

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,  
SYSTEM-TWT TRANSPORT, a Washington corporation,

Appellants,

v.

STATE OF WASHINGTON  
EMPLOYMENT SECURITY  
DEPARTMENT,

Respondent.

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**RESPONSE TO AMICUS CURIAE BRIEF OF AMERICAN  
TRUCKING ASSOCIATIONS, INC.**

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## I. ARGUMENT

The Amicus Curiae Brief of American Trucking Associations, Inc. (ATA), adds little to the parties' arguments. Like the trucking carriers' briefs, ATA's arguments are premised on the false assumption that requiring motor carriers to pay unemployment insurance taxes for their owner-operators means that truck drivers can no longer be owner-operators. This is simply not true. Rather, the Department seeks to enforce the Employment Security Act only, whose definition of covered employment includes persons who, under other laws, are independent contractors. *Western Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 458, 41 P.3d 510 (2002). Under the facts of this case, the Court should follow the longstanding precedent that supports the owner-operators are in covered employment under the Employment Security Act and affirm the Commissioner's final order.

### A. **The Assessment of Unemployment Taxes Will Not Restructure the Trucking Industry or Prohibit the Use of Owner-Operators**

The Court should not be persuaded by the parade of horrors ATA claims would result if the Court finds unemployment insurance coverage here. *See* Amicus Br. 3. The type of "employment" covered by the Act is explicitly broader than the common law relationship "or any other legal relationship." RCW 50.04.100. It "include[s] independent contractors so

long as they perform ‘personal services’ under a contract and an exemption does not apply.” *Washington Trucking Ass’ns, et al. v. Emp’t Sec. Dep’t, et al.*, No. 93079-1, slip op. at 3 (Wash. April 27, 2017) (citing RCWs 50.04.100, .140, and .145).

The only relationship the Department seeks to define is “the employment intended to be covered by the act for the purpose of the act and none other.” *W. Ports*, 110 Wn. App. at 458 (quoting *Compensation & Placement v. Hunt*, 22 Wn.2d 897, 899, 158 P.2d 98 (1945)). Nothing about the Commissioner’s decision precludes carriers from using owner-operators to haul freight. Carriers can continue to use owner-operators and treat them as independent contractors for other legal purposes. Indeed, they are exempt from the mandatory coverage provisions of the Industrial Insurance Act. RCW 51.08.180. And the test for whether workers are employees for minimum wage purposes differs from that under the Employment Security Act. *See Anfinson v. FedEx Ground Package System, Inc.*, 159 Wn. App. 35, 52-55, 244 P.3d 32 (2010), *aff’d*, 174 Wn.2d 851, 281 P.3d 289 (2012) (describing economic realities test for determining whether a worker is an employee under minimum wage law).

Further, the modest impact of having to pay unemployment taxes on owner-operators’ wages reveals that no wholesale restructuring of the industry is required. Under RCW 50.29.025, the *highest* unemployment

insurance tax rates are 6–6.5 percent of payroll, and not all wages are taxed, as there is a cap per worker under RCW 50.24.010. System-TWT Transport (System) is a company with more than 630 drivers, and its unemployment insurance tax liability for the three-year period at issue is \$58,300.99. Br. Appellant 5, 24, 27-29.<sup>1</sup> This minor increase in operating costs will not imperil carriers’ business model as ATA alleges—and no other increased costs are required by the Commissioner’s order.

Other courts have rejected ATA’s warnings about the practical implications of affirming the tax assessment. *See Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1056 (7th Cir. 2016) (court 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); *C.R. England, Inc. v. Dep’t of Emp’t Sec.*, 7 N.E.3d 864, 880 (Ill. App. Ct. 2014) (court disagreed that applying Illinois’ Unemployment Insurance Act to a carrier would “prohibit motor carriers and drivers from establishing independent contractor relationships outside the context of the Act”). “Conspicuously absent from [ATA’s] parade of horrors is any citation of authority showing that [carriers] would be required to comply” with other laws or reclassify their drivers for other

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<sup>1</sup> Discussion concerning the carriers in this case is focused throughout this brief on System because ATA’s amicus brief was filed in support of System. But the same reasoning and conclusions apply to the other carriers based on facts in those cases too.

purposes. *Costello*, 810 F.3d at 1056. As a matter of law, the Employment Security Act requires employers to pay unemployment taxes only. *W. Ports*, 110 Wn. App. at 458.

ATA also makes certain claims that are divorced from the facts of this case. For example, ATA argues that owner-operators may drive their trucks or employ others to do so. Amicus Br. 2, 7, 11. But none of the owner-operators included in the Commissioner's order employed others. *See* Br. Respondent 32 n.12 (citing Agency Record System-TWT Transport Vol. I at 5 (Stipulations ¶ 10)). Those who did were excluded. *Id.* The hypothetical ability to hire employees does not exempt a worker from coverage under the Employment Security Act. *See Daily Herald Co. v. Emp't Sec. Dep't*, 91 Wn.2d 559, 564, 588 P.2d 1157 (1979).

ATA's policy argument about the advantages of owner-operators rests in part on the assumption that the owner-operators provide services for multiple carriers. Amicus Br. 5 (quoting *Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys.*, 423 U.S. 28, 35, 96 S. Ct. 229, 46 L. Ed. 2d 169 (1975) (referring to carriers seeking use of a vehicle "not then required by another carrier for its operations")). But here, System offered no evidence that any owner-operators drove for another carrier, and this was its burden to prove. Br. Respondent 30-32; RCW 50.04.140(1)(c); *Affordable Cabs, Inc. v. Emp't Sec. Dep't*, 124 Wn. App. 361, 369, 101

P.3d 440 (2004) (employer must prove all parts of RCW 50.04.140(1) or (2) for its workers to be exempt).

The trucking business also is not the only industry that experiences fluctuating demand. *See* Amicus Br. 5. There is no exemption in Title 50 RCW for industries that experience fluctuating labor demands, and service demand is not one of the elements of the independent contractor test under RCW 50.04.140. Indeed, this is precisely what unemployment benefits are designed to cover: involuntarily losing a job through no fault of one's own. RCW 50.01.010.

ATA fails to show the Commissioner's decision should be reversed either under the law or the facts.

**B. Amicus Ignores the Facts and Presents No Reason To Depart from *Western Ports*'s Discussion of Control or Direction Under RCW 50.04.140(1)(a)**

Like the carriers, ATA asks the Court to ignore 15-year-old Washington governing precedent, *Western Ports Transport, Inc. v. Employment Security Department*.<sup>2</sup> But the Commissioner understood the

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<sup>2</sup> Stare decisis principles support *Western Ports*'s continued application. 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). Washington Courts of Appeal "apply the same standard for overruling precedent as does the Supreme Court." *State v. Stalker*, 152 Wn. App. 805, 811-12, 219 P.3d 722 (2009).

Overruling *Western Ports* would harm *other* carriers and drivers who have relied on and complied with its holding and paid their fair share of taxes, giving an unfair advantage to carriers who failed to follow this precedent. System notes that hundreds of carriers were audited. Br. Appellant 1. Only a relative handful filed appeals of tax

relationship of the owner-operators with the carriers and properly applied *Western Ports* concerning the independent contractor claim consistent with other states, recent Washington precedent, and legislative intent.

**1. The primary holding of *Western Ports* permits considering federally required controls as evidence of control or direction**

As discussed in the Department's response brief, *Western Ports* permits the trier of fact to consider federally required controls in applying the Employment Security Act's statutory exception test. *W. Ports*, 110 Wn. App. at 453-54. ATA attempts to dismiss this important holding as dicta. Amicus Br. 11. But rather, it is the court's primary holding.

In considering whether *Western Ports* had established its owner-operators' freedom from direction and control, the court first addressed the carrier's contention that "the Department erred in looking at federal and state law requirements as evidence of direction and control." *W. Ports*, 110 Wn. App. at 543. The court explicitly rejected this argument, analyzing the language of RCW 50.04.100. 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 . . . .

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assessments. Resp. to Mot. to Consol. Under RAP 3.3(b) 2-3. And even of those carriers who appealed, at least one has since paid its sums due. ARST2 384-88 (withdrawal of appeal and remittance of registry funds by Knight Transportation, Inc.).

*Id.* at 453-54. The court then examined the federal lease provisions and later explained that the federal regulations are designed to place responsibility for the safe operation of leased vehicles on the carrier and to create a paper trail for that responsibility; “they are not designed to protect motor carriers from responsibility under state laws governing unemployment benefits.” *Id.* at 456. The Court held in the alternative that it would reach the same conclusion even if it did not consider the federal controls because Western Ports exerted several controls beyond those required by law. *Id.* at 454. This alternative holding does not render the court’s primary holding dicta. The *Western Ports* court would not have analyzed federal controls in depth as it did or provided a thorough explanation why those controls could be considered if it intended for its reasoning to be ignored.

But even if it were dicta, the Washington Supreme Court has said that “a deliberate expression of the court upon the meaning of the statute” should not be disregarded” even if dicta. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 53 n.7, 959 P.2d 1091 (1998) (quoting *State v. Nikolich*, 137 Wash. 62, 66, 241 P. 664 (1925)). The *Western Ports* court’s statement about federal controls was a “deliberate expression”: the issue was clearly argued by the parties, and

the court's analysis was detailed and thorough. "If it is *dictum*, it is a judicial *dictum* that should be followed by courts as they would follow the primary holding of the case." *Hawkins v. Commonwealth Edison Co.*, 28 N.E.3d 869, 875 (Ill. App. Ct. 2015) (explaining difference between "judicial dictum"—the court's expression of an opinion upon a point in a case argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the case, and "obiter dictum"—a court's remark or opinion uttered as an aside that is neither integral to the opinion nor considered binding authority or precedent); *see also Phelps Dodge Corp. v. Arizona Dep't of Water Res.*, 118 P.3d 1110, 1116 (Ariz. Ct. App. 2005) (judicial dictum "should be followed absent a cogent reason for departing from it.").

**2. Other states before and after *Western Ports* reached similar results**

ATA points to other states and jurisdictions whose rulings differ from *Western Ports*. *See* Amicus Br. 12-13 (citing cases, most of which are not unemployment cases). But the *Western Ports* court acknowledged that different states have ruled differently concerning owner-operator unemployment coverage. The court discussed several such cases and stated: "courts in other states with similar statutes have reached the same result under similar fact patterns, even though some courts have reached

the opposite result under similar circumstances.” 110 Wn. App. at 461-62. Besides, courts in at least Illinois and Colorado have approved of *Western Ports*. See *C.R. England, Inc.*, 7 N.E.3d at 878-79 (finding “instructive” the *Western Ports* court’s recognition that “owner drivers” who lease their vehicles to motor carriers “may be independent contractors or they may be employees, but even if they are independent contractors, the carriers cannot escape ultimate responsibility for safety of operations and equipment” (quoting *W. Ports*, 110 Wn. App. at 455)); *SZL, Inc. v. Indus. Claim Appeals Office*, 254 P.3d 1180, 1186 (Colo. Ct. App. 2011) (favorably citing *Western Ports* and noting 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”).

All that ATA establishes is that different states may rule differently on similar issues. This is common on a range of legal issues and not a compelling reason for the Court to depart from Washington precedent.

**3. Recent Washington precedent supports consideration of third party controls**

Recent Washington precedent involving a similar statute supports *Western Ports*’s rationale. In *Henry Industries, Inc. v. Department of Labor & Industries*, 195 Wn. App. 593, 597, 381 P.3d 172 (2016), the

court affirmed an industrial insurance tax assessment on a company that contracted with drivers to perform courier services for third parties. The first element of exception from coverage under the Industrial Insurance Act's independent contractor statute, RCW 51.08.195, is nearly identical to the corresponding provision of the Employment Security Act: services shall not constitute employment if 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." RCW 51.08.195(1). *Cf.* RCW 50.04.140(1)(a).

The company in that case argued that it had no right to control the drivers and that it was "its customer [that] sets the requirements that [the company] includes in its contracts." *Henry Indus., Inc.*, 195 Wn. App. at 621. The court rejected this argument, stating, "The fact that the customer sets the requirements is immaterial to the analysis. In any event, [the company] cites no authority for the proposition that third party requirements negate the contracting firm's control over the contractors." *Id.*

Similarly in *Western Ports* and here, although the government requires certain controls over drivers and equipment, the carrier enforces this control as to the worker and, thus, exercises the right to control performance of services. If legally-required controls could not be

considered, it would mean that workers in highly regulated industries would be less likely to be employees. Barring consideration of “customer demands,” Amicus Br. 9, or insurer requirements under RCW 50.04.140(1)(a), likewise would not make sense and would undermine the purposes of the Employment Security Act by carving out workers in certain industries from unemployment insurance coverage under this element.

There is no support for ATA’s assertion that freedom from control or direction under RCW 50.04.140(1)(a)—which applies to employment in any industry—should mean something different for persons “in the trucking industry” than in “other, less extensively regulated industries.” Amicus Br. 15. Such a ruling could have far-reaching consequences and would contradict the mandate to construe exceptions from unemployment coverage narrowly. *See Wash. Trucking Ass’ns*, No. 93079-1, slip op. at 3.

#### **4. Legislative intent supports the Commissioner’s decision**

ATA argues there is not “any indication” that the Legislature intended to “stack the deck against independent contractor relationships in the trucking industry.” Amicus Br. 15. This is wrong. Courts have time and again recognized the breadth of the Employment Security Act’s coverage, and narrowness of exceptions, with respect to all types of work. *Wash. Trucking Ass’ns*, No. 93079-1, slip op. at 3; *W. Ports*, 110 Wn.

App. at 451, 458. Moreover, as the *Western Ports* court recognized, the Act expressly includes services performed *in interstate commerce*. *W. Ports*, 110 Wn. App. at 453-54. Thus, general and specific legislative intent supports *Western Ports* and the Commissioner's decision.

Moreover, longstanding legislative acquiescence in *Western Ports* signals the Legislature's intent. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 346-47, 217 P.3d 1172 (2009). *Western Ports* was decided more than 15 years ago, and the Legislature has not since amended the pertinent provisions of the Employment Security Act. This acquiescence is all the more apparent because the Legislature specifically exempted owner-operators from coverage under the Industrial Insurance Act in 1982. RCW 51.08.180; Laws of 1982, ch. 80, § 1. It has never provided for such an exemption under the Employment Security Act.

Federal legislative intent does not support ATA's argument either. *See* Amicus Br. 15 n.1. Rather, 49 C.F.R. § 376.12(c)(4) provides:

Nothing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor . . . is an independent contractor or an employee of the authorized carrier lessee.

Paragraph (c)(1) provides only for a required lease between carriers and owners of equipment, which must include that the carrier lessee shall have "exclusive possession, control, and use of the equipment," and "shall

assume complete responsibility for the operation of the equipment” for the duration of the lease. 49 C.F.R. § 376.12(c)(1). But the language in 49 C.F.R. § 376.12(c)(4) about (c)(1) not affecting the employment status of owner-operators does not extend to the *14-plus* other regulatory provisions for interstate truckers that ATA cites. Amicus Br. 14-15 n.1. No statute, binding case law, or rule prevents their consideration.

**5. Amicus urges too narrow a definition of employment and ignores the evidence of control beyond what is required by law**

ATA misplaces its focus on the superior court’s analysis of control or direction instead of the Commissioner’s findings. Amicus Br. 11. But this Court reviews the Commissioner’s final decision, not the superior court’s. RCW 34.05.558; *Verizon Nw., Inc. v. Emp’t Sec. Dep’t*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008) (“Because [the appellate] court sits in the same position as the superior court, we do not give deference to the superior court’s rulings.”).

Moreover, even though the superior court ultimately affirmed the Commissioner’s decision, it improperly relied on certain aspects of the carriers’ relationship with owner-operators that were part of “the essence of the relationship.” CP 637-38. This is an erroneous imputation of standards from other laws into the Employment Security Act and runs contrary to the liberal construction mandate and deference to the

Commissioner's interpretation. See RCW 50.01.010; *Verizon Nw., Inc.*, 164 Wn.2d at 915 (deference to Commissioner's interpretation from expertise in applying Employment Security Act). There is no "essence of" test under the Employment Security Act.<sup>3</sup> RCW 50.04.140(1)(a) requires the carriers to prove freedom from control or direction over the performance of any services under the contract. It does not matter that the superior court would have weighed the evidence differently but for *Western Ports*, see Amicus Br. 11, because this misapplies the Act's test and the standard of review. See *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996).

The federally required and additional controls under the facts of this case support the Commissioner's ruling under RCW 50.04.140(1)(a). ATA ignores the numerous indicia of control in the record that are not federal requirements. The owner-operators must operate the equipment in compliance with *System's* rules and regulations, maintain their equipment "in a safe and prudent manner at all times," comply with System's drug and alcohol policy, assist in investigation, settlement, or litigation of any accident, claim, or potential claim by or against System, and more. ARST2 319-32, 372-73. Those contract provisions demonstrate System's

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<sup>3</sup> The definition of "employment" in the Employment Security Act, RCW 50.04.100, is different from and broader than the definition of "worker" in the Industrial Insurance Act, RCW 51.08.180 (covering people working under a contract, "the *essence* of which is . . . personal labor" (emphasis added)).

right to control the performance of services and support the Commissioner's order, regardless of federally-required controls. ATA's statement that "nearly all" factors of control flow from government requirements is effectively a concession that some factors of control present here are not legal requirements. *See* Amicus Br. 12.

**C. Though Owner-Operators Can Obtain Motor Carrier Authority and Work for Themselves and Other Carriers, the Owner-Operators Here Did Not Do These Things and Are Not in Independent Businesses Under RCW 50.04.140(1)(c)**

To prove exception from coverage under RCW 50.04.140(1)(c), a carrier must show that each owner-operator "is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service." ATA undercuts its and System's argument when it acknowledges:

To be sure, an owner-operator with his or her own authority would be able to haul freight for shippers—and some owner-operators who find it advantageous to do such work as part of their business obtain FMCSA authority for that very reason. But other owner-operators, who prefer to carry freight for motor carriers exclusively, would have no business reason whatsoever to obtain their own authority.

Amicus Br. 16-17. Thus ATA admits that some owner-operators in the industry obtain independent motor carrier authority, which allows them to haul freight independent of other carriers.<sup>4</sup> But none of the owner-

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<sup>4</sup> The record also supports that owner-operators may choose to obtain their own motor carrier, or "operating authority." ARST3 132.

operators here did this. Br. Respondent 30-32. ATA also admits that those owner-operators who do not obtain motor carrier authority drive *exclusively* for motor carriers—or, as was the case here, for one carrier. Br. Respondent 30-32. The owner-operators were thus not independently established businesses within the meaning of RCW 50.04.140(1)(c).

To be independent, the carrier must prove each owner-operator “is customarily engaged in” an independent business. RCW 50.04.140(1)(c). This is a present tense showing—meaning that during the audit period, the worker was carrying on an independent business. *See id.* The factors for assessing the existence of an independent business include whether the worker: (1) has a separate office or place of business outside of the home; (2) has investment in the business; (3) provides equipment and supplies needed for the job; (4) whether the alleged employer fails to provide protection from risk of injury or nonpayment; (5) whether the worker works for others and has individual business cards; (6) is registered as an independent business with the State; and, (7) is able to continue in business even if the relationship with the alleged employer is terminated. *Penick v. Emp’t Sec. Dep’t*, 82 Wn. App. 30, 44, 917 P.2d 136 (1996). This last factor—the ability to continue in business even if the relationship with the carrier ends—is the most important factor under longstanding law. *See All-State Constr. Co. v. Gordon*, 70 Wn.2d 657, 666, 425 P.2d 16

(1967) (“Most important for unemployment compensation are those factors—investment, good will, an independent clientele, and the like—which enable the worker to continue in business if he loses a particular customer, and which thus prevent that loss from rendering him unemployed.”) (quoting Willcox, *The Coverage of Unemp’t Comp. Laws*, 8 Vand. L. Rev. 245, 265 (1955)). This means that an owner-operator who does not have his or her own motor carrier authority and who works exclusively for one motor carrier is not in an independent business.

ATA suggests that truck ownership alone should be enough to deem owner-operators independent businesses. But this is not so. To be truly independent, owner-operators must possess their own motor carrier authority from the Federal Motor Carrier Safety Administration. See 49 C.F.R. § 376.11. If owner-operators who do not have separate motor carrier authority “were terminated by [the carrier to whom they leased their equipment], in all likelihood they would be out of work until they could make similar arrangements with another carrier.” *Stafford Trucking, Inc. v. Dep’t of Indus., Labor & Human Rel.*, 306 N.W.2d 79, 84 (Wis. Ct. App. 1981). Thus if System terminated a contract with an owner-operator, the owner-operators without motor carrier authority would lose the ability to haul freight, which would render them unemployed. See *All-State Constr. Co.*, 70 Wn.2d at 666. Although the owner-operator can then go

work for another carrier under that carrier's authority or obtain their own motor carrier authority to haul for themselves, this is no different than any at-will employee's ability to find a new job. During the period while they are unemployed and searching for work, the owner-operator should be covered by unemployment benefits as other workers would be, thereby minimizing the suffering and economic hardship of involuntary unemployment. *See* RCW 50.01.010.

ATA notes that Idaho finds motor carrier authority is inconsequential for an owner-operator's ability to provide services to a motor carrier. Amicus Br. 17 (citing *Western Home Transp., Inc. v. Idaho Dep't of Labor*, 318 P.3d 940 (Idaho 2014)). This is unavailing for three reasons. First, Washington courts need not follow Idaho's. The Court should defer to the Commissioner of the Department, not the Idaho court. *See Verizon Nw., Inc.*, 164 Wn.2d at 915. Second, the Idaho decision did not address certain facts and arguments raised here. System offered no evidence that its owner-operators worked for any other carriers during the audit period.<sup>5</sup> Where an owner-operator works exclusively for one carrier,

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<sup>5</sup> In the Swanson Hay Company case, the owner-operators "drove exclusively for Swanson Hay" for years. *See* ARSH2 237 (incorporated initial order, ¶ 4.22). One owner-operator testified, "Swanson is the only one I've ever been contracted to, and I'm now retired." ARSH4 6/9/14 Earl test. 157. And another testified, "I have worked for Swanson Hay in one form or another since 1979, the biggest year of the time. I've leased to them, I think, three different times. This last time was pretty close to 20 years." ARSH4 6/9/14 McGlothern test. 161. This is longtime employment for a motor carrier, not "service to the motor carrier market." *W. Home Transport, Inc.*, 318 P.3d at 944.

this indicates employment, not independence. And where an owner-operator lacks his or her own hauling authority and hauls for multiple carriers under those carriers' authority, this indicates multiple employers, not independence. Besides, the carriers did not prove those facts here.

Third, the Idaho court's reasoning that motor carrier authority is irrelevant in evaluating an owner-operator's independence because it is an unnecessary overhead expense is misguided. *W. Home Transport, Inc.*, 318 P.3d at 943. Whether an owner-operator *needs* motor carrier authority to haul exclusively for a carrier is not the question; the question is whether the owner-operator needs motor carrier authority to continue in business and be economically independent from that motor carrier, which is the focus of RCW 50.04.140(1)(c) and Washington case law. *See All-State Constr. Co.*, 70 Wn.2d at 666.<sup>6</sup>

Finally, ATA's discussion of RCW 50.04.140(1)(c) fails to consider other indicia of independence and the facts of this case. It focuses only on motor carrier authority, ignoring that System offered no proof that the owner-operators ever advertised their services, had individual business

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<sup>6</sup> The Idaho court was also mistaken in its assumption that owner-operators cannot haul using their own authority if they form a relationship with a carrier. *See W. Home Transport, Inc.*, 318 P.3d at 943. An owner-operator with independent authority would be a carrier, *see* 49 C.F.R. § 376.2(a), and there is an exception to many of the leasing requirements of 49 C.F.R. §§ 376.11 and 376.12 for leases between carriers under 49 C.F.R. § 376.22. For such agreements between carriers, only certain leasing requirements apply. *See* 49 C.F.R. § 376.22. An owner-operator with motor carrier authority can operate independently in business, utilizing those procedures for agreements between carriers.

cards, registered as independent businesses, or did any business for other carriers or for themselves during the period at issue. Br. Respondent 32. Further, System protected owner-operators from risks of loss from non-payment. *Id.* For these *many* reasons, the Commissioner properly ruled that System failed to prove exception from employment for purposes of the Employment Security Act, and ATA's arguments do not help System.

ATA fails to demonstrate error in the Commissioner's decision concerning RCW 50.04.140(1)(c).

## II. CONCLUSION

The Court should affirm the Commissioner's decision.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of May, 2017.

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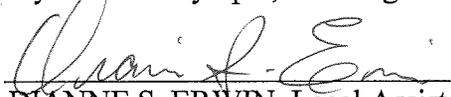
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