627-28. Moreover, the owner-operators are solely responsible for selecting, hiring, training, disciplining, discharging, and setting hours and wages for, its employee drivers and laborers. See Independent Contractor Agreement ¶ 24 at AR 630. Finally, the owner-operators pay their own employees and make such deductions or contributions as may be required by regulatory entities. See Independent Contractor Agreement ¶ 13 at AR 629.

On the other hand, System exerts extensive controls over the methods and details of how the freight-hauling and truck-driving services are to be performed by the owner-operators. For example, System has exclusive possession, control, and use of the trucking equipment, and assumes complete responsibility for the operation of the equipment during the term of the contract. See Independent Contractor Agreement ¶ 2 at AR 627. Additionally, all bills of lading, waybills, freight bills, and manifests shall indicate that the property transported is under the responsibility of System. See Independent Contractor Agreement ¶ 23(C) at AR 630. The owner-operators must properly and correctly identify the equipment and, upon termination of the contract, must remove System's identification from the equipment and return to System all permits, plates, decals, door signs, fuel cards, toll cards, load securement equipment, satellite equipment, and copies of operating authorities. See Independent Contractor Agreement ¶¶ 1, 2, 19 at AR 627, 629. Although the owner-operators may trip lease their equipment to other motor carriers, they must first obtain written authorization from System. See Independent Contractor Agreement ¶ 2 at AR 627. The owner-operators are required to submit to System delivery documents and other paperwork, including copies of fuel purchases, daily vehicle condition reports, mileage sheets, delivery receipts, and monthly maintenance reports. See Independent Contractor Agreement ¶ 6 at AR 628. Moreover, the owner-operators must submit to System on a timely basis, all driver

logs, physical examination certificates, accident reports, and any other required data, documents, or reports. *See Independent Contractor Agreement* ¶ 23(B) at AR 630. The owner-operators must maintain their equipment in good operating condition and supply all safety devices as required by System. *See Independent Contractor Agreement* ¶ 17 at AR 629. The owner-operators are required to operate their equipment in a safe and prudent manner at all times and must ensure their drivers comply with System's policies and procedures and any subsequent revisions thereto. *See Independent Contractor Agreement* ¶ 23(E) at AR 630. At no time shall the owner-operators allow a passenger or a driver to occupy or operate the equipment who has not been approved by System. *See Independent Contractor Agreement* ¶ 15 at AR 629. Further, the owner-operators and their drivers must adhere to System's drug and alcohol policy, including participation in System's random drug and alcohol testing program. *See Independent Contractor Agreement* ¶ 23(D) at AR 630. System retains the right to disqualify any driver supplied by the owner-operators if the driver is found to be unsafe or in violation of System's minimum qualification standards or any policies of System's customers. *See Independent Contractor Agreement* ¶ 23(A) at AR 630. The owner-operators are required to immediately notify System of any accident involving the equipment or the cargo transported by the equipment. The owner-operators are expected to cooperate fully with System regarding any legal action, regulatory hearing, or other proceeding arising from the operation of the equipment, the relationship created by the agreement, or the services performed under the agreement. Upon System's request, the owner-operators must, at their own expense, provide written reports or affidavits, attend hearings or trials, and assist in securing evidence or obtaining the attendance of witnesses. The owner-operators are also required to assist in investigation, settlement, or litigation of any accident, claim, or potential claim by or against System. *See Independent Contractor Agreement* ¶ 14 at AR 629. If the owner-operators fail to complete timely transportation of commodities, abandon a shipment, or otherwise subject System to liabilities, System has the right to take possession of the shipment and complete the transportation. *See Independent Contractor Agreement* ¶¶ 20, 22 at AR 629. Finally, System may terminate the agreement with any owner-operator if the owner-operator commits an illegal or other misconduct that is detrimental to System or System's business. *See Independent Contractor Agreement* ¶ 21 at AR 629.

The above-referenced requirements imposed by System are generally incompatible with freeing the owner-operators from its control and direction, in other words, System is not just

interested in the *end result* of the freight-hauling and truck-driving services performed by the owner-operators, but it also concerns itself as to “*how*” those services are to be performed by the owner-operators. 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, System argues that the administrative law judge erred in considering federally-mandated controls over the leased equipment to conclude that the owner-operators did not satisfy the “control or direction” criterion of the exemption test. See System’s Petition for Review at 1-2. This argument, however, has been specifically rejected by the W Ports court:

It is true that a number of the controls exerted by Western Ports over the services performed by Mr. Marshall are dictated by federal regulations that govern the use of leased trucks-with-drivers in interstate commerce. Even so, RCW 50 04.100 suggests that the Department properly can consider such federally mandated controls in applying the statutory test for exemption, in that “service in interstate commerce” is specifically included in the statutory definition of “employment.” RCW 50 04 100 (“Employment” . . . means personal service of whatsoever nature, . . . including service in interstate commerce[ ]”) 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 . . .

See W. Ports, 110 Wn App. at 453-54. Consequently, the administrative law judge did not err in considering the federally-mandated controls over leased trucks-with-drivers (in addition to those controls exerted by System itself over the owner-operators’ truck-driving and freight-hauling services) to conclude that the owner-operators have not met the first criterion under RCW 50 04.140(1)(a) and (2)(a)

Relying primarily on Kamla v. Space Needle Corp., 147 Wn.2d 114, 52 P.3d 472 (2002), System contends that “control” in the employment context requires a showing of something more than “general contractual rights,” *Id.* at 121, and 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)) See System's Petition for Review at 4 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). Accordingly, we do not find the Kamla's reasoning readily applicable to the case at hand. 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 System, 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.

System further argues that the contract terms do not show controls over "methods and details" of how the freight-hauling services are performed, but merely show the general contractual rights of the parties. See System's Petition for Review at 4. System's argument is not persuasive. In fact, general contractual rights 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 had the right to 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 contractual rights in evaluating the "control or direction" criterion under RCW 50.04.140(1)(a). *Id.* at 454.

In sum, it is not any single contractual right, or any single control over an equipment (federally mandated or otherwise), 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, System's usual course of business is to transport goods in interstate commerce, and the owner-operators provided truck-driving services to System. As such, the owner-operators' services were performed within, not outside, the usual course of System's business. Accordingly, System 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 System constitute the places of System'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 System 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 hand 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, repair shop, or terminal, in addition to simply driving the trucks leased to the carrier

In this case, System leased the trucks owned by the owner-operators, and, as required by 49 C.F.R. § 376.12(c)(1), the independent contractor agreements between System and the owner-operators provided that System "shall have exclusive possession, control, and use of the equipment specified in this contract for the duration of the contract" and "shall assume complete responsibility

for the operation of said equipment during the term of the contract.” See Independent Contractor Agreement ¶ 2 at AR 627 As discussed above, the sheer fact that System leased the trucks with driving services does not automatically transform the trucks (leased to System but owned by the owner-operators) into the places of System’s business pursuant to 49 C.F.R. § 376.12(c)(4). Moreover, the record does not show that the owner-operators routinely engaged themselves in other places of System’s business, such as the office, repair shop, or terminal. Accordingly, we are satisfied that the truck-driving and freight-hauling services performed by the owner-operators were performed outside all places of System’s business and, thus, System has satisfied the second alternative under RCW 50 04.140(1)(b).

C. Independently Established Business

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.

Furthermore, when a business plans 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 December 17, 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 December 17, 2015). Consequently, 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). However, if an owner-operator chooses the latter 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, System did not introduce any evidence, documentary or testimonial, to show that the owner-operators at issue here had independently established enterprises or entities during the audit period. The record is devoid of any business registration, business license, UBI number, and account with the Department of Revenue tending to show the existence of an established business entity. As such, it matters not that the owner-operators owned their trucks and were responsible for the costs of operating those trucks; or that the costs of the trucks or trailers were significant; or that the owner-operators maintained their own financial books reflecting their income and expenses. See Appellant's Hearing Brief at 31. The fact remains that the owner-operators had no established business entities that were separate and apart from their own individuals *in the first place*.

Moreover, System did not introduce any evidence to show that the owner-operators had their own operating authorities; instead, the owner-operators had to contract with System in order to operate under System's operating authority. As a result, the owner-operators 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 many of the traditional factors are also not in favor of finding independently established business,<sup>4</sup> 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, System has not carried its burden to prove the owner-operators are independent contractors because these owner-operators have failed at least one of the criteria under RCW 50.04.140(1) or (2). All of the disputed owner-operators are in "employment" of System 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, System is liable to pay the contributions, penalties, and interest assessed pursuant to RCW 50.24.010 in the amount of \$58,300.99 for the period in question.

Now, therefore,

**IT IS HEREBY ORDERED** that the July 1, 2015, Initial Order issued by the Office of Administrative Hearings is **AFFIRMED**. System is liable for the contributions, penalties, and interest assessed pursuant to RCW 50.24.010 regarding the owner-operators in the amount of \$58,300.99 for the period of the second quarter of 2007 through the fourth quarter of 2009.

Dated at Olympia, Washington, December 18, 2015.\*

***S. Alexander Liu***

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Deputy Chief Review Judge  
Commissioner's Review Office

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<sup>4</sup> For example, the owner-operators were not registered as independent businesses with the state during the audit period, the owner-operators did not have individual business cards, and the putative employer here, System, protected the owner-operators from risk of non-payment by the customers. See Stipulated Finding of Fact No. 6 (the owner-operators get paid for the freight hauled whether or not the customers pay).

\*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 (30<sup>th</sup>) day of the appeal period. See RCW 34.05.542(4) and WAC 192-04-210. The copy of your judicial appeal you 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.

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