No. 34566-1-III

SUPREME COURT
OF THE STATE OF WASHINGTON

95246-9

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

Petitioner,

v.

STATE OF WASHNGTON EMPLOYMENT
SECURITY DEPARTMENT,

Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER:

Petitioner, Swanson Hay Company asks this Court to review the decision of the court of appeals referred to in seciont B.

B. CITATION TO COURT OF APPEALS DECISION

Petitioner Swanson Hay seeks review of the Washington State Court of Appeals, Division III, published decision, No. 34566-1-III, filed on October 31, 2017, attached as an Appendix 1.

C. ASSIGNMENTS OF ERROR:

1. Whether federally mandated controls must be used in the determination of whether owner-operator drivers are under the direction and control of their respective carriers.
2. Whether an owner-operators' operating authority should be determinative of whether the owner-operator is engaged in an independently established business.
3. Whether the Petitioner failed to meet its burden of demonstrating that the owner-operators' services qualify for exemption from unemployment insurance tax liability.

D. STATEMENT OF THE CASE:

Trucking is a critical part of the economy, both on a state and national level. The majority of trucking businesses are small businesses with nearly 96% operating fewer than 20 trucks. The trucking industry itself fluctuates in demand and the utilization of owner-operators[1] is vital to handling these fluctuations. Independent, owner-operators are the backbone of the trucking industry and their usage is a common and widespread practice within the trucking industry. The vast majority of interstate truckload transportation businesses in Washington, rely on the use of contractual relationships with owner-operators. Contracting with independent owner-operators allows trucking business to use the owner-operators' equipment without having to purchase the expensive equipment themselves.

This relationship also benefits the owner-operators. It is extremely difficult for an individual owning a single truck to compete

[1] Owner-operators are self-employed commercial truck drivers who own and operate their own trucks while hauling goods on behalf of carriers.

in the trucking market. By contracting with the large trucking carriers, owner-operators are able to maintain their small businesses. Furthermore, the carriers provide the owner-operators with higher paying hauls than the owner-operators would be able to obtain if they operated under their own authority.

The federal government requires motor carriers to engage its owner-operators through a written lease agreement. 49 C.F.R. § 376. The regulations not only require a written lease agreement, but also specify certain terms that must be included in the lease agreement. 49 C.F.R. §§ 376.11, 376.12.

Petitioner is a family-owned interstate trucking company that transports general freight, lumber, drywall, and insulation. Furthermore, Petitioner is duly licensed by the U.S. Department of Transportation and the Federal Motor Carrier Safety Administration and operates throughout the eleven western states and British Columbia. Petitioner utilizes owner-operators to be flexible in the market and save money by avoiding the purchase of expensive equipment. Petitioner's owner-operators own their own vehicles and

equipment and Petitioner provides no financing for the owner-operators' equipment. The owner-operators remain responsible for, but not limited to, truck repairs and maintenance, insurance, licensing fees, trip expenses, and fuel costs. Pursuant to both federal and state regulations, the respective owner-operator's trucks carry the Petitioner's insignia and are operated under the Petitioner's operations authority[2].

This matter and the underlying litigation arises out of the decision by ESD to assess unemployment taxes on the Petitioner for its owner-operators. ESD determined that, even though the owner-operators are employees of the Petitioner, the owner-operators are not exempt under RCW 50.04.140(1). On November 8, 2011, ESD issued an Order and Notice of Assessment assessing the Petitioner a penalty in the amount of $36,070.32. The Petitioner filed a timely appeal from the Order of Notice and Assessment.

[2] As required by federal and state trucking regulations, Petitioner's owner-operators operate under the Petitioner's motor carrier number (MC#) and U.S. Department of Transportation number (USDOT#).

On June 9, 2014, the Petitioner and ESD proceeded to an evidentiary hearing before the Office of Administrative Hearings on the issue of whether the owner-operators in dispute were exempted from coverage under RCW 50.04.140(1). The Office of Administrative Hearings ultimately held that the disputed owner-operators were not exempt from coverage under RCW 50.04.140(1) since they were not free from the Petitioner's direction and control over the performance of their services and the owner-operators were not engaged in independently established businesses. Subsequently, the Petitioner filed a timely appeal to the Spokane County Superior Court which ultimately affirmed the previous decision.

The Court ultimately upheld ESD's determination that he owner-operators were not exempt from liability. In response to the "direction and control" element, the Court stated that it "would hold the carriers are controlling the end result of the work, not the performance of the work, and the decision of the Commissioner should be reversed." Superior Court Opinion at 7. However, since the Court is

constrained by the *Western Ports* (*W. Ports Transp., Inc v. Employment Sec. Dep't of State of Wash.*, 110 Wn. App. 440, 41 P.3d 510 (2002)) decision, it must deny Petitioner's appeal. *Id.*

Furthermore, in response to the "independently established enterprise" element, the Superior Court determined the ESD's use of the owner-operator's operating authority as a paramount factor in its determination is erroneous. Superior Court Opinion at 5. The Court further held that ESD's decision is merely speculating whether a driver may be out of work for any period longer without operating authority than the owner-operator would be otherwise. *Id.* However, on appeal to the Court of Appeals, the Court held otherwise.

On appeal at the Washington State Court of Appeals, Division III, the Court upheld ESD's determination. However, the Petitioner believes that the Court incorrectly decided the issues presented by the Petitioner and, pursuant to 13.4(b)(4) and believes this decision presents an issue of substantial public interest that should be determined by the Supreme Court.

E. **ARGUMENT**

The Employment Security Act requires employers to contribute to the compensation fund for workers in its employment unless the employer establishes that the workers are exempt. *Penick v. Employment Security Department*, 82 Wn.App. 30, 42, 917 P.2d 136, 143 (1996). To qualify for such exemption, the employer must prove that:

> (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). The Petitioner contends that it is not required to contribute to the unemployment compensation fund for the owner-operators in its employment since such owner-operators are exempt under RCW 50.04.140(1). However, the Court of Appeals

ultimately disagreed with the Petitioner's contention holding that federally mandated controls are relevant to the determination of the owner-operator's freedom from direction or control and must be considered in that determination and that the Petitioner failed to establish that its owner-operators were engaged in independently established businesses. The Petitioner believes that using federal regulations as a determinative factor in establishing whether a carriers' owner-operators are exempt from unemployment compensation coverage presents a substantial public interest that should be clarified by the Supreme Court.

1. **Review should be granted to provide clearer guidance as to whether federal regulations should be used in determining whether owner-operators are under the direction and control of the carriers.**

This Court should review the Court of Appeal's *Swanson Hay* decision because it requires the use of federally mandated controls in the Department of Employment Security's determination as to whether an employer exerts the right to direction and control over owner-operators, thereby presenting an issue of substantial public interest under RAP 13.4(b)(4).

The first prong of the exemption test is whether "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." 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, 41 P.3d at 517.

49 C.F.R. §§ 376.11, 390-97, 1043 and 1057.12(C) lay out the regulations carriers must follow if the carrier uses motor vehicles not owned by the carrier to transport property under an arrangement with another party.[34] Accordingly, whether the Petitioner has followed these regulations is not at issue here.

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[3] Carrier shall maintain a policy of public liability and property damage insurance and a policy of cargo damage insurance; provided, however that contractor shall be liable to carrier ... for any loss, injury or damage to cargo, or to their person's or their property not covered under said policies, and for any deductible under such policies, up to a maximum of $1,000.00" 49 C.F.R. 1043 and 49 U.S.C. 10927, "

[4] "In order that carrier may comply with the rules and regulations of the interstate commerce summation, department of transportation and the various state regulatory agencies having jurisdiction over their operations, contract shall at all

Congress stated that a, "[s]tate ... may not enact or enforce a law ... relating to a price, route or service of any motor carrier ... with respect to the transportation of property." *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 368, 128 S. Ct. 989, 993, 169 L.Ed. 2d 933 (2008), quoting 49 U.S.C. § 14501(c)(1). Congress' goal was to help ensure transportation rates, routes, and services and stimulate efficiency, innovation, and low prices. *Rowe,* 552 U.S. at 371, 128 S. Ct. at 995, 169 L. Ed. 2d 933. In order to achieve such a goal, certain aspects of the trucking industry needed to be federally regulated. Federal regulations require the carrier to "assume complete responsibility" for the operation of the leased equipment and to maintain "exclusive possession, control, and use of the equipment for the duration of the

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time comply with the rules and regulations as set forth by agencies and furnish carrier with the following documents and information: (1) On a daily basis, the original of the daily log of each driver whom the contractor employs in the performance of this agreement. (2) On a daily basis, the original of the driver's daily vehicle condition report for vehicles used in the performance of this agreement. (3) The original or true copies of all scale tickets, toll receipts, delivery receipts for each load transported. (4) Such other documents or data which must be maintained by carrier or filed by carrier pursuant to complying with the regulation of such agencies. (5) On a current basis, all maintenance reports and records as required by regulation."

lease." 49 C.F.R § 376.12(c)(1). Congress provided that nothing in the above resolution "is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier." 49 C.F.R. § 376.12(c)(4).

The Court of Appeals determined that federal regulations must be used in the determination of whether an employer retains the right of direction and control over their owner-operators. The Court reasoned that "there is no textual basis for concluding that the control exercised by the employer must be control it has freely chosen to exercise, as opposed to control it is required by law to exercise." Court of Appeals Published Decision at 39, (No. 34566-1-III). The Court of Appeals further stated that "control may be an indicator of dependence whether control is imposed by Congress or by the employer." Court of Appeals Published Decision at 41. However, federal regulations should not be considered in this determination since such regulations are mandated and the Petitioner

has no authority to refuse to comply with the regulations. Furthermore, consideration of the regulations would create a substantial impact on the future of the Washington trucking industry.

The determination of the carriers' control over their owner-operators should be solely based on the control imposed by the employer not based on controls required by federal regulations. All carriers transporting goods from other states into Washington, and vice versa, are required by law to comply with the regulations created by Congress. These carriers have no other choice but to include these provisions in their independent contractor agreement unless the carriers want to lose their MC# and be fined for failing to comply with the regulations. It is one thing to consider the regulations as control if these carriers have the authority to negotiate the terms of whether to include the regulations in their ICAs or if the carriers can elect not to comply with the regulations without penalty. However, the carriers have no such authority.

Furthermore, requiring the owner-operators to obtain their own MC# is not only meaningless, but essentially eliminates all

owner-operators from the trucking industry by converting the owner-operators to carriers. In the trucking industry, carriers lease owner-operators to haul the carriers' goods. As required by the federal regulations, carriers are required to obtain MC#s and operate under these MC#s. Similarly, federal regulations require all drivers driving for the carriers to operate under the carriers' MC#s. Once an owner-operator leaves a carrier, the owner-operator no longer operates under that carrier's MC# and hauls under the new carrier's MC#.

Similarly, by requiring owner-operators to obtain their own MC# to act as an independent contractor, Washington essentially will eliminate owner-operators from Washington's trucking industry. Even if the owner-operators obtain a MC# as required by Washington, the owner-operators would never operate under their own MC# unless the owner-operator is hauling for itself. The owner-operator would still be required to use the carriers' MC# while operating for the carrier. Accordingly, evidence of an owner-operator without a MC# is not an indication that the carrier retains

the right of direction and control over the owner-operator. It is only an indication that the owner-operator is following the federal regulations as a carrier which an owner-operator is not required to follow. A smart business owner would not add an unnecessary overhead expense such as buying a license if there is no need. Therefore, requiring the owner-operators to obtain their own operating authority would cause meaningless financial hardship on the owner-operators.

Furthermore, this decision results in substantial policy implications to the trucking industry in Washington. This will force carriers to provide trucking services only through employees, limiting the carriers' operational flexibility. Since owner-operators provide all the equipment at no extra costs to the carriers, it would create a substantial financial burden on trucking companies as they would have to hire more employees and purchase equipment at substantial costs. Accordingly, this decision will be in direct conflict with Congress' goal to help ensure transportation rates, routes

and services, and stimulate efficiency, innovate and low prices. *Rowe*, 552 U.S. at 371, 128 S. Ct. at 995, 169 L. Ed. 2d 993.

Because of the foregoing reasons, federal regulations should not be used in the determination of whether an owner-operator is free from the direction and control of the carrier, and thus implicating an issue of substantial public interest.

2. Review should be granted to provide clear guidance as to whether operating authority demonstrates that owner-operators are engaged in independently established enterprises.

This Court should review the Court of Appeal's *Swanson Hay* decision because operating authority is not indicative of owner-operators being engaged in independently established enterprises, thereby presenting an issue of substantial public interest under RCW 13.4(b)(4).

Owner-operators must be "customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that invaded in the contract of service" with the Petitioner. RCW 50.04.140(1)(c). This element may be satisfied by proof 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) (quoting *Schuffenhauer v. Dep't of Emp't Sec.*, 86 Wn.2d 233, 238, 543 P.2d 343 (1975)). The court in *Penick* provided the following factors as indicia of an independently established business:

> (1) worker has separate office or place of business outside of the home; (2) worker has investment in the business; (3) 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) worker works for other and has individual business cards; (6) work is registered as independent business with the state; and (7) worker is able to continue in business even if relationship with alleged employer is terminated.

82 Wn. App. at 44. The seventh factor — ability to continue in business even if the relationship is terminated — is the most important factor in determining whether an individual is independently engaged. *Affordable Cabs, Inc. v. Emp't Sec. Dep't*, 124 Wn. App. 361, 371-72, 101 P.3d 440 (2004) (citing *All-State Constr. Co. v. Gordon*, 70 Wn.2d 657, 666, 425 P.2d 16 (1967)).

As explained above, federal regulations require a carrier that leases equipment to have complete control over the leased equipment. Thus, each carrier must acquire a MC# and a USDOT #, and each owner-operator must operate under the carrier's MC# and USDOT#.

The ESD determined, and the Court of Appeals agreed, that the petitioner failed to demonstrate the third requirement that the owner-operators were "customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service" with the Petitioner. RCW 50.04.140(1)(c). Accordingly, ESD determined that whether the owner-operators possessed one's own operating authority is a "paramount" factor in determining whether the owner-operators have independent enterprises. 2 ARS at 279. The Court of Appeals further concluded that even though the owner-operators cannot operate under their own operating authority when the owner-operator hauls for a carrier, the owner-operator still must obtain the operating authority of a carrier as required by federal

regulations to show an independently established business. Court of Appeals Published Decision at 48.

An owner-operator's operating authority is not indicative of whether the owner-operator is able to continue to operate even if the relationship with the alleged employer is terminated. Requiring the owner-operators to acquire operating authority merely allows the owner-operators to act as the carriers and transport goods under its own operating authority. However, in the trucking industry, owner-operators always operate under the operating authority of the carrier the owner-operator is hauling for. The owner-operators never operate under their own operating authority unless hauling strictly for their sole entity. Even if the owner-operators have to obtain their own operating authority, the owner-operators will still operate under the carriers' operating authority unless the owner-operators hauls for their sole entity.

Moreover, in its opinion, the Court of Appeals stated, "if the truck owner's lease ends, he or she will have more entrepreneurial options by holding his or her own operating authority."

Court of Appeals Published Decision at 49. This may be correct. However, this is merely speculative. As just stated, owner-operators do not haul for themselves. They haul for the carriers because the carriers provide substantially more business opportunities that what the owner-operators could acquire on their own.

The Court further explained that no evidence was presented that, during a period with dramatically reduced demand, an owner-operator whose services are no longer needed by the Petitioner will be needed by other carriers, and such owner-operators actually worked for other carriers. *Id.*

Whether an owner-operator actually moved to another carrier should be irrelevant to whether the owner-operator can continue in business after the relationship with the carrier is terminated. The question should be whether the owner-operator had the authority to switch carriers and continue its business; not whether the owner-operator actually switched carriers. The Court of Appeals' decision essentially penalizes the Petitioner because the

owner-operators want to continue their relationship with the Petitioner and do not want to change carriers. This decision is counter-productive and will affect Washington commerce if the Petitioner is required to hire only owner-operators with previous hauling experience.

Because of the foregoing reasons, an owner-operator's operating authority is not indicative of whether the owner-operator is engaged in an independently established enterprise, and thus implicating an issue of substantial public interest.

F. **CONCLUSION:**

For the reasons set for above, this Court should accept review. RAP 13.4(b)(4).

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DATED this 29th day of November 2017

Respectfully submitted,

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APPENDIX 1

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October 31, 2017

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CASE # 345661
Swanson Hay Company v. Employment Security Department
SPOKANE COUNTY SUPERIOR COURT No. 152037042
Consolidated with CASE # 345670
Hatfield Enterprizes, Inc. v. Employment Security Department
SPOKANE COUNTY SUPERIOR COURT No. 152038561
Consolidated with CASE # 345688
System-TWT Transport v. Employment Security Department
SPOKANE COUNTY SUPERIOR COURT No. 162001216

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:jab
Enc.

c: E-mail—Hon. Harold D. Clarke

FILED
OCTOBER 31, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

SWANSON HAY COMPANY, Appellant, v. STATE OF WASHINGTON EMPLOYMENT SECURITY DEPARTMENT, Respondent.	No. 34566-1-III (consolidated with No. 34567-0-III, No. 34568-8-III) PUBLISHED OPINION
HATFIELD ENTERPRIZES, INC., a Washington corporation, Appellant, v. STATE OF WASHINGTON EMPLOYMENT SECURITY DEPARTMENT, Respondent.	

SYSTEM-TWT TRANSPORT, a Washington corporation,

Appellant,

v.

STATE OF WASHINGTON EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

SIDDOWAY, J. — The common law, the Washington legislature, and the United States Congress have defined whether two parties stand in an employment as opposed to an independent contractor relationship in different ways, depending on the context. This case illustrates that it can be clearer to ask not whether someone is an independent contractor, but to ask instead whether the contractor is independent for a given purpose: e.g., for the purpose of the doctrine of respondeat superior, for federal payroll tax purposes, for state worker's compensation, or for other state law purposes. At issue here is employment security—the context in which, in Washington, the relationship is more likely than any other to be viewed as employment.

The three motor carriers in this consolidated appeal challenge assessments of unemployment insurance taxes on amounts they paid for services provided by "owner-operators," meaning individuals who own trucking equipment, lease it to a carrier, and then use that equipment under contract to haul freight for that carrier. The carriers did

not meet their burden of demonstrating that the owner-operators' services qualify for the narrow exemption from unemployment insurance tax liability for payments to sufficiently independent enterprises. We find no federal preemption of the tax's application to the owner-operators' services and no basis on which the agency's final order was arbitrary or capricious. We affirm.

BACKGROUND

Washington's Employment Security Act

Title IX of the Social Security Act of 1935 for the first time imposed a federal excise tax on employers on wages paid, for the purpose of creating an unemployment benefit fund. *Steward Machine Co. v. Davis*, 301 U.S. 548, 574, 57 S. Ct. 883, 81 L. Ed. 1279 (1937). The tax began with the year 1936 and was payable for the first time on January 31, 1937. *Id.* An employer could claim a 90 percent credit against the tax for contributions paid to an unemployment fund under a state law, provided the state law had been certified to the United States Secretary of the Treasury as meeting criteria designed in part "to give assurance that the state unemployment compensation law [is] one in substance as well as name." *Id.* at 575. The tax and largely offsetting credit were described by supporters as "the states and the nation joining in a coöperative endeavor to avert a common evil": the problem of unemployment that the nation had suffered at unprecedented levels during the years 1929 to 1936. *Id.* at 587, 586.

Before Congress considered adoption of the act, most states held back from adopting state unemployment compensation laws despite the ravages of the Great Depression. *Id.* at 588. This was not for "lack of sympathetic interest," but "through alarm lest in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors." *Id.* "The federal Act, from the nature of its ninety per cent credit device, [was] obviously an invitation to the states to enter the field of unemployment insurance." *Standard Dredging Corp. v. Murphy*, 319 U.S. 306, 310, 63 S. Ct. 1067, 87 L. Ed. 1416 (1943) (citing *Buckstaff Bath House Co. v. McKinley*, 308 U.S. 358, 363, 60 S. Ct. 279, 84 L. Ed. 322 (1939)). Most states accepted the invitation and adopted state unemployment compensation laws. *See* Benjamin S. Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 YALE L. J. 76, 83-85, nn.24-34 (1945) (discussing laws adopted by 31 states and the District of Columbia).

Criteria by which the Social Security Board would certify state laws were limited to what was "basic and essential" to provide reasonable protection to the unemployed, with "[a] wide range of judgment . . . given to the several states as to the particular type of statute to be spread upon their books." *Steward*, 301 U.S. at 593. But to assist state legislatures, the Social Security Board published draft laws in 1936 and 1937 as examples

meeting the federal requirements.[1] Following a recommendation by the Committee on Legal Affairs of the Interstate Conference of Unemployment Compensation Agencies that "employment" for purposes of the state laws should be broadly defined, using a pioneering 1935 Wisconsin law as a model, a draft bill published by the Social Security Board in January 1937 tracked Wisconsin's expansive definition of employment. Asia, *supra* at 83, n.21. It broadly defined employment to mean "service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied . . . ." *Draft Bill*, 1937 ed., § 2(i)(1) at 7. To narrowly exempt payments to individuals engaged in an independent enterprise, it employed a three-part measure of independence, often referred to as the "ABC" definition, that included a

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[1] Introductory language to the draft bills explained:

> These drafts are merely suggestive and are intended to present some of the various alternatives that may be considered in the drafting of State unemployment compensation acts. Therefore, they cannot properly be termed "model" bills or even recommended bills. This is in keeping with the policy of the Social Security Board of recognizing that it is the final responsibility and the right of each State to determine for itself just what type of legislation it desires and how it shall be drafted.

U.S. SOC. SEC. BD., DRAFT BILLS FOR STATE UNEMPLOYMENT COMPENSATION OF POOLED FUND AND EMPLOYER RESERVE ACCOUNT TYPES, at i (Sept. 1936) (*Draft Bills*, 1936 ed.), https://babel.hathitrust.org/cgi/pt?id=mdp.39015073775531;view=1up;seq=9; *see also* U.S. SOC. SEC. BD., DRAFT BILL FOR STATE UNEMPLOYMENT COMPENSATION OF POOLED FUND TYPE: JANUARY 1937 EDITION, WITH TENTATIVE REVISIONS (May 1938) (*Draft Bill*, 1937 ed.), https://babel.hathitrust.org/cgi/pt?id=coo.31924002220212;view=1up;seq=9. As to the latter publication, only the version marked for tentative revisions could be located by this author.

freedom from control ("A") requirement, an independent business character or location ("B") requirement, and an independently established enterprise ("C") requirement. The "C" requirement was described as "at once the most radical departure from common-law criteria and the most relevant of the three tests to the purposes of the unemployment compensation program." Asia, *supra* at 87.

In March 1937, the Washington Legislature enacted an unemployment compensation act substantially based on the Social Security Board's draft bills, to take effect immediately. LAWS OF 1937, ch. 162 § 24, at 617. Tracking language in the draft bills, its preamble described "economic insecurity due to unemployment" as the "greatest hazard of our economic life." *Id.*, § 2, at 574, presently codified at RCW 50.01.010. It authorized taxation to create resources from which to provide benefits for persons "unemployed through no fault of their own" by applying "the insurance principle of sharing the risks, and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment." *Id.* at 575.

Section 19(g)(1) of the 1937 Washington legislation tracked Wisconsin's and the Social Security Board's definition of employment. Its "ABC" definition of exempt independent enterprises, which was virtually identical to the Social Security Board's 1937 draft bill,[2] provided:

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[2] Apart from a few formatting differences, the only changes from the federal draft language in the Washington exemption provision were the substitution of "remuneration"

> Services performed by an individual for remuneration shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the director that:
>
> (i) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
>
> (ii) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed; and
>
> (iii) Such individual is customarily engaged in an independently established trade, occupation, profession or business, of the same nature as that involved in the contract of service.

LAWS OF 1937, ch. 162, § 19(g)(5). As later observed by our Supreme Court, because the requirements were stated in the conjunctive, a failure to satisfy any one of them rendered the exemption unavailable. *Penick v. Emp't Sec. Dep't*, 82 Wn. App. 30, 42, 917 P.2d 136 (1996).

In 1945, the Washington legislature repealed all acts relating to unemployment compensation and enacted a new unemployment compensation act, presently codified as amended in Title 50 RCW. LAWS OF 1945, ch. 35 §§ 1-192, at 76-151. The breadth of

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for "wages" in the introductory paragraph and, in the "ABC" paragraphs ((i), (ii), (iii) in Washington until 1945, when they became (a), (b), (c)); the substitution of "director" for "commissioner"; and the addition to the "C" requirement of the language that the individual's independently established trade, occupation, profession, or business is "of the same nature as that involved in the contract of service." *Compare* LAWS OF 1945, ch. 35, § 15, *with Draft Bill*, 1937 ed., at § 2(i)(5), at 8-9.

"employment" covered by the act was made even clearer by the addition of language describing "personal service, of whatever nature," etc., as "unlimited by the relationship of master and servant as known to the common law or any other legal relationship." *Id.* at § 11.

Appellants and the assessments

In proceedings below, the appellant-carriers, Swanson Hay, Co. (Swanson), System-TWT Transport (System), and Hatfield Enterprizes, Inc. (Hatfield), appealed unemployment taxes assessed by the Employment Security Department (Department) on the carriers' payments for services to owner-operators. They participated in evidentiary or summary judgment proceedings before an administrative law judge (ALJ) and filed petitions for review of the ALJ's adverse determinations by the Department's commissioner (Commissioner). The Commissioner entered modified findings and conclusions but affirmed determinations adverse to the carriers.

There are some differences in the three carriers' operations and audit history. System was identified for audit through the work of an "underground economy unit" of the Department and was originally assessed $264,057.40 in taxes for the period beginning in the second quarter of 2007 and including years 2008 and 2009. 1 AR(ST) at 4,[3] ¶ 7; 3

[3] We identify volumes of the administrative record involved by the volume number, followed by "AR," and followed by a parenthetical identification of the case—SH, ST and H for the Swanson, System, and Hatfield appeals, respectively.

AR(ST) at 185-86, 183, 222-23; 2 AR(ST) at 350. During that time frame, System treated roughly 380 company drivers as employees, reporting and paying unemployment insurance taxes. 2 AR(ST) at 320, ¶ 5; Br. of Appellant System at 5. But it contracted with more than 250 owner-operators that it treated as exempt from operation of the tax. *Id.* It engaged in several appeals of its assessment, contesting both the amount and liability for the tax, but ultimately stipulated to an assessment value of $58,300.99 should its challenge to liability fail. 1 AR(ST) at 5, ¶ 11; 2 AR(ST) at 350-51.

Swanson and Hatfield are smaller operators. Swanson was originally found by the Department to have misclassified 12 contractors as not in employment and was assessed $36,070.32 for the period 2009, 2010, and the first two quarters of 2011. 2 AR(SH) at 235, ¶¶ 4.1, 4.5. On appeal, the Department agreed to modify the assessment to treat only 11 of the contractors as misclassified. 2 AR(SH) at 235, ¶ 4.7. The order and notice of assessment was later remanded to reduce the assessment to account for the contractor treated as exempt. *Id.* at 280.

Hatfield was found by the Department to have misclassified 15 contractors as not in employment and was assessed taxes and penalties of $13,616.53 for eight calendar quarters falling within the period January 2009 through June 2011. 4 AR(H) at 1140, ¶ 4.1. On appeal, the ALJ ordered that the assessment be reduced to 30 percent of that amount to account for the fact that the Department relied on payment amounts

approximately 70 percent of which were for equipment rather than driving services. *Id.* at 1144, ¶ 5.8. The reduction was affirmed by the Commissioner. *Id.* at 1201.

Differences in the carriers and their procedural histories are mostly inconsequential on appeal. They are discussed where relevant.

ANALYSIS

GROUNDS RELIED ON FOR JUDICIAL REVIEW AND STANDARDS OF REVIEW

Judicial review of agency action is governed by the Administrative Procedure Act (APA), Title 34 RCW. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). We apply the standards of the APA directly to the record before the agency and in employment security appeals we review the decision of the Commissioner, not the underlying decision of the ALJ or the decision of the superior court. *Id.*; *Verizon Nw., Inc., v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). The Commissioner's decision is deemed prima facie correct and the burden of demonstrating otherwise is on the party attacking it. RCW 50.32.150.

The APA authorizes courts to grant relief from an agency order in an adjudicative proceeding in nine instances, five of which were relied on in petitions for judicial review filed by one or more of the carriers:

- The order or the statute on which it is based is in violation of constitutional provisions;
- The agency engaged in unlawful procedure or decision-making process, or failed to follow a prescribed procedure;

- The agency erroneously interpreted or applied the law;
- The agency did not decide all issues requiring resolution by the agency; and
- The order is arbitrary or capricious.

RCW 34.05.570(3)(a), (c), (d), (f), and (i). Clerk's Papers (CP) at 4, 24, 98, 318.

Errors of law are reviewed de novo. *Inland Empire Distrib. Sys., Inc. v. Utils. & Transp. Comm'n*, 112 Wn.2d 278, 282, 770 P.2d 624 (1989). An agency's decision is arbitrary and capricious if it is "willfully unreasonable, without consideration and in disregard of facts or circumstances." *W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 450, 41 P.3d 510 (2002).

ISSUE ONE: FEDERAL PREEMPTION

System makes a threshold argument that even if the Employment Security Act (ESA)[4], would otherwise apply to its payments for the services of owner-operators, the Department's assessments are preempted by federal law. Hatfield joins in all of System's arguments. Br. of Appellant Hatfield at 9. The Department responds that Division One of this court already held that the ESA is not federally preempted in *Western Ports*, 110 Wn. App. at 457.

In its final decisions in the System and Hatfield appeals, the Commissioner, "mindful of [his] limited authority as a quasi-judicial body" discussed case law from

[4] What had formerly been entitled the Unemployment Compensation Act was renamed the Employment Security Act in 1953. LAWS OF 1953, 1st Ex. Sess., ch. 8, § 14.

other jurisdictions dealing with the federal preemption issue but ultimately concluded that his was not the appropriate forum to decide the constitutional issue, except insofar as he would apply *Western Ports*. *E.g.*, 4 AR(H) at 1191. He correctly observed that the Commissioner's Review Office, being an office within the executive branch, lacks the authority or jurisdiction to determine whether the laws it administers are constitutional; only the courts have that power. *Id.* (citing RCW 50.12.010 and .020; *Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 379 (1974)). At the same time, he recognized that on judicial review, the superior and appellate courts may consider and rule on the constitutionality of an agency order. *Id.* (citing RCW 34.05.570(3)(a)). He found that the record had been adequately developed at the administrative level to enable judicial review. *Id.* at 1192.

To assess the relevance of *Western Ports*, we begin by identifying the preemption arguments that System advances. It first relies on an express preemption provision that System argues was not considered in *Western Ports*. Its second argument relies on language from federal leasing regulations that were considered in *Western Ports* and found not to preempt state law, but System argues we should reject *Western Ports*' conclusion in light of later, persuasive authority.

A. EXPRESS PREEMPTION

In 1994, seeking to preempt state trucking regulation, Congress adopted the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, § 601, 108 Stat. 1605-06; *see also* ICC Termination Act of 1995, Pub. L. No. 104-

88, § 14501, 109 Stat. 899. Its express rule of preemption, which is subject to exceptions and exclusions not relevant here, provides:

> [A] State, political subdivision of a State, or political authority of 2 or more States 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 . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1).

In adopting the preemptive language "related to a price, route, or service," Congress copied language of the preemptive clause of the Airline Deregulation Act of 1978 (ADA), Pub. L. No 95-504, 92 Stat. 1705, in order to ensure application of the broad interpretation of that preemption provision adopted by the United States Supreme Court in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992). The Supreme Court held in *Morales* that the "related to" preemption provided by the ADA preempted all "[s]tate enforcement actions having a connection with, or reference to airline 'rates, routes, or services.'" *Id.* at 384 (alteration in original) (quoting 49 U.S.C. App. § 1305(a)(1)). It rejected states' arguments that their laws of general applicability were immune from preemption. Pointing to its earlier holding in an ERISA[5] case (ERISA also employs the same preemptive language), the Court held that "'[a] state law may "relate to" a benefit plan, and thereby be pre-empted, even if the law

[5] Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461.

is not specifically designed to affect such plans, or the effect is only indirect.'" *Id.* at 386 (alteration in original) (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990)). In a critical limitation on its holding, the Court recognized that "'[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." *Id.* at 390 (alterations in original) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983)).

The carriers in this case argue that imposing unemployment insurance taxation on their use of owner-operators has a significant impact rather than a tenuous, remote, or peripheral impact on their prices, routes, and services. They contend that it "effective[ly] eliminat[es] . . . the owner/operator business model" that has been long relied upon for "a flexible supply of equipment in an industry with erratic demand." Br. of Appellant System at 1-2.

1. *Western Ports* did not address express preemption

With System's first challenge in mind, we turn to *Western Ports*. It arose not from a Department audit, but from an application for unemployment benefits by Rick Marshall, an owner-operator whose independent contractor agreement with Western Ports, a trucking firm, had been terminated by the firm. The Department denied Mr. Marshall's application for benefits based on Western Port's contention that he was an independent contractor exempt from coverage under RCW 50.04.140. The principal

focus of this court's decision on appeal was whether Western Ports proved the first, "freedom from control" requirement for the exemption. *W. Ports*, 110 Wn. App. at 452-59.

But Western Ports also argued that federal transportation law preempted state employment security law because it both permitted and heavily regulated owner-operator lease arrangements like Mr. Marshall's. *Id.* at 454. This court analyzed that argument as an issue of implied "field" preemption—one of three ways federal law can be found to preempt state law, the other two being express preemption or where state law would conflict with federal law. *Estate of Becker v. Avco Corp.*, 187 Wn.2d 615, 622, 387 P.3d 1066 (2017). Field preemption can be found from federal regulation so pervasive it supports the inference that Congress left no room for state supplementation, where the federal interest is so dominant it can be assumed to be exclusive, or where the federal objective and regulation reveals the same purpose as the state purpose. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983).

In analyzing the field preemption argument, *Western Ports* considered 49 U.S.C. § 14102, which authorizes the Secretary of the federal Department of Transportation to regulate the leasing of motor vehicles used in interstate commerce, and the detailed federal leasing regulations adopted thereunder. 110 Wn. App. at 454-57, 455 n.2. It "decline[d] to infer" from them that Congress intended to supplant state law, given that

"[n]owhere . . . has Congress even mentioned state employment law" and federal transportation law and state unemployment insurance law "have very different policy objectives." *Id.* at 457. Only once in *Western Ports* did the court mention the FAAAA's express preemption provision, and that was to point out that when Congress wanted to preempt state law, it did so "expressly, clearly, and understandably." *Id.*

Western Ports contains no analysis of whether imposing state unemployment insurance taxes on Western Port's payment for owner-operator services related to its prices, routes, or services. While the decision is relevant and persuasive as to other issues presented in this appeal, it simply did not address the first, express preemption issue that is raised by these carriers.[6]

2. The carriers' express preemption argument proceeds on a theory that Title 50's broad definition of "employment" will be applied in other contexts, a legal premise we reject

The carriers largely rely on a series of state and federal court decisions that have found a portion of Massachusetts's independent contractor statute to be preempted by the FAAAA as applied to motor carriers' payment for owner-operator services. The carriers' briefs even echo language from one of those decisions, *Sanchez v. Lasership, Inc.*, 937 F.

[6] The Department points out that Division Three of the Colorado Court of Appeals read *Western Ports* as rejecting the "argument that the imposition of unemployment tax liability under [Washington's] scheme against a carrier concerning a truck driver was preempted by federal law, *including 49 U.S.C. § 14501(c)(1).*" *SZL, Inc. v. Indus. Claim Appeals Office*, 254 P.3d 1180, 1188 (Colo. App. 2011) (emphasis added). We respectfully disagree with the Colorado court's analysis of the decision.

Supp. 2d 730, 736 (E.D. Va. 2013), which characterized the Massachusetts law as "an unprecedented change in independent contractor law that dictates an end to independent contractor carriers in Massachusetts and imposes an anticompetitive, government-driven mandate that motor carriers change their business models to avoid liability under the statute."

The Massachusetts law—chapter 149, section 148B of the Massachusetts General Laws—is different from Washington law in important respects. It mandates "employee" classification for purposes of multiple state laws, more significantly affecting motor carriers. The mandated classification applies at a minimum to chapters 149 and 151 of the Massachusetts General Laws, which deal with workmen's compensation and minimum fair wages. *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 433 (1st Cir. 2016). Under those laws, an "employer" must provide benefits to employees that include days off, parental leave, work-break benefits, a minimum wage, and reimbursement of all out-of-pocket expenses incurred for the benefit of the employer regardless of what the parties' agreement would otherwise provide. *Id.*

By contrast, chapter 50.04 RCW defines employment and identifies its exemptions solely for unemployment insurance tax purposes. As observed in *Western Ports*, "an individual may be both an independent contractor for some purposes, and engaged in 'employment' for purposes of Washington's exceedingly broad definition of covered employment." 110 Wn. App. at 458.

System asks us to reject that conclusion of *Western Ports* and the Department's position that Title 50's definitions and exemptions apply only to unemployment insurance taxes, calling them "unrealistic." Br. of Appellant System at 25. It cites to evidence that the Department participated in an underground economy task force "whose thrust was to subject carriers to state regulation for a variety of other agency purposes," and to an Obama administration employee misclassification initiative. Br. of Appellant System at 25 n.35. Our own reading supports the carriers' contention that there is advocacy from some quarters for extending the narrow "ABC" criteria for independent contractor status in the unemployment compensation context to other worker protections. *See, e.g.*, Jennifer Pinsof, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341 (2016); Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53 (2015). But there is opposition advocacy as well, as evidenced by the participation in this appeal of American Trucking Associations, Inc. as amicus curiae in support of System.

The scope of Title 50's broad definition of "employment" presents an issue of law for this court, not an issue for political speculation. Under the law as it presently stands, the definition and exemptions apply only to the imposition of unemployment insurance

taxes.[7] We reject as legally unsupported the argument that assessment of the tax on carriers' payments for owner-operator services will dictate the end to an historic business model and force carriers to begin purchasing all of their trucking equipment.[8]

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[7] Washington's Minimum Wage Act, chapter 49.46 RCW, applies the non-exhaustive factors developed under the Fair Labor Standards Act of 1938 to determine whether the economic reality of the business relationship suggests employee or independent contractor status. *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 50-51, 52, 244 P.3d 32 (2010), *aff'd*, 174 Wn.2d 851, 281 P.3d 289 (2012).

To determine employer liability for worker injuries under Washington's Industrial Safety and Health Act (WISHA), chapter 49.17 RCW, courts consider whether the employer has retained the right to control the manner in which the work is performed. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 52 P.3d 472 (2002).

The Industrial Insurance Act, Title 51 RCW, definition of "worker" was most recently characterized by this court as including common law employees as well as those independent contractors who "'work[ ] under an independent contract, the essence of which is his or her personal labor.'" *Henry Indus., Inc. v. Dep't of Labor & Indus.*, 195 Wn. App. 593, 604, 381 P.3d 172 (2016) (quoting RCW 51.08.180). Notably, the legislature has specifically exempted commercial motor vehicle owner-operators from the definition since 1982, while taking no similar action under the ESA. LAWS OF 1982, ch. 80, § 1, codified at RCW 51.08.180.

And see RCW 49.78.020(4)(a) (defining employee for the purposes of Washington's Family Leave Act, chapter 49.78 RCW, as "a person who has been employed: (i) For at least twelve months by the employer with respect to whom leave is requested under RCW 49.78.220; and (ii) for at least one thousand two hundred fifty hours of service with the employer during the previous twelve-month period" and not as "a person who is employed at a worksite at which the employer as defined in (a) of this subsection employs less than fifty employees if the total number of employees employed by that employer within seventy-five miles of that worksite is less than fifty"). RCW 49.78.010(4)(b)

[8] System argues that the Department failed to present evidence to contradict the carriers' testimony that employment insurance taxation affects routes, prices, or services by forcing carriers to treat owner-operators as employees in all respects and forcing them to purchase all trucking equipment needed for their operations.

Case law holds that empirical evidence of an effect on services or rates is not necessary to demonstrate preemption. Courts may, instead, examine the logical effect

3. Federal law does not expressly preempt the assessments

Whether federal law preempts state law fundamentally is a question of congressional intent. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990). When "federal law is said to bar state action in fields of traditional state regulation . . . [courts] have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *NY State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)).

Laws of general applicability are usually not preempted merely because they increase a carrier's overall costs. *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014). "[G]enerally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted, even if employers must factor those provisions into their decisions about the prices that they set, the routes that they use, or the services that they

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that state regulation will have on the delivery of services or setting of rates. *E.g., Mass. Delivery Ass'n v. Healey*, 117 F. Supp. 3d 86, 91 (D. Mass. 2015) (citing *Mass. Delivery Ass'n v. Coakley*, 769 F.3d 11, 21 (1st Cir. 2014)) and *Overka v. Am. Airlines, Inc.*, 790 F.3d 36, 40-41 (1st Cir.), *cert. denied*, 136 S. Ct. 372 (2015)). Just as examining the logical effect of state regulation can be sufficient to establish that it *is* preempted, examining its logical effect can be sufficient to establish that it is not.

provide." *Id.* Such laws are not preempted "even if they raise the overall cost of doing business or require a carrier to re-direct or reroute some equipment." *Id.* (citing *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998)). Laws of general applicability may be preempted where they have such "acute, albeit indirect, economic effects" that states essentially dictate the prices, routes, or services that the federal law intended the market to control. *See Travelers Ins.*, 514 U.S. at 668.

The relevant evidence presented and found by the ALJ is that the ongoing cost of doing business to which the Hatfield will be subjected by the application of Title 50 is a quarterly tax rate that has so far not exceeded 1.14 percent. 1 AR(H) at 79. The record does not reveal the agreed tax rate that led to System's stipulated liability of $58,300.99 for owner-operators over an almost three-year period. But the highest unemployment tax rate presently imposed in Washington is 6 to 6.5 percent of payroll, and not all wages are taxed; they are only taxed up to a cap. RCW 50.29.025; 50.24.010.

System and Hatfield fail to demonstrate that assessment of unemployment insurance taxes on their payment for owner-operator services at the rates provided by Title 50 will have an acute effect that essentially dictates their prices, routes, or services. Instead, they rely unpersuasively on state and federal cases finding the Massachusetts independent contractor act to be preempted. Br. of Appellant System at 19-20 (citing *Sanchez*, 937 F. Supp. 2d 730; *Coakley*, 769 F.3d at 17; *Schwann*, 813 F.3d 429; and

Healey, 821 F.3d 187). As already discussed, the Massachusetts law has a greater effect on a carrier's operation because it applies to more laws, imposing additional employer liabilities.

In addition, both the federal First Circuit and the Massachusetts Supreme Court have found the Massachusetts law to be preempted only in part, and on the basis of a provision that has no parallel in RCW 50.04.140(1). *Schwann*, 813 F.3d at 438; *Chambers v. RDI Logistics, Inc.*, 476 Mass. 95, 102-03, 65 N.E.3d 1 (2016). Similar to RCW 50.04.140(1), the Massachusetts statute has three conjunctive requirements that must be shown to establish that an individual is an independent contractor under the applicable laws. Its "A" and "C" requirements are similar to the Washington exemption's "freedom from control" and "independently established enterprise" requirements. But Massachusetts' "B" requirement—the one found to be federally preempted—is materially different from the "independent business character or location" requirement of RCW 50.04.140(1)(b).

RCW 50.04.140(1)(b), like the "B" prong of the Social Security Board's 1937 draft bill, requires the party contracting services to show that the "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.*" (Emphasis added.) The Commissioner found that System and Hatfield

demonstrated that requirement by establishing that the owner-operators perform services using their own trucks, which are outside the carriers' places of business.[9]

By contrast, the second requirement that must be shown under the Massachusetts statute is that "the service is performed outside the usual course of the business of the employer." There is no "outside the place of the carrier's business" alternative. An owner-operator performing delivery service in Massachusetts for a carrier will never satisfy the "B" prong of Massachusetts's exemption. The Massachusetts Supreme Court agreed with the federal First Circuit that "[u]nlike the first and third prongs [of section 148B], prong two 'stands as something of an anomaly' amongst State laws regulating the classification of workers." *Chambers*, 476 Mass. at 103 (quoting *Schwann*, 813 F.3d at 438).

Preemption is an affirmative defense, so the proponent bears the burden of establishing it. *Hill v. Garda CL Nwest, Inc.*, 198 Wn. App. 326, 343, 394 P.3d 390 (2017). System and Hatfield rely on inapplicable case law and present no evidence that the unemployment insurance tax has an acute effect that essentially dictates their prices, routes, or services. They fail to demonstrate express preemption.

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[9] Given the carriers' leases, which give them exclusive control of the trucking equipment, the Commissioner did not view this as necessarily a clear call. But he found persuasive a federal neutrality provision, discussed further below, that cautions against assuming that a lessee's federally-required exclusive control precludes an independent contractor relationship. *See, e.g.*, 2 AR(ST) at 375-78 (citing 49 C.F.R. § 376.12(c)(4)). The Department did not cross appeal that decision.

B. FIELD OR CONFLICT PREEMPTION

Alternatively, System argues that field or conflict preemption is required by subsection (4) of 49 C.F.R. § 376.12(c), a provision added to that leasing regulation in 1992 that cautions against its misapplication.

What we refer to as the subsection (4) "neutrality provision" had its genesis in an arguably unintended construction of federal law that sought to "'correct abuses that had arisen under often fly-by-night arrangements'" through which certificated carriers, by leasing equipment from owner-operators, avoided liability for vehicle accidents and left "'thousands of unregulated vehicles on the highways as a menace to safety.'" *Rodriguez v. Ager*, 705 F.2d 1229, 1234 (10th Cir. 1983) (quoting *Simmons v. King*, 478 F.2d 857 (5th Cir. 1973)). Congress responded by enacting legislation under which the Secretary of Transportation could regulate motor carrier leasing arrangements, including by requiring carriers who hold interstate transportation authority to control and be responsible for trucking equipment used in their operations, whether they own it or not. *Edwards v. McElliotts Trucking, LLC*, __ F. Supp. 3d __, 2017 WL 3279168, at *7 (S.D. W.Va. 2017) (citing 49 U.S.C. § 14102(a)(4)).

Among regulations adopted was 49 C.F.R. § 376.12(c)(1), often referred to as the motor carrier "control regulation," which provides:

> 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.

Consistent with this requirement for continuous carrier control during the lease term, federal regulations require that commercial motor vehicles transporting property in interstate commerce legibly display the name of the operating motor carrier and identify the number of the authority under which the vehicle is being operated. 49 C.F.R. § 390.21(b).

Another regulation in effect until 1986 required that when a carrier terminated a lease and relinquished possession of leased equipment, its relinquishment was not complete until it procured the removal of its name and operating authority identification from the owner-operator's vehicle.[10] Former 49 C.F.R. § 1057.4(d) (1985).

A majority of courts construed these regulations, and later the control regulation standing alone, as creating an irrebuttable presumption of "statutory employment" that trumped state law dealing with the doctrine of respondeat superior in the event an owner-operator negligently caused an accident at a time when the carrier's logo and operating

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[10] As explained in *Thomas v. Johnson Agri-Trucking*, this regulation was repealed in 1986 and replaced with a regulation that only requires parties to specify in their lease which party is responsible for removing identification devices and how they will be returned to the carrier. 802 F. Supp. 2d 1242, 1246 n.19 (D. Kan. 2011) (citing 49 C.F.R. 376.12(e)).

authority number appeared on its vehicle. Even if the facts and circumstances would not support liability of the carrier under state law, the federal regulation was found to dictate liability.

In *Rodriguez*, for example, an owner-operator, David Ager, decided to sell his tractor-trailer to his brother John. David notified the carrier under whose authority he operated of his desire to terminate their lease. 705 F.2d at 1230-31. The carrier sent the necessary paperwork to David, and he signed it. *Id.* He then turned possession of his tractor-trailer over to John, to perform a trip that David had arranged independently, without any involvement or knowledge on the part of the carrier. *Id.* at 1231. Yet the carrier was held liable as a matter of law when John, driving negligently, had a head-on collision with an automobile, killing four members of the Rodriguez family. *Id.* at 1236. At the time of the accident, which occurred within days after David signed the termination paperwork, the carrier's insignia and identifying number had not yet been removed from the sides of David's tractor. *Id.* at 1230. As the Tenth Circuit observed, "[I]t cannot be said that John was driving the truck as an agent of [the carrier]. If . . . liability exists at all it is by virtue of a regulation of the ICC." *Id.* at 1231.

Beginning in the late 1980s, and at the behest of industry trade groups, the Interstate Commerce Commission (ICC) began publishing guidance questioning this interpretation of its regulations as creating a federal basis for liability. *Edwards*, 2017 WL 3279168 at *7. The ICC expressed its view that courts should "decide suits of this

nature by applying the ordinary principles of State tort, contract, and agency law. The Commission did not intend that its leasing regulations would supersede otherwise applicable principles of State tort . . . law and create carrier liability where none would otherwise exist." *Lease & Interchange of Vehicles*, 3 I.C.C.2d 92, 93 (1986). In 1992, the ICC formally amended its regulations by adding the following subsection (4) to the control regulation:

> 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.

49 C.F.R. § 376.12(c)(4). System argues that this provision was intended to explain to "confused" state officials what impact federally-mandated requirements had on state law control issues. Br. of Appellant System at 35.

We disagree. Confusion on the part of state officials is not what the ICC was trying to address. It was trying to disabuse courts of the notion that if state common law did not support a carrier's vicarious liability for the negligence of an owner-operator, then ICC's control regulation should be viewed as creating federal-law based vicarious liability. Nothing in the history of the irrebuttable presumption/statutory employee cases suggests that the ICC believed it should—or could—narrow vicarious liability under state

law by dictating to states certain evidence of the relationship between the carrier and the owner-operator that they were required to ignore.

To view 49 C.F.R. § 376.12(c)(4) in this way is to claim that it is preemptive, and System does make that claim. It characterizes the provision as "direct[ing the Department of Employment Security] not to utilize federally-mandated lease requirements to establish that owner/operators are System employees." Reply Br. of Appellant System at 15. System argues that the regulation was held to be preemptive in *Remington v. J.B. Hunt Transp., Inc.*, 2016 WL 4975194 (D. Mass. 2016).

Remington merely found a narrow conflict-based preemption of the Massachusetts independent contractor act, insofar as that act required a carrier to pay certain owner-operator expenses that federal leasing regulations treated as a matter to be negotiated by the parties. *Id.* at *4-5. As the district court observed, "What is explicitly permitted by federal regulations cannot be forbidden by state law." *Id.* at *4. It held that the Massachusetts act would be preempted "to [the] extent" it conflicted with federal regulations that permitted allocation of expenses. *Id.* at *5.

Remington rejected the carriers' argument that the neutrality provision and other federal leasing regulations created field preemption, pointing out that federal regulations were silent as to a number of matters the carriers argued were preempted. It was in this context that the district court cited the neutrality provision as demonstrating that the regulations are "explicitly agnostic on the issue of the carrier-driver relationship,"

language that System deems important. *Id.* at *5. We read that statement as recognizing a "hands off" approach the neutrality provision takes when it comes to deciding matters of state law—not as dictating what states can consider or what they should find.

Courts heeding the neutrality provision in the vehicle accident context from which it arose also do not view it as preempting state law. Where a lease is still in effect and the control regulation is therefore meaningful evidence of the motor carrier's and owner-operator's legal relationship, courts take the carrier's federally-required control into account in deciding vicarious liability. *E.g., Edwards*, 2017 WL 3279168 at *6 (describing the control regulation as "assum[ing] an additive role in the common law analysis, bolstering Edwards' allegations that [the owner-operator] was a [carrier's] employee but not subsuming the common law standard defining a master-servant relationship"); *Thomas*, 802 F. Supp. 2d at 1249 (viewing the neutrality provision as eliminating the basis for the irrebuttable presumption formerly imposed, but viewing the control regulation as still supporting a rebuttable presumption of agency, which would be analyzed according to state law); *Bays v. Summitt Trucking, LLC*, 691 F. Supp. 2d 725, 731-32 (W.D. Ky. 2010) (since the trucking equipment lease complied with federal regulations and established that a semitractor was under the carrier's exclusive control and possession, there was a rebuttable presumption of agency, with agency and liability to be analyzed according to Kentucky law).

System again has the burden of demonstrating federal preemption. It identifies no authority that has treated the neutrality provision as preempting state law distinctions between employees and independent contractors. We adhere to *Western Ports*' holding: federal leasing regulations have not been shown to preempt application of the unemployment insurance tax to payment for owner-operator services.

ISSUE TWO: APPLICATION OF THE INDEPENDENT CONTRACTOR EXEMPTION

The ESA requires an employer to contribute to the compensation fund for workers in its employment unless the employer establishes that the workers are exempt. *Penick*, 82 Wn. App. at 42. The carriers do not dispute that the owner-operators from whom they lease equipment and contract delivery service are in their "employment" as defined by the ESA. They contend that the exemption for services provided by an independent enterprise applies.

Consistent with the legislature's command that Title 50 "be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby," exemptions must be narrowly construed in favor of applying the tax. RCW 50.01.010; *W. Ports*, 110 Wn. App. at 450. Moreover, where taxes are imposed not for revenue only, but to be held in trust for the benefit of a group society is attempting to aid and protect, "courts will scrutinize much more closely . . . where the taxes to be saved jeopardize the protection such groups were intended to have." *Fors Farms, Inc. v. Emp't Sec. Dep't*, 75 Wn.2d 383, 391, 450 P.2d 973 (1969).

The Commissioner concluded that System and Swanson failed to demonstrate the first, "freedom from control" requirement, and the third, "independently established enterprise" requirement. In the case of Hatfield, the Department was granted summary judgment on the carrier's failure to demonstrate "freedom from control" and the Commissioner found the record to be inadequate to address the two other requirements for exemption.[11]

A. FREEDOM FROM DIRECTION OR CONTROL

"The first prong of the exemption test requires determination of whether a worker is free from direction or control during his or her performance of services." *W. Ports*, 110 Wn. App. at 452. "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." *Id.* (citing *Risher v. Dep't of Labor & Indus.*, 55 Wn.2d 830, 834, 350 P.2d 645 (1960)).

The parties disagree on two matters fundamental to application of the "freedom from control" requirement: they dispute whether the exemption incorporates the common law test for control, making relevant all precedents dealing with the common law of

[11] We agree with the Commissioner that the summary judgment record in Hatfield's case is inadequate to determine whether the "B" and "C" prongs of RCW 50.04.140(1) are satisfied by that carrier. We will not further address Hatfield's assignments of error to the Commissioner's refusal to rule in its favor on those issues.

agency, not just cases decided under Title 50; and they disagree whether direction and control required by federal regulation should count. We address these matters first.

1. 1945 changes to the ESA make clear that it does not incorporate the common law test of control

Between 1939 and June 1945, justices of our Supreme Court engaged in a tug of war over the scope of "employment" for unemployment compensation purposes. In a 1939 decision in *Washington Recorder Publishing Co. v. Ernst*, a majority of the members of Department Two strayed from prior decisions recognizing the uniquely broad definition of "employment" for unemployment compensation purposes and held that "[i]n drafting the statute, the legislators attempted to codify the common law. . . . intend[ing] that the common law test of employment relationship should likewise be the test under the unemployment compensation act." 199 Wash. 176, 195, 91 P.2d 718 (1939).

The Washington Supreme Court appeared to rectify the inconsistency in *Sound Cities Gas & Oil Co., Inc. v. Ryan*, in which it identified six decisions of the court that had construed the scope of "employment" under the ESA and the "ABC" requirements for exemption, stating:

> The opinions of this court, just cited, with the exception of *Washington Recorder Pub. Co. v. Ernst, supra*, commit this court to the view that our unemployment compensation act, which is similar to those of the majority of the states where this form of social security obtains, does not confine taxable employment to the relation of master and servant. If the common law relationship of master and servant was to obtain, the legislature would

> have so stated. . . .
>
> . . . .
>
> "It is unnecessary to determine whether the common law relation of master and servant exists between respondent and [appellants] . . . because the parties are brought within the purview of the unemployment compensation act by a definition more inclusive than that of master and servant."

13 Wn.2d 457, 464-65, 125 P.2d 246 (1942) (quoting *McDermott v. State*, 196 Wash. 261, 266, 82 P.2d 568 (1938)).

Within a matter of three years, however, in *Henry Broderick Inc. v. Riley*, 22 Wn.2d 760, 157 P.2d 954 (1945) and *Seattle Aerie No. 1 of Fraternal Order of Eagles v. Commissioner of Unemployment Compensation & Placement*, 23 Wn.2d 167, 168, 160 P.2d 614 (1945), the inconsistency was revived, with the majority holding in both cases that the initial step of determining whether an individual is in "employment" requires an analysis—even before considering exemptions—of whether the parties stand in an independent contractor relationship under common law.

Days after *Seattle Aerie* was filed and months after the filing of *Broderick*, the ESA newly-enacted by the 1945 legislature became effective, with its revised definition of employment, which reads: "personal service, of whatever nature, *unlimited by the relationship of master and servant as known to the common law or any other legal relationship* . . . ." LAWS OF 1945, ch. 35, § 11 (emphasis added).

The Commissioner's position in decisions published as precedential has been that while *Seattle Aerie* remains good law for other purposes, it is no longer good law on the

scope of "employment" for unemployment compensation purposes. In a 1969 case that, like *Seattle Aerie*, involved the taxpayer's engagement of a musical ensemble, the Commissioner observed that *Seattle Aerie* would have been pertinent had the law not changed, but "the modification in the definition of the term 'employment' is most significant [and] makes the decision in the *Eagles* case inapplicable to the present case." *In re Ida's Inn*, No. 68-19-P, 1969 WL 102104, at *5 (Wash. Emp't Sec. Dep't Comm'r Dec. 773, Jan. 13, 1969). In a 1983 case, the Commissioner found the fact situation to be "practically on all fours with the facts found in *Seattle Aerie*" but reached a different outcome because, "Unfortunately for [the appellant,] Mr. Fuller, the statute was amended that same year to make the definition much more inclusive for employment tax purposes." *In re Clayton L. Fuller*, No. 2-07013, 1983 WL 492331, at *2 (Wash. Emp't Sec. Dep't Comm'r Dec. 744, 2d Series Oct. 31, 1983).

In its 1947 decision in *Skrivanich v. Davis*, our Supreme Court recognized that the 1945 act materially modified the language from which the *Broderick* and *Seattle Aerie* courts inferred that determining whether one was in "employment" required deciding whether one was a "servant" working for "wages":

> It is to be noted that in the 1943 act . . . employment meant service "performed for wages or under any contract of hire" *suggesting by that phraseology alone* a relationship of master and servant; whereas, in the 1945 act, upon which the instant case rests, the term "employment" is defined as meaning

> '. . . 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.'
>
> It is apparent that the 1945 legislature intended and deliberately concluded to extend the coverage of the 1943 unemployment compensation 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.

29 Wn.2d 150, 158, 186 P.2d 364 (1947) (emphasis added) (some alterations in original).

If the carriers are contending that the common law distinction between servants and independent contractors applies not to the definition of "employment" but to the "freedom from control" requirement for exemption, we disagree on that score as well. The legislature adopted the language of the "freedom from control" requirement suggested by the Social Security Board's draft bill; it did not use the language incorporating the "control" that distinguished servants and independent contractors under Washington common law. At the time, the test in Washington for that purpose was "whether or not the employer retained the right, or had the right under the contract, to control the mode or manner in which the work was to be done." *Sills v. Sorenson*, 192 Wash. 318, 324, 73 P.2d 798 (1937) and cases cited therein. The statutory "freedom from control" exemption requirement adopted in 1937 and reenacted in 1945 is forward-looking and broader ("has been and will continue to be free from control or direction over

the performance of such service") and emphasizes that the freedom from control must be "both under [the contractor's] contract of service and in fact." RCW 50.04.140(1)(a).

We agree that since the legislature did not define the word "control" in the ESA, cases from other contexts can be consulted for the meaning of that word alone. But we agree with the Department that when it comes to applying the "free[dom] from control or direction over the performance of services" required for exemption under RCW 50.04.140(1), it is cases applying Title 50, not common law cases, that are controlling.

2. We will not disregard control or direction because it is required in a regulated industry

The carriers and amici contend that in applying the "freedom from control" exemption, we should not consider control or direction that the carriers are required to exercise under federal regulations. They argue that carrier compliance with federal lease regulations is not "control" by the carriers, it is control by the federal government. Br. of Appellant System at 33-34. Or as amici puts it, quoting a National Labor Relations Act[12] case, "'[i]t is *the law* that controls the driver.'" Br. of Amici Curiae at 13 (alteration in original) (quoting *N. Am. Van Lines, Inc. v. Nat'l Labor Relations Bd.*, 276 U.S. App. D.C. 158, 869 F.2d 596, 599 (1989)). The parties recognize that *Western Ports* addressed this same argument. In *Western Ports*, this court agreed that "a number of the controls exerted by Western Ports . . . are dictated by federal regulations," but stated, "Even so,

[12] 29 U.S.C. §§ 151-169.

RCW 50.40.100 suggests that the Department properly can consider such federally mandated controls in applying the statutory test for exemption." 110 Wn. App. at 453. Amici argues that this language was dicta. The Department argues it is stare decisis. System argues that *Western Ports*' reasoning has "been rejected by pervasive and more current authority." Reply Br. of Appellant System at 16.

a. *Western Ports*' holding was not dicta, but we believe the issue merits closer review

When a court unquestionably issues a holding based on multiple grounds, none of the grounds are dicta. *See In re Pers. Restraint of Heidari*, 174 Wn.2d 288, 293, 274 P.3d 366 (2012). Language suggesting that a court is speaking hypothetically can suggest that a statement is dicta, but in *Western Ports*, the court addressed the argument that federal control did not count first, and addressed it directly, before going on to explain that it would reach the same result "even if" it ignored federal control. 110 Wn. App. at 454. This reflects multiple grounds for the decision, not dicta.

As for the issue of whether we are required to apply the doctrine of stare decisis and our Supreme Court's "incorrect and harmful" standard before disagreeing with Division One, there is room for debate on that issue. This author has concluded that we are not. *See* the two concurring opinions in *In re Personal Restraint of Arnold*, 198 Wn. App. 842, 851-55, 396 P.3d 375 (2017). At a minimum, "it is not inappropriate for this

court to consider whether a previous opinion is incorrect and harmful in deciding whether or not to follow it." *Id.* at 850 (Siddoway, J., concurring).

Western Ports reasoned that by including service in interstate commerce in the statutory definition of "employment," RCW 50.40.100 suggests that the Department properly can consider federally mandated controls. Since the reference to interstate commerce is only vaguely suggestive and System directs us to more recent case law, we believe the parties' arguments on this issue warrant closer review.

b. Federally mandated control is relevant and must be considered under the plain language of RCW 50.04.140(1)(a)

To determine whether federally mandated control should be ignored, we begin with the language of this first requirement for the exemption. RCW 50.04.140(1)(a) says that it must be "shown . . . that . . . [s]uch 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."

Our fundamental objective in construing a statute is to ascertain and carry out the legislature's intent. *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004). The language at issue must be evaluated in the context of the entire statute. *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 149, 3 P.3d 741 (2000). Where the statute's meaning is plain on its face, we give effect to that meaning as expressing the legislative intent. *Arborwood*, 151 Wn.2d at 367. At the same time, we

avoid interpretations that are "'[s]trained, unlikely, or unrealistic.'" *Simpson Inv.*, 141 Wn.2d at 149 (quoting *Bour v. Johnson*, 122 Wn.2d 829, 835, 864 P.2d 380 (1993)).

Although the exemption requirement does not say that the control or direction to be assessed is control or direction exercised by the employer, it is implicit and necessary to a reasonable reading of the requirement that the employer exercise the control or direction. The other two requirements of the exemption look to the employee's relationship with the employer. The freedom from control requirement speaks of control under the "contract of service," meaning the contract with the employer. RCW 50.04.140(1)(a). And control or direction over the service provider that is exercised by a third party with no involvement by the employer has no relevance to the employee's economic insecurity.

But there is no textual basis for concluding that the control exercised by the employer must be control it has freely chosen to exercise, as opposed to control it is required to exercise by law.

The case law on which System and amici rely does not persuade us to read such a limitation into the Washington exemption requirement. To begin with, the cases are from other jurisdictions, and almost all arise in the distinguishable contexts of worker's compensation or the duty to collectively bargain under the National Labor Relations Act. The Washington Legislature has already approached owner-operators differently for worker's compensation and unemployment compensation purposes, exempting them as

workers for the first purpose but not the second.[13] And identifying individuals with whom a business must collectively bargain is fundamentally different from identifying individuals whose capped wages a business must multiply by .065 or less and contribute to an unemployment benefit fund. We could reject the case law on which System and amici rely as unhelpful on these bases alone.

But we also find the reasoning unpersuasive. Take the three out-of-state decisions dealing with worker's compensation on which amici relies. *Wilkinson v. Palmetto State Transportation Co.*, 382 S.C. 295, 676 S.E.2d 700 (2009) and *Hernandez v. Triple Ell Transport, Inc.*, 145 Idaho 37, 175 P.3d 199 (2007), rely on the reasoning announced in the first of the three, *Universal Am-Can, Ltd. v. Workers' Compensation Appeal Board*, 762 A.2d 328 (Pa. 2000). In that case, the Pennsylvania court held, "Because a motor carrier has no ability to negotiate aspects of the operation of leased equipment that are regulated, these factors may not be considered in resolving whether an owner-operator is an independent contractor or employee." *Id.* at 334; *and see Wilkinson*, 676 S.E.2d at 703, *and Hernandez*, 175 P.3d at 205.

This reasoning is too simplistic to resolve the issue presented to us. The implication is that only freely chosen employer control counts. But before that conclusion can be drawn, consideration must be given to why the legislature identified

[13] *See* note 7, *supra*.

control as a factor in imposing the unemployment insurance tax. Is it because freely chosen control is disfavored, and should be penalized? Or is it because the fact that a service provider is controlled or directed by the employer is one indicator of dependence? The purpose of the "ABC" requirements has been said to be to distinguish between "the person who pursues an established business of his own, who is not ordinarily dependent upon a particular business relationship with another for his economic survival, and other persons who are dependent upon the continuance of their relationship with a principal for their economic livelihood." Asia, *supra* at 87. Control may be an indicator of dependence whether control is imposed by Congress or by the employer.

We see no room in the plain language of the "freedom from control" requirement for excluding federally mandated control exercised by an employer, and we find nothing strained or unrealistic about including that control in the analysis. If we viewed the statute is ambiguous, we would give substantial weight to its interpretation by the Department, as the agency that administers the statute. *Dep't of Revenue v. Bi-Mor, Inc.*, 171 Wn. App. 197, 202, 286 P.3d 417 (2012). We agree with Division One's conclusion in *Western Ports* that federally mandated control counts.

3. The carriers have not demonstrated the required freedom from control and direction

System and Swanson did not assign error to any of the Commissioner's findings of fact.[14] They are verities on appeal. *Kittitas County v. Kittitas County Conservation Coal.*, 176 Wn. App. 38, 55, 308 P.3d 745 (2013). At issue with respect to those appellants is whether the Commissioner's findings support its conclusion that they failed to demonstrate that the owner-operators whom they paid for services were free from control and direction.

As for Hatfield, the Commissioner determined as a matter of summary judgment that it failed to demonstrate the "freedom from control" requirement for exemption. We review that decision de novo, viewing the evidence in the light most favorable to Hatfield, as the nonmoving party. *Verizon Nw.*, 164 Wn.2d at 916.

The following evidence of the carriers' relationship with their owner-operators during the audit periods is undisputed:

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[14] System and Swanson complain that this is a hypertechnical shortcoming and that we should glean their challenges to factual findings from their petitions in the trial court and their briefing on appeal. Extensive numbered findings were made following the administrative hearings and were almost entirely adopted by the Commissioner. Those findings are the intended and judicially economical way to identify evidence sufficiency challenges. RAP 10.3(g); *see* RAP 10.3(h). Moreover, none of the carriers identified RCW 34.05.570(3)(e) (insufficient evidence) as a basis for seeking judicial review.

- Swanson's, System's, and Hatfield's lease agreements with their owner-operators gave the carriers exclusive control and possession of their owner-operators' trucking equipment.

- The owner-operators' services were performed under the carriers' operating authority. Swanson's and Hatfield's agreements required owner-operators to mark their equipment with the carrier's name, address, and operating authority number.

- Swanson and System required their owner-operators to notify the carrier of any accident.

- Swanson required owner-operators to provide photos of freight they hauled when requested.

- Swanson provided owner-operators with medical and dental coverage, which would be fraudulent if they were independent contractors.

- Swanson allowed owner-operators to store equipment at its premises if they wanted to, and approximately half of the owner-operators did.

- Swanson was responsible for overload violations.

- Swanson required owner-operators to file daily logs, daily vehicle condition reports, scale tickets, toll receipts, delivery receipts, maintenance reports and records, and all other reports, documents, and data required by law; System likewise required owner-operators to submit delivery paperwork to it. Hatfield more generally required owner-

operators to comply with all rules and regulations applicable to their operations and it reserved the right to immediately terminate their lease in the event of a violation.

- Swanson billed customers and paid 88 percent to the owner-operators less deductions such as fuel charged by owner-operator to Swanson and insurance purchased through Swanson. System and Hatfield likewise billed customers and paid the owner-operators for transporting their customers' freight.

- If a customer failed to pay, Swanson would still pay the owner-operator unless the failure to pay was caused by the conduct of the owner-operator; System similarly paid the owner-operator whether or not its client paid it.

- While owner-operators could find their own loads on return trips, they had to get Swanson's permission to accept the load and Swanson would do the billing.

- System's contract with its owner-operators required all drivers to meet its minimum qualifications, gave System the right to disqualify any driver it found unsafe or unqualified, required compliance with its drug and alcohol policy including random testing, required the owner-operators to operate the equipment in compliance with System's other rules and regulations, and gave it the right to immediately terminate the agreement if the owner-operator committed an act of misconduct detrimental to System's business.

- System's contract with its owner-operators prohibited them, without System's written consent, from assigning or subcontracting to another party or trip leasing the equipment to other carriers.

- System prohibited owner-operators from transporting a third person without its prior approval and its contract provided that it could take physical possession of the owner-operators' equipment at its discretion.

- System's contract included nondisclosure protections for customer information that survived termination of its agreement with an owner-operator.

- None of Hatfield's owner-operators carried their own insurance, although they were responsible for the cost of cargo and liability insurance borne by Hatfield.

- Hatfield held all licenses and fuel permits.

- Hatfield's owner-operators were required to maintain the leased equipment in good repair, mechanical condition, running order and appearance, including by washing and cleaning it as frequently as required to maintain a good public image.

- Hatfield retained the right to discuss and recommend actions against an owner-operator's employees or agents in the event they damaged Hatfield's customer relations through their negligence. It also retained the right to take possession of the owner-operator's equipment and cargo, and complete a shipment itself if it believed the owner-operator had breached the contract in manner creating liability for Hatfield.

• Hatfield required owner-operators to have a safety inspection of the leased equipment at least once every 90 days at a federally approved inspection station.

The carriers bear the burden of showing qualification for the exemption from unemployment insurance taxation. *Group Health Coop. of Puget Sound, Inc. v. Wash. State Tax Comm'n*, 72 Wn.2d 422, 429, 433 P.2d 201 (1967). Their terms of agreement and practice with owner-operators support the Commissioner's conclusion (including as a matter of law, in Hatfield's case) that the carriers failed to demonstrate that their owner-operators have been and will continue to be free from control or direction in performing services, both under their contract of service and in fact. The nature of the relationship is similar to that presented in *Western Ports*, where the owner-operator was found to be an employee for the purposes of unemployment insurance taxation despite the fact that he "owned his own truck, paid for his own truck repairs, fuel and insurance, chose his own routes and could have hired another driver to operate his equipment." *W. Ports*, 110 Wn. App. at 453.

B. INDEPENDENTLY ESTABLISHED BUSINESS

The Commissioner's decision that the exemption provided by RCW 50.04.140(1) did not apply to Swanson or System was independently supported by his conclusion that they did not demonstrate the third requirement for the exemption: that the owner-operators were "customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service"

with the alleged employer. This element may be satisfied by proof 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) (quoting *Schuffenhauer v. Dep't of Emp't Sec.*, 86 Wn.2d 233, 238, 543 P.2d 343 (1975)).

> The following factors provide indicia of an independently established business: (1) worker has separate office or place of business outside of the home; (2) worker has investment in the business; (3) 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) worker works for others and has individual business cards; (6) worker is registered as independent business with state; and (7) worker is able to continue in business even if relationship with alleged employer is terminated.

Penick, 82 Wn. App. at 44. The most important factor in determining whether an individual is independently engaged is the seventh: the ability to continue in business even if the relationship with the alleged employer is terminated. *Affordable Cabs, Inc. v. Emp't Sec. Dep't*, 124 Wn. App. 361, 371-72, 101 P.3d 440 (2004) (citing *All-State Constr. Co. v. Gordon*, 70 Wn.2d 657, 666, 425 P.2d 16 (1967)).

The Commissioner recognized that the first, second, and third factors weighed in favor of the owner-operators' independence since they work in their trucks, outside their home; have a substantial investment in their trucking equipment; and provide other supplies needed for the transportation of goods. He also recognized that some, but not all of the owner-operators had registered businesses in the State of Washington. But other

factors were absent. The most significant to the Commissioner was that the individuals engaged as owner-operators by Swanson and System did not have their own operating authority and had not worked for others. The Commissioner characterized holding one's own operating authority as a "paramount" factor in determining whether the owner-operators had independent enterprises. 2 AR(SH) at 279.

Both carriers argue that it is actually against federal law for an owner-operator to have his or her own operating authority and haul goods for a carrier. But this is semantics. A truck owner working as an owner-operator can apply for and acquire operating authority. He or she just won't be able to operate as an owner-operator under that authority, because when he or she leases equipment and works as an owner-operator, federal law requires the service to be performed under the lessee-carrier's authority. The truck owner can still have and hold operating authority in reserve. The Commissioner's point, and a legitimate one, is that if the truck owner's lease ends, he or she will have more entrepreneurial options by holding his or her own operating authority.

The carriers vigorously disagree with the Commissioner's treatment of independent operating authority as a paramount factor. There is conflicting authority from other jurisdictions as to its importance. *Compare Stafford Trucking, Inc. v. Dep't of Indus., Labor & Human Relations*, 102 Wis. 2d 256, 264, 306 N.W.2d 79 (Wis. Ct. App. 1981) (possessing operating authority is an important indicator of an independently established business), *with W. Home Transp., Inc. v. Idaho Dep't of Labor*, 155 Idaho

950, 953, 318 P.3d 940 (2014) (if the individual's business is to operate as an owner-operator, then possessing operating authority is "completely inconsequential and irrelevant").

The carriers' own evidence and argument suggests that having operating authority is relevant. As the carriers tell us, the reason for the independent operator business model in the trucking industry is "[b]ecause demand in the contemporary American trucking industry fluctuates so dramatically," and owner-operators "provide carriers . . . with a flexible supply of trucking equipment." Br. of Appellant System at 3-4. The obvious corollary is that in periods of dramatically reduced demand, owner-operators go unused. Perhaps in some future case, a carrier will prove that despite dramatically reduced demand, an owner-operator whose services are no longer needed by his or her primary carrier will be needed by other carriers. No such evidence was presented here. None of the owner-operators had worked for more than one carrier.

In Swanson's case, six of the seven disputed owner-operators had registered businesses. However, of the six owner-operators with registered businesses, Swanson contracted with two of them in their capacities as individuals, rather than as businesses. Swanson provided protection for risk of nonpayment of customers. When it comes to the most important factor—the ability to continue in business even if the relationship with the employer is terminated—Swanson presented no evidence that even in a period of dramatic reduced demand, their former owner-operators would be able to continue in

business leasing to others. Its evidence and argument was that "owner-operators make the business decision to 'work exclusively for one carrier to establish and cultivate that particular business relationship.'" Reply Br. of Appellant Swanson at 15 (quoting 7 AR(SH) Ex. Z, at 3).

System presented even less evidence of owner-operator engagement in independent business. Though the owner-operators owned their own trucks, were responsible for the costs of operating them, and maintained their own financial books, System presented no evidence that the owner-operators had registered or licensed businesses or business cards. System also protected the owner-operators from nonpayment.

The Commissioner's findings supported his conclusion that Swanson and System failed to meet their burden of demonstrating that their owner-operators were engaged in independently established businesses.

ISSUE THREE: WHETHER THE ASSESSMENTS SHOULD BE SET ASIDE AS VOID

The final issue raised by System and Hatfield is whether the Department's assessments should be set aside as void, as a result of constitutional violations.[15] System argues that the Department violated procedural due process when its employees failed to

[15] Only Swanson sought judicial review on the basis that the Commissioner's decision was arbitrary and capricious. It does not contend on appeal that the Department's assessments are void.

comply with its standards requiring adequate training, independence and professional care, and that it violated substantive due process by targeting the trucking industry and essentially directing auditors to find liability. Hatfield makes arguments similar to System's, and argues in addition that the Department assessed taxes on its equipment despite knowing it was unlawful to do so.

The APA authorizes three types of judicial review of agency action. Under RCW 34.05.570(2), courts are authorized to review the validity of agency rules. Under RCW 34.05.570(3), they are authorized to grant relief from "an agency order in an adjudicative proceeding." All other agency action or inaction is reviewable by courts under RCW 34.05.570(4). Relief for persons aggrieved by the performance of this last category of agency action or inaction is available if the agency's action or inaction is unconstitutional, outside the agency's statutory or other legal authority, arbitrary or capricious, or taken by persons not lawfully entitled to take the action. RCW 34.05.570(4)(c).

Hatfield's and System's petitions for judicial review sought only one type of relief: relief under RCW 34.05.570(3) from the Commissioner's order in the adjudicative appeal. They did not seek relief under RCW 34.05.570(4) for the acts or omissions of

department employees engaged in the audits. *See* CP at 98-101, 318-21.[16] The question on appeal, then, is whether their constitutional rights were violated in the administrative appeals process.

The only reasoned argument by System and Hatfield as to how conduct of department employees in the audit process relates to a deprivation of their rights in the administrative appeals process is that the Commissioner erred by failing to exclude the Department's evidence. They cite the requirement of the APA that the presiding officer in an adjudicative proceeding "shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state." RCW 34.05.452(1). They argue that the remedy for the constitutional violations they assert is the exclusion of unlawfully obtained evidence, citing *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), *State v. Miles*, 160 Wn.2d 236, 156 P.3d 864 (2007), *McDaniel v. City of Seattle*, 65 Wn. App. 360, 828 P.2d

[16] In a separate action, System, the Washington Trucking Associations, and five other carriers sought money damages from the Department and department employees who had engaged in the complained-of audit conduct, asserting claims for relief under 42 U.S.C. § 1983 and tortious interference with contract. In a decision filed earlier this year, the Supreme Court held that the § 1983 claim was barred by comity and the tortious interference claim was barred by the exclusive remedy provision of the ESA, RCW 50.32.180. *Wash. Trucking Ass'ns v. Emp't Sec. Dep't*, 188 Wn.2d 198, 393 P.3d 761 (2017), *cert. denied*, No. 17-145, 2017 WL 3324734 (U.S. Oct. 2, 2017). In arriving at its decision, our Supreme Court observed that the carriers had an adequate remedy in their ability to appeal the assessments, including to obtain judicial review of challenges that could not be resolved by the ALJ or the commissioner.

81 (1992), and *Barlindal v. City of Bonney Lake*, 84 Wn. App. 135, 925 P.2d 1289 (1996). Br. of Appellant System at 47, n.56.

Even if the carriers could support their arguments for exclusion of the Department's evidence with proof of a procedural or substantive due process violation by department employees, the exclusionary rule does not apply in the administrative appeal of an unemployment insurance tax assessment. The two civil cases the carriers cite do not help them. In *McDaniel*, this court refused to extend the exclusionary rule to civil suits that are not quasi-criminal in nature and that do not seek to exact a penalty or forfeiture. 65 Wn. App. at 366. *Barlindal*, like our Supreme Court's decision in *Deeter v. Smith* before it, merely recognized that in forfeiture proceedings, which are quasi-criminal in nature, the Fourth Amendment[17] exclusionary rule applies. 84 Wn. App. at 141 (citing *Deeter*, 106 Wn.2d 376, 377-79, 721 P.2d 519 (1986)). As the Court observed in *Deeter*, "a forfeiture proceeding is quasicriminal if it is intended to impose a penalty on an individual for a violation of the criminal law." 106 Wn.2d at 378 (citing *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700-02, 85 S. Ct. 1246, 14 L. Ed. 2d 170 (1965)). The appeal of an unemployment insurance tax assessment is not quasi-criminal. The Commissioner properly concluded that the exclusionary rule did not apply.

[17] U.S. CONST. amend. XIV.

The Department conduct about which System and Hatfield complain also does not amount to a constitutional violation. Addressing procedural due process first, for there to be a procedural due process violation, we must find that the State deprived an individual of a constitutionally protected liberty or property interest. *Smith v. State*, 135 Wn. App. 259, 277, 144 P.3d 331 (2006). The carriers rely on an asserted property interest in a benefit: a right to be audited under the Department's standards requiring adequate training, independence and professional care.[18] But "'[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire' and 'more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)). Such entitlements are "not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Roth*, 408 U.S. at 577.

[18] The Department argues that the audit procedures had no application to Hatfield and also defends most of the conduct of department employees that the carriers claim was improper. Given the two grounds on which we can reject this assignment of error by the carriers, we do not address these additional issues.

No Washington statute or regulation mandates the Department's adherence to its audit procedures, let alone in a manner suggesting that a taxpayer entitlement was being created. *See Castle Rock*, 545 U.S. at 764-65 (even a statute mandating certain action by government employees "would not necessarily mean that state law gave *respondent* an *entitlement* to *enforcement* of the mandate. Making the actions of government employees obligatory can serve various legitimate ends other than the conferral of a benefit on a specific class of people."). Internal audit procedures are not law. *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 323, 119 P.3d 825 (2005). No property interest is demonstrated by System and Hatfield.

Turning to System's and Hatfield's substantive due process claims, substantive due process bars certain government actions regardless of the fairness of the procedures used to implement them. *Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). It is concerned with respect for those personal immunities that "are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" *Rochin v. California*, 342 U.S. 165, 169, 72 S. Ct. 205, 96 L. Ed. 183 (1952) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934)), "or are 'implicit in the concept of ordered liberty,'" *id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937)). An agency's decision resulting from a failure to follow its own procedures may be so arbitrary and

capricious that it amounts to a violation of substantive due process. *Nieshe v. Concrete Sch. Dist.*, 129 Wn. App. 632, 641, 127 P.3d 713 (2005).

The substantive component of due process, like its procedural component, requires that System and Hatfield establish that they were deprived of life or of a constitutionally protected liberty or property interest. *Id.* & n.17. The inability to make that threshold showing is fatal to a substantive due process claim. *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998). It is fatal to the carriers' claims.

Finally, System and Hatfield cite this court's decision in *Washington Trucking Associations v. Employment Security Department* as holding that "[the Employment Security Department's] assessments are invalid if they result from audits that violate [the Department's] own standards." Br. of Appellant System at 46 (citing 192 Wn. App. 621, 647, 369 P.3d 170 (2016), *rev'd*, 188 Wn. 2d 198, 393 P.3d 761 (2017), *cert. denied*, No. 17-145, 2017 WL 3324734 (U.S. Oct. 2, 2017)). Their citation is to a discussion of whether the plaintiffs' § 1983 claims asserted against department employees were barred by the principle of comity because state law provides an adequate remedy. It was in that context that this court observed that the plaintiffs *alleged* that department assessments were invalid if they violated Department audit standards. The court's holding was that the plaintiffs "have the ability to argue [that] before the ALJ," who "has authority to

address these arguments." *Id.* at 646-47. No view was expressed that there was any merit to that allegation by the plaintiffs.

Affirmed.[19]

Siddoway, J.

WE CONCUR:

Korsmo, J.

Fearing, C.J.

[19] Swanson and System both request attorney fees but neither cites authority to support their requests. Their requests are denied. *See* RAP 18.1.

RAP 13.4
DISCRETIONARY REVIEW OF DECISION TERMINATING REVIEW

(a) How to Seek Review. A party seeking discretionary review by the Supreme Court of a Court of Appeals decision terminating review must serve on all other parties and file a petition for review or an answer to the petition that raises new issues. A petition for review should be filed in the Court of Appeals. If no motion to publish or motion to reconsider all or part of the Court of Appeals decision is timely made, a petition for review must be filed within 30 days after the decision is filed. If such a motion is made, the petition for review must be filed within 30 days after an order is filed denying a timely motion for reconsideration or determining a timely motion to publish. If the petition for review is filed prior to the Court of Appeals determination on the motion to reconsider or on a motion to publish, the petition will not be forwarded to the Supreme Court until the Court of Appeals files an order on all such motions. The first party to file a petition for review must, at the time the petition is filed, pay the statutory filing fee to the clerk of the Court of Appeals in which the petition is filed. Failure to serve a party with the petition for review or file proof of service does not prejudice the rights of the party seeking review, but may subject the party to a motion by the Clerk of the Supreme Court to dismiss the petition for review if not cured in a timely manner. A party prejudiced by the failure to serve the petition for review or to file proof of service may move in the Supreme Court for appropriate relief.

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

(c) Content and Style of Petition. The petition for review should contain under appropriate headings and in the order here indicated:

(1) Cover. A title page, which is the cover.

(2) Tables. A table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with reference to the pages of the brief where cited.

(3) Identity of Petitioner. A statement of the name and designation of the person filing the petition.

(4) Citation to Court of Appeals Decision. A reference to the Court of Appeals decision which petitioner wants reviewed, the date of filing the decision, and the date of any order granting or denying a motion for reconsideration.

(5) Issues Presented for Review. A concise statement of the issues presented for review.

(6) Statement of the Case. A statement of the facts and procedures relevant to the issues presented for review, with appropriate references to the record.

(7) Argument. A direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument.

(8) Conclusion. A short conclusion stating the precise relief sought.

(9) Appendix. An appendix containing a copy of the Court of Appeals decision, any order granting or denying a motion for reconsideration of the decision, and copies of statutes and constitutional provisions relevant to the issues presented for review.

(d) Answer and Reply. A party may file an answer to a petition for review. A party filing an answer to a petition for review must serve the answer on all other parties. If the party wants to seek review of any issue that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals, the party must raise those new issues in an answer. Any answer should be filed within 30 days after the service on the party of the petition. A party may file a reply to an answer only if the answering party seeks review of issues not raised in the petition for review. A reply to an answer should be limited to addressing only the new issues raised in the answer. A party filing any reply to an answer must serve the reply to the answer on all other parties. A reply to an answer should be filed within 15 days after the service on the party of the answer. An answer or reply should be filed in the Supreme Court. The Supreme Court may call for an answer or a reply to an answer.

(e) Form of Petition, Answer, and Reply. The petition, answer, and reply should comply with the requirements as to form for a brief as provided in rules 10.3 and 10.4, except as otherwise provided in this rule.

(f) Length. The petition for review, answer, or reply should not exceed 20 pages double spaced, excluding appendices, title sheet, table of contents, and table of authorities.

(g) Reproduction of Petition, Answer, and Reply. The clerk will arrange for the reproduction of copies of a petition for review, an answer, or a reply, and bill the appropriate party for the copies as provided in rule 10.5.

(h) Amicus Curiae Memoranda. The Supreme Court may grant permission to file an amicus curiae memorandum in support of or opposition to a pending petition for review. Absent a showing of particular justification, an amicus curiae memorandum should be received by the court and counsel of record for the parties and other amicus curiae not later than 60 days from the date the petition for review is filed. Rules 10.4 and 10.6 should govern generally disposition of a motion to file an amicus curiae memorandum. An amicus curiae memorandum or answer thereto should not exceed 10 pages.

(i) No Oral Argument. The Supreme Court will decide the petition without oral argument.

[Originally effective July 1, 1976; amended effective September 1, 1983; September 1, 1990; September 18, 1992; September 1, 1994; September 1, 1998; September 1, 1999; December 24, 2002; September 1, 2006; September 1, 2009; September 1, 2010; December 8, 2015; September 1, 2016.]

RCW 50.04.100

Employment.

"Employment", subject only to the other provisions of this title, 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.

Except as provided by RCW **50.04.145**, personal services performed for an employing unit by one or more contractors or subcontractors acting individually or as a partnership, which do not meet the provisions of RCW **50.04.140**, shall be considered employment of the employing unit: PROVIDED, HOWEVER, That such contractor or subcontractor shall be an employer under the provisions of this title in respect to personal services performed by individuals for such contractor or subcontractor.

[**1982 1st ex.s. c 18 § 14; 1945 c 35 § 11**; Rem. Supp. 1945 § 9998-150. Prior: **1943 c 127 § 13; 1941 c 253 § 14; 1939 c 214 § 19; 1937 c 162 § 19.**]

NOTES:

Severability—Conflict with federal requirements—1982 1st ex.s. c 18: See notes following RCW **50.12.200**.

RCW 50.04.140

Employment—Exception tests.

Services performed by an individual for remuneration shall be deemed to be employment subject to this title unless and until it is shown to the satisfaction of the commissioner that:

(1)(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.

(2) Or as a separate alternative, it shall not constitute employment subject to this title if it is shown that:

(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, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the 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, or such individual has a principal place of business for the work the individual is conducting that is eligible for a business deduction for federal income tax purposes; and

(d) On the effective date of the contract of service, such individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting; and

(e) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, such individual has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and

(f) On the effective date of the contract of service, such individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.

[**1991 c 246 § 6; 1945 c 35 § 15;** Rem. Supp. 1945 § 9998-154. Prior: **1943 c 127 § 13; 1941 c 253 § 14; 1939 c 214 § 16; 1937 c 162 § 19.**]

NOTES:

Effective date—Conflict with federal requirements—1991 c 246: See notes following RCW **51.08.195.**

REFERENCES IN TEXT

Section 10923(b) of this title, referred to in par. (3), was redesignated section 10923(c), and a new section 10923(b) was added, by Pub. L. 103–311, title II, § 208(b), Aug. 26, 1994, 108 Stat. 1687.

AMENDMENTS

1986—Par. (3). Pub. L. 99–521 inserted "household goods" before "freight forwarder" wherever appearing.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–521 effective 60 days after Oct. 22, 1986, see section 15 of Pub. L. 99–521, set out as a note under section 10102 of this title.

§ 10927. Security of motor carriers, brokers, and freight forwarders

(a)(1) The Commission may issue a certificate under section 10922 or 10530 or a permit under section 10923 only if the carrier (including a motor private carrier and a foreign motor private carrier) applying for such certificate files with the Commission a bond, insurance policy, or other type of security approved by the Commission, in an amount not less than such amount as the Secretary of Transportation prescribes pursuant to, or as is required by, section 30[1] of the Motor Carrier Act of 1980, section 18[1] of the Bus Regulatory Reform Act of 1982, and the laws of the State or States in which the carrier is operating, to the extent applicable. The security must be sufficient to pay, not more than the amount of the security, for each final judgment against the carrier for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles under the certificate or permit, or for loss or damage to property (except property referred to in paragraph (3) of this subsection), or both. A certificate or permit remains in effect only as long as the carrier satisfies the requirements of this paragraph.

(2) A motor carrier and a foreign motor private carrier and foreign motor carrier (as defined under section 10530(a)) operating in the United States when providing transportation between places in a foreign country or between a place in one foreign country and a place in another foreign country shall comply with the requirements of sections 10329 and 10330 that apply to a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title. To protect the public, the Commission may require any such motor carrier to file the type of security that a motor carrier is required to file under paragraph (1) of this subsection.

(3) The Commission may require a motor common carrier providing transportation under a certificate to file with the Commission a type of security sufficient to pay a shipper or consignee for damage to property of the shipper or consignee placed in the possession of the motor common carrier as the result of transportation provided under this subtitle. A carrier required by law to pay a shipper or consignee for loss, damage, or default for which a connecting motor common carrier is responsible is subrogated, to the extent of the amount paid, to the rights of the shipper or consignee under any such security.

(b) The Commission may issue a broker's license to a person under section 10924 of this title only if the person files with the Commission a bond, insurance policy, or other type of security approved by the Commission to ensure that the transportation for which a broker arranges is provided. The license remains in effect only as long as the broker complies with this subsection.

(c)(1) The Commission may require a household goods freight forwarder providing service under a permit issued under section 10923 of this title to file with the Commission a bond, insurance policy, or other type of security approved by the Commission. The security must be sufficient to pay, not more than the amount of the security, for each final judgment against the household goods freight forwarder for bodily injury to, or death of, an individual, or loss of, or damage to, property (other than property referred to in paragraph (2) of this subsection), resulting from the negligent operation, maintenance, or use of motor vehicles by or under the direction and control of the household goods freight forwarder when providing transfer, collection, or delivery service under this subtitle.

(2) The Commission may require a household goods freight forwarder providing service under a permit or a freight forwarder to file with the Commission a bond, insurance policy, or other type of security approved by the Commission sufficient to pay, not more than the amount of the security, for loss of, or damage to, property for which the freight forwarder provides service.

(d) The Commission may determine the type and amount of security filed with it under this section.

(Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1413; Pub. L. 96–296, § 29, July 1, 1980, 94 Stat. 820; Pub. L. 97–261, § 18(h), Sept. 20, 1982, 96 Stat. 1121; Pub. L. 98–554, title II, § 226(c)(2), (3), Oct. 30, 1984, 98 Stat. 2851; Pub. L. 99–521, § 8(d), Oct. 22, 1986, 100 Stat. 2996; Pub. L. 100–690, title IX, § 9111(h), Nov. 18, 1988, 102 Stat. 4534; Pub. L. 103–272, § 5(m)(26), July 5, 1994, 108 Stat. 1378.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
10927(a)(1) ..	49:315 (1st sentence related to filing security).	Feb. 4, 1887, ch. 104, 24 Stat. 379, § 215; added Aug. 9, 1935, ch. 498, § 1, 49 Stat. 557; July 22, 1954, ch. 563, § 2, 68 Stat. 526.
10927(a)(2) ..	49:303(a)(11) (last sentence).	Feb. 4, 1887, ch. 104, 24 Stat. 379, § 203(a)(11) (last sentence); added July 22, 1954, ch. 563, § 1, 68 Stat. 526.
	49:315 (last sentence).	
10927(a)(3) ..	49:315 (2d and 3d sentences related to filing security).	
10927(b)	49:311(c) (words after 2d comma).	Feb. 4, 1887, ch. 104, 24 Stat. 379, § 211(c) (words after 2d comma); added Aug. 9, 1935, ch. 498, § 1, 49 Stat. 554.
10927(c)(1) ..	49:1003(d) (related to filing security).	Feb. 4, 1887, ch. 104, 24 Stat. 379, § 403(c), (d); added May 16, 1942, ch. 318, § 1, 56 Stat. 285.
10927(c)(2) ..	49:1003(c) (related to filing security).	
10927(d)	49:315 (related to kind and amount of security).	

[1] See References in Text note below.

HISTORICAL AND REVISION NOTES—CONTINUED

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
	49:1003(c), (d) (related to kind and amount of security).	

In subsection (a), the word "reasonable" is omitted as unnecessary. The words "rules and regulations as the Commission shall prescribe", "rules and regulations as it shall prescribe" and "regulations" are omitted in view of section 10321(a) of the revised title giving the Interstate Commerce Commission general authority to carry out the subtitle.

In subsection (a)(1), the word "each" is inserted for clarity. The phrase "(except property referred to in paragraph (3) of this subsection)" is inserted for clarity and consistency.

In subsection (a)(2), the words "and these provisions of section 304 of this title which relate to qualifications and maximum hours of service of employees and safety of operation and equipment" in the last sentence of 49:303(a)(11) are omitted because, under section 6(e)(6)(C) of Public Law 89–670, those provisions were transferred to the Secretary of Transportation. The balance of that sentence is omitted as unnecessary in view of this subsection since it specifically gives authority to impose requirements under the circumstances referred to in the last sentence.

In subsection (a)(3), the words "motor common carrier providing transportation under a certificate" are substituted for "such common carrier" for clarity. The words "in its discretion" and "legally" are omitted as surplus. The word "service" is omitted for consistency and because the jurisdictional grant to the Commission under subchapter II of chapter 105 of the revised title is jurisdiction over transportation and service is included in the definition of "transportation".

In subsection (b), the words "in such form and amount" are omitted as unnecessary in view of section 10321(a) of the revised title giving the Commission general authority to carry out the subtitle.

In subsection (c), the words "to prescribe reasonable rules and regulations" are omitted in view of section 10321(a) of the revised title giving the Commission general authority to carry out the subtitle. The word "providing" is substituted for "performance" for consistency.

REFERENCES IN TEXT

Section 30 of the Motor Carrier Act of 1980, referred to in subsec. (a)(1), is section 30 of Pub. L. 96–296, which was formerly set out as a note below and was repealed and reenacted as section 31139 of this title by Pub. L. 103–272, §§ 1(e), 7(b), July 5, 1994, 108 Stat. 1006, 1379, the first section of which enacted subtitles II, III, and V to X of this title.

Section 18 of the Bus Regulatory Reform Act of 1982, referred to in subsec. (a)(1), is section 18 of Pub. L. 97–261, of which subsecs. (a) to (g) were formerly set out as a note below and subsec. (h) amended subsec. (a)(1) of this section. Section 18(a)–(g) was repealed and reenacted as section 31138 of this title by Pub. L. 103–272, §§ 1(e), 7(b), July 5, 1994, 108 Stat. 1005, 1379, the first section of which enacted subtitles II, III, and V to X of this title.

AMENDMENTS

1994—Subsec. (a)(1). Pub. L. 103–272 inserted "section" before "10923".

1988—Subsec. (a)(1). Pub. L. 100–690, § 9111(h)(1), inserted first sentence and struck out former first sentence which read as follows: "The Interstate Commerce Commission may issue a certificate or permit to a motor carrier under section 10922 or 10923 of this title and a certificate of registration to a motor carrier or motor private carrier under section 10530 of this title only if the carrier files with the Commission a bond, insurance policy, or other type of security approved by the Commission, in an amount not less than such amount as the Secretary of Transportation prescribes pursuant to, or as is required by, the provisions of section 30 the Motor Carrier Act of 1980, in the case of a motor carrier of property, section 18 of the Bus Regulatory Reform Act of 1982, in the case of a motor carrier of passengers, or the laws of the State or States in which the carrier is operating, in the case of a motor private carrier."

Subsec. (a)(2). Pub. L. 100–690, § 9111(h)(2), substituted "and foreign motor carrier (as defined under section 10530(a))" for "(as such term is defined under section 10530(a)(3) of this title)".

1986—Subsec. (c). Pub. L. 99–521 inserted "household goods" before "freight forwarder" wherever appearing in par. (1), and in par. (2) inserted "household goods" before first reference to "freight forwarder", inserted "or a freight forwarder" after "permit", and struck out "under this subtitle" after "provides service".

1984—Subsec. (a)(1). Pub. L. 98–554, § 226(c)(2), inserted "and a certificate of registration to a motor carrier or motor private carrier under section 10530 of this title" after "10923 of this title", struck out "or" before "section 18 of the Bus Regulatory Reform Act of 1982", and inserted ", or the laws of the State or States in which the carrier is operating, in the case of a motor private carrier" at end of first sentence.

Subsec. (a)(2). Pub. L. 98–554, § 226(c)(3), inserted "and a foreign motor private carrier (as such term is defined under section 10530(a)(3) of this title)" after "A motor carrier".

1982—Subsec. (a)(1). Pub. L. 97–261 inserted ", in the case of a motor carrier of property, or section 18 of the Bus Regulatory Reform Act of 1982, in the case of a motor carrier of passengers" after "Motor Carrier Act of 1980".

1980—Subsec. (a)(1). Pub. L. 96–296 substituted "approved by the Commission, in an amount not less than such amount as the Secretary of Transportation prescribes pursuant to, or as is required by, the provisions of section 30 the Motor Carrier Act of 1980" for "approved by the Commission".

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–690 effective Jan. 1, 1990, see section 9111(k) of Pub. L. 100–690, set out as a note under section 10530 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–521 effective 60 days after Oct. 22, 1986, see section 15 of Pub. L. 99–521, set out as a note under section 10102 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–554 effective May 1, 1985, except as otherwise provided, see section 226(d) of Pub. L. 98–554, set out as an Effective Date note under section 10530 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–261 effective on 60th day after Sept. 20, 1982, see section 31(a) of Pub. L. 97–261, set out as a note under section 10101 of this title.

FINANCIAL RESPONSIBILITY

Section 18(a)–(g) of Pub. L. 97–261, as amended by Pub. L. 98–554, title II, § 224, Oct. 30, 1984, 98 Stat. 2847, which directed Secretary of Transportation to establish regulations to require minimal levels of financial responsibility sufficient to satisfy liability amounts to be determined by Secretary covering public liability and property damage for transportation of passengers for hire by motor vehicle in the United States from place in State to place in another State, from place in State to another place in such State through place outside such State, and between place in State and place outside of United States, was repealed and reenacted as

section 31138 of this title by Pub. L. 103–272, §§1(e), 7(b), July 5, 1994, 108 Stat. 1005, 1379.

MINIMUM FINANCIAL RESPONSIBILITY FOR MOTOR CARRIERS ENGAGED IN TRANSPORTATION OF PROPERTY FOR HIRE FOR PUBLIC LIABILITY, PROPERTY DAMAGE, AND ENVIRONMENTAL RESTORATION; OIL OR HAZARDOUS MATERIALS, SUBSTANCES, OR WASTES; PENALTY; REPORT TO CONGRESS; VEHICLES AFFECTED; DEFINITIONS

Section 30 of Pub. L. 96–296, as amended by Pub. L. 97–424, title IV, §406, Jan. 6, 1983, 96 Stat. 2158; Pub. L. 98–554, title II, §222, Oct. 30, 1984, 98 Stat. 2846; Pub. L. 100–690, title IX, §9112, Nov. 18, 1988, 102 Stat. 4534; Pub. L. 101–615, §23, Nov. 16, 1990, 104 Stat. 3272, which related to minimum financial responsibility for motor carriers engaged in transportation of property for hire for public liability, property damage, and environmental restoration, oil or hazardous materials, substances or wastes, penalties, reports to Congress, vehicles affected, and pertinent definitions, was repealed and reenacted as section 31139 of this title by Pub. L. 103–272, §§1(e), 7(b), July 5, 1994, 108 Stat. 1006, 1379.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10505, 10922, 10923, 10924, 10925, 11708 of this title.

§ 10928. Temporary authority for motor and water carriers

(a) Without regard to subchapter II of chapter 103 of this title and subchapter II of chapter 5 of title 5, the Interstate Commerce Commission may grant a water carrier temporary authority to provide transportation to a place or in an area having, respectively, no water carrier capable of meeting the immediate needs of the place or area. Unless suspended or revoked, the Commission may grant the temporary authority for not more than 180 days. A grant of temporary authority does not establish a presumption that permanent authority to provide transportation will be granted under this subchapter.

(b)(1) Without regard to subchapter II of chapter 103 of this title and subchapter II of chapter 5 of title 5, the Commission, pursuant to such regulations as the Commission may issue, may grant a motor carrier temporary authority to provide transportation to a place or in an area having no motor carrier capable of meeting the immediate needs of the place or area. Unless suspended or revoked, the Commission may grant the temporary authority for not more than 270 days. A grant of temporary authority does not establish a presumption that permanent authority to provide transportation will be granted under this subchapter.

(2) The Commission shall take final action upon an application filed under this subsection no later than 90 days after the date the application is filed with the Commission.

(c)(1) Without regard to subchapter II of chapter 103 of this title and subchapter II of chapter 5 of title 5, the Commission, pursuant to such regulations as the Commission may issue, may grant a motor carrier emergency temporary authority to provide transportation to a place or in an area having no motor carrier capable of meeting the immediate needs of the place or area if the Commission determines that, due to emergency conditions, there is not sufficient time to process an application for temporary authority under subsection (b) of this section. Unless suspended or revoked, the Commission may grant the emergency temporary authority for not more than 30 days, and the Commission may extend such authority for a period of not more than 90 days and, in addition, in the case of a motor carrier of passengers, the Commission may extend such authority for a period of more than 90 days but not more than 180 days if no other motor carrier of passengers is providing transportation to the place or in the area. A grant of emergency temporary authority does not establish a presumption that permanent authority to provide transportation will be granted under this subchapter.

(2) The Commission shall take final action upon an application filed under this subsection not later than 15 days after the date the application is filed with the Commission.

(Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1414; Pub. L. 96–296, §23, July 1, 1980, 94 Stat. 814; Pub. L. 97–261, §15, Sept. 20, 1982, 96 Stat. 1114.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
10928	49:310a(a), (c).	Feb. 4, 1887, ch. 104, 24 Stat. 379, §210a(a), (c); added June 29, 1938, ch. 811, §10, 52 Stat. 1238; Mar. 27, 1942, ch. 199, §102, 56 Stat. 177.
	49:911(a).	Feb. 4, 1887, ch. 104, 24 Stat. 379, §311(a); added Sept. 18, 1940, ch. 722, §201, 54 Stat. 943.

The word "transportation" is substituted each place for "service" and "transportation service" for consistency and as being more precise because the jurisdictional grant to the Interstate Commerce Commission under subchapter III of chapter 105 of the revised title is jurisdiction over transportation. The words "Without regard to subchapter II of chapter 103 of this title and subchapter II of chapter 5 of title 5" are substituted for "without hearings or other proceedings" as being more precise. The words "motor carrier or water carrier" are inserted before "carrier capable" for clarity. The phrase "not more than 180 days" is retained. The amendments made by sections 102 and 103 of the Act of March 27, 1942, striking the words "not to exceed 180 days" expired on March 31, 1947, and the words struck out were restored to the law, by virtue of section 1501 of the same Act, as amended (60 Stat. 345; 50 U.S.C. app. 645). The words "and urgent" are omitted as redundant. The words "place" and "area" are substituted for "point" and "territory", respectively, for consistency. The words "or points" are omitted as unnecessary. The words "in its discretion" are omitted as surplus. The words "Unless suspended or revoked" are made applicable to 49:911(a) for clarity and consistency. The words "under this subchapter" are inserted for clarity. 49:310a(c) is omitted for consistency and as being unnecessary in view of the authority of the Commission to grant the authority and the general authority of the Commission under section 10321(a) of the revised title to carry out the subtitle.

AMENDMENTS

1982—Subsec. (a). Pub. L. 97–261, §15(1), struck out "motor carrier of passengers or" before "water carrier" wherever appearing.

Subsec. (b)(1). Pub. L. 97–261, §15(2), struck out "of property" after "motor carrier" wherever appearing.

Subsec. (c)(1). Pub. L. 97–261, §15(3), struck out "of property" after "motor carrier" wherever appearing, and inserted to the provisions relating to the duration of a grant of emergency temporary transportation authority further provision that in the case of a motor carrier of passengers, the Commission may extend such

Pub. L. 109–59, title IV, §4305(a), Aug. 10, 2005, 119 Stat. 1764, as amended by Pub. L. 110–53, title XV, §1537(c), Aug. 3, 2007, 121 Stat. 467, struck out item 14504 "Registration of motor carriers by a State", effective Jan. 1, 2008.

§ 14501. Federal authority over intrastate transportation

(a) MOTOR CARRIERS OF PASSENGERS.—

(1) LIMITATION ON STATE LAW.—No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to—

(A) scheduling of interstate or intrastate transportation (including discontinuance or reduction in the level of service) provided by a motor carrier of passengers subject to jurisdiction under subchapter I of chapter 135 of this title on an interstate route;

(B) the implementation of any change in the rates for such transportation or for any charter transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required; or

(C) the authority to provide intrastate or interstate charter bus transportation.

This paragraph shall not apply to intrastate commuter bus operations, or to intrastate bus transportation of any nature in the State of Hawaii.

(2) MATTERS NOT COVERED.—Paragraph (1) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle, or the authority of a State to regulate carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

(b) FREIGHT FORWARDERS AND BROKERS.—

(1) GENERAL RULE.—Subject to paragraph (2) of this subsection, no State or political subdivision thereof and no intrastate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to intrastate rates, intrastate routes, or intrastate services of any freight forwarder or broker.

(2) CONTINUATION OF HAWAII'S AUTHORITY.—Nothing in this subsection and the amendments made by the Surface Freight Forwarder Deregulation Act of 1986 shall be construed to affect the authority of the State of Hawaii to continue to regulate a motor carrier operating within the State of Hawaii.

(c) MOTOR CARRIERS OF PROPERTY.—

(1) GENERAL RULE.—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States 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 (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) MATTERS NOT COVERED.—Paragraph (1)—

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the intrastate transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

(3) STATE STANDARD TRANSPORTATION PRACTICES.—

(A) CONTINUATION.—Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to—

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent-van line operations (as set forth in section 13907),

if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) REQUIREMENTS.—A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if—

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this part or a regulation issued by the Secretary or the Board under this part; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) ELECTION.—Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

(4) NONAPPLICABILITY TO HAWAII.—This subsection shall not apply with respect to the State of Hawaii.

(5) LIMITATION ON STATUTORY CONSTRUCTION.—Nothing in this section shall be construed to prevent a State from requiring that, in the case of a motor vehicle to be towed from private property without the consent of the owner or operator of the vehicle, the person towing the vehicle have prior written authorization from the property owner or lessee (or an employee or agent thereof) or that such owner or lessee (or an employee or agent thereof) be present at the time the vehicle is towed from the property, or both.

(d) PRE-ARRANGED GROUND TRANSPORTATION.—

(1) IN GENERAL.—No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law requiring a license or fee on account of the fact that a motor vehicle is providing pre-arranged ground transportation service if the motor carrier providing such service—

(A) meets all applicable registration requirements under chapter 139 for the interstate transportation of passengers;

(B) meets all applicable vehicle and intrastate passenger licensing requirements of the State or States in which the motor carrier is domiciled or registered to do business; and

(C) is providing such service pursuant to a contract for—

(i) transportation by the motor carrier from one State, including intermediate stops, to a destination in another State; or

(ii) transportation by the motor carrier from one State, including intermediate stops in another State, to a destination in the original State.

(2) INTERMEDIATE STOP DEFINED.—In this section, the term "intermediate stop", with respect to transportation by a motor carrier, means a pause in the transportation in order for one or more passengers to engage in personal or business activity, but only if the driver providing the transportation to such passenger or passengers does not, before resuming the transportation of such passenger (or at least 1 of such passengers), provide transportation to any other person not included among the passengers being transported when the pause began.

(3) MATTERS NOT COVERED.—Nothing in this subsection shall be construed—

(A) as subjecting taxicab service to regulation under chapter 135 or section 31138;

(B) as prohibiting or restricting an airport, train, or bus terminal operator from contracting to provide preferential access or facilities to one or more providers of pre-arranged ground transportation service; and

(C) as restricting the right of any State or political subdivision of a State to require, in a nondiscriminatory manner, that any individual operating a vehicle providing pre-arranged ground transportation service originating in the State or political subdivision have submitted to pre-licensing drug testing or a criminal background investigation of the records of the State in which the operator is domiciled, by the State or political subdivision by which the operator is licensed to provide such service, or by the motor carrier providing such service, as a condition of providing such service.

(Added Pub. L. 104–88, title I, §103, Dec. 29, 1995, 109 Stat. 899; amended Pub. L. 105–178, title IV, §4016, June 9, 1998, 112 Stat. 412; Pub. L. 105–277, div. C, title I, §106, Oct. 21, 1998, 112 Stat. 2681–586; Pub. L. 107–298, §2, Nov. 26, 2002, 116 Stat. 2342; Pub. L. 109–59, title IV, §§4105(a), 4206(a), Aug. 10, 2005, 119 Stat. 1717, 1754.)

REFERENCES IN TEXT

The Surface Freight Forwarder Deregulation Act of 1986, referred to in subsec. (b)(2), is Pub. L. 99–521, Oct. 22, 1986, 100 Stat. 2993. For complete classification of this Act to the Code, see Short Title of 1986 Amendment note set out under section 10101 of this title and Tables.

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 11501 of this title prior to the general amendment of this subtitle by Pub. L. 104–88, §102(a).

AMENDMENTS

2005—Subsec. (c)(2)(B). Pub. L. 109–59, §4206(a), inserted "intrastate" before "transportation".

Subsec. (c)(5). Pub. L. 109–59, §4105(a), added par. (5).

2002—Subsec. (d). Pub. L. 107–298 added subsec. (d).

1998—Subsec. (a). Pub. L. 105–178 reenacted heading without change and amended text of subsec. (a) generally. Prior to amendment, text read as follows: "No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to scheduling of interstate or intrastate transportation (including discontinuance or reduction in the level of service) provided by motor carrier of passengers subject to jurisdiction under subchapter I of chapter 135 of this title on an interstate route or relating to the implementation of any change in the rates for such transportation or for any charter transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required. This subsection shall not apply to intrastate commuter bus operations."

Subsec. (a)(1). Pub. L. 105–277 substituted "operations, or to intrastate bus transportation of any nature in the State of Hawaii" for "operations" in concluding provisions.

EFFECTIVE DATE

Chapter effective Jan. 1, 1996, except as otherwise provided in Pub. L. 104–88, see section 2 of Pub. L. 104–88, set out as a note under section 701 of this title.

§ 14502. Tax discrimination against motor carrier transportation property

(a) DEFINITIONS.—In this section, the following definitions apply:

(1) ASSESSMENT.—The term "assessment" means valuation for a property tax levied by a taxing district.

(2) ASSESSMENT JURISDICTION.—The term "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) MOTOR CARRIER TRANSPORTATION PROPERTY.—The term "motor carrier transpor-

the free time allocated for the shipment, under circumstances not attributable to the performance of the carrier.

[44 FR 4681, Jan. 23, 1979, as amended at 49 FR 47850, Dec. 7, 1984; 62 FR 15424, Apr. 1, 1997]

Subpart B—Leasing Regulations

§ 376.11 General leasing requirements.

Other than through the interchange of equipment as set forth in § 376.31, and under the exemptions set forth in subpart C of these regulations, the authorized carrier may perform authorized transportation in equipment it does not own only under the following conditions:

(a) There shall be a written lease granting the use of the equipment and meeting the requirements contained in § 376.12.

(b) Receipts, specifically identifying the equipment to be leased and stating the date and time of day possession is transferred, shall be given as follows:

(1) When possession of the equipment is taken by the authorized carrier, it shall give the owner of the equipment a receipt. The receipt identified in this section may be transmitted by mail, telegraph, or other similar means of communication.

(2) When possession of the equipment by the authorized carrier ends, a receipt shall be given in accordance with the terms of the lease agreement if the lease agreement requires a receipt.

(3) Authorized representatives of the carrier and the owner may take possession of leased equipment and give and receive the receipts required under this subsection.

(c) The authorized carrier acquiring the use of equipment under this section shall identify the equipment as being in its service as follows:

(1) During the period of the lease, the carrier shall identify the equipment in accordance with the FMCSA's requirements in 49 CFR part 390 of this chapter (Identification of Vehicles).

(2) Unless a copy of the lease is carried on the equipment, the authorized carrier shall keep a statement with the equipment during the period of the lease certifying that the equipment is being operated by it. The statement shall also specify the name of the owner, the date and length of the lease, any restrictions in the lease relative to the commodities to be transported, and the address at which the original lease is kept by the authorized carrier. This statement shall be prepared by the authorized carrier or its authorized representative.

(d) The authorized carrier using equipment leased under this section shall keep records of the equipment as follows:

(1) The authorized carrier shall prepare and keep documents covering each trip for which the equipment is used in its service. These documents shall contain the name and address of the owner of the equipment, the point of origin, the time and date of departure, and the point of final destination. Also, the authorized carrier shall carry papers with the leased equipment during its operation containing this information and identifying the lading and clearly indicating that the transportation is under its responsibility. These papers shall be preserved by the authorized carrier as part of its transportation records. Leases which contain the information required by the provisions in this paragraph may be used and retained instead of such documents or papers. As to lease agreements negotiated under a master lease, this provision is complied with by having a copy of a master lease in the unit of equipment in question and where the balance f documentation called for by this paragraph is included in the freight documents prepared for the specific movement.

(2) [Reserved]

[44 FR 4681, Jan. 23, 1979, as amended at 49 FR 47269, Dec. 3, 1984; 49 FR 47850, Dec. 7, 1984; 50 FR 24649, June 12, 1985; 51 FR 37406, Oct. 22, 1986; 62 FR 15424, Apr. 1, 1997]

§ 376.12 Written lease requirements.

Except as provided in the exemptions set forth in subpart C of this part, the written lease required under § 376.11(a) shall contain the following provisions. The required lease provisions shall be adhered to and performed by the authorized carrier.

(a) The lease shall be made between the authorized carrier and the

the free time allocated for the shipment, under circumstances not attributable to the performance of the carrier.

[44 FR 4681, Jan. 23, 1979, as amended at 49 FR 47850, Dec. 7, 1984; 62 FR 15424, Apr. 1, 1997]

Subpart B—Leasing Regulations

§376.11 General leasing requirements.

Other than through the interchange of equipment as set forth in §376.31, and under the exemptions set forth in subpart C of these regulations, the authorized carrier may perform authorized transportation in equipment it does not own only under the following conditions:

(a) There shall be a written lease granting the use of the equipment and meeting the requirements contained in §376.12.

(b) Receipts, specifically identifying the equipment to be leased and stating the date and time of day possession is transferred, shall be given as follows:

(1) When possession of the equipment is taken by the authorized carrier, it shall give the owner of the equipment a receipt. The receipt identified in this section may be transmitted by mail, telegraph, or other similar means of communication.

(2) When possession of the equipment by the authorized carrier ends, a receipt shall be given in accordance with the terms of the lease agreement if the lease agreement requires a receipt.

(3) Authorized representatives of the carrier and the owner may take possession of leased equipment and give and receive the receipts required under this subsection.

(c) The authorized carrier acquiring the use of equipment under this section shall identify the equipment as being in its service as follows:

(1) During the period of the lease, the carrier shall identify the equipment in accordance with the FMCSA's requirements in 49 CFR part 390 of this chapter (Identification of Vehicles).

(2) Unless a copy of the lease is carried on the equipment, the authorized carrier shall keep a statement with the equipment during the period of the lease certifying that the equipment is being operated by it. The statement shall also specify the name of the owner, the date and length of the lease, any restrictions in the lease relative to the commodities to be transported, and the address at which the original lease is kept by the authorized carrier. This statement shall be prepared by the authorized carrier or its authorized representative.

(d) The authorized carrier using equipment leased under this section shall keep records of the equipment as follows:

(1) The authorized carrier shall prepare and keep documents covering each trip for which the equipment is used in its service. These documents shall contain the name and address of the owner of the equipment, the point of origin, the time and date of departure, and the point of final destination. Also, the authorized carrier shall carry papers with the leased equipment during its operation containing this information and identifying the lading and clearly indicating that the transportation is under its responsibility. These papers shall be preserved by the authorized carrier as part of its transportation records. Leases which contain the information required by the provisions in this paragraph may be used and retained instead of such documents or papers. As to lease agreements negotiated under a master lease, this provision is complied with by having a copy of a master lease in the unit of equipment in question and where the balance f documentation called for by this paragraph is included in the freight documents prepared for the specific movement.

(2) [Reserved]

[44 FR 4681, Jan. 23, 1979, as amended at 49 FR 47269, Dec. 3, 1984; 49 FR 47850, Dec. 7, 1984; 50 FR 24649, June 12, 1985; 51 FR 37406, Oct. 22, 1986; 62 FR 15424, Apr. 1, 1997]

§376.12 Written lease requirements.

Except as provided in the exemptions set forth in subpart C of this part, the written lease required under §376.11(a) shall contain the following provisions. The required lease provisions shall be adhered to and performed by the authorized carrier.

(a) The lease shall be made between the authorized carrier and the

owner of the equipment. The lease shall be signed by these parties or by their authorized representatives.

(b) The lease shall specify the time and date or the circumstances on which the lease begins and ends. These times or circumstances shall coincide with the times for the giving of receipts required by § 376.11(b).

(c) (1) 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.

(2) Provision may be made in the lease for considering the authorized carrier lessee as the owner of the equipment for the purpose of subleasing it under these regulations to other authorized carriers during the lease.

(3) When an authorized carrier of household goods leases equipment for the transportation of household goods, as defined by the Secretary, the parties may provide in the lease that the provisions required by paragraph (c)(1) of this section apply only during the time the equipment is operated by or for the authorized carrier lessee.

(4) 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.

(d) The amount to be paid by the authorized carrier for equipment and driver's services shall be clearly stated on the face of the lease or in an addendum which is attached to the lease. Such lease or addendum shall be delivered to the lessor prior to the commencement of any trip in the service of the authorized carrier. An authorized representative of the lessor may accept these documents. The amount to be paid may be expressed as a percentage of gross revenue, a flat rate per mile, a variable rate depending on the direction traveled or the type of commodity transported, or by any other method of compensation mutually agreed upon by the parties to the lease. The compensation stated on the lease or in the attached addendum may apply to equipment and driver's services either separately or as a combined amount.

(e) The lease shall clearly specify which party is responsible for removing identification devices from the equipment upon the termination of the lease and when and how these devices, other than those painted directly on the equipment, will be returned to the carrier. The lease shall clearly specify the manner in which a receipt will be given to the authorized carrier by the equipment owner when the latter retakes possession of the equipment upon termination of the lease agreement, if a receipt is required at all by the lease. The lease shall clearly specify the responsibility of each party with respect to the cost of fuel, fuel taxes, empty mileage, permits of all types, tolls, ferries, detention and accessorial services, base plates and licenses, and any unused portions of such items. The lease shall clearly specify who is responsible for loading and unloading the property onto and from the motor vehicle, and the compensation, if any, to be paid for this service. Except when the violation results from the acts or omissions of the lessor, the authorized carrier lessee shall assume the risks and costs of fines for overweight and oversize trailers when the trailers are pre-loaded, sealed, or the load is containerized, or when the trailer or lading is otherwise outside of the lessor's control, and for improperly permitted overdimension and overweight loads and shall reimburse the lessor for any fines paid by the lessor. If the authorized carrier is authorized to receive a refund or a credit for base plates purchased by the lessor from, and issued in the name of, the authorized carrier, or if the base plates are authorized to be sold by the authorized carrier to another lessor the authorized carrier shall refund to the initial lessor on whose behalf the base plate was first obtained a prorated share of the amount received.

(f) The lease shall specify that payment to the lessor shall be made within 15 days after submission of the necessary delivery documents and other paperwork concerning a trip in the service of the authorized carrier. The paperwork required before the lessor can receive payment is limited to log books required by the Department of Transportation and those documents necessary for the authorized carrier to secure payment from the shipper. In addition, the lease may provide that, upon termination of the lease agreement, as a condition precedent to payment, the lessor shall remove all identification devices of the authorized carrier and, except in the case of identification painted directly on equipment, return them to the carrier. If the identification device has been lost or stolen, a letter certifying its removal will satisfy this requirement. Until this requirement is complied with, the carrier may withhold final payment. The authorized carrier may require the submission of additional documents by the lessor but not as a prerequisite to payment. Payment to the lessor shall not be made contingent upon submission of a bill of lading to which no exceptions have been taken. The authorized carrier shall not set time limits for the submission by the lessor of required delivery documents and other paperwork.

(g) When a lessor's revenue is based on a percentage of the gross revenue for a shipment, the lease must specify that the authorized carrier will give the lessor, before or at the time of settlement, a copy of the rated freight bill or a computer-generated document containing the same information, or, in the case of contract carriers, any other form of documentation actually used for a shipment containing the same information that would appear on a rated freight bill. When a computer-generated document is provided, the lease will permit lessor to view, during normal business hours, a copy of any actual document underlying the computer-generated document. Regardless of the method of compensation, the lease must permit lessor to examine copies of the carrier's tariff or, in the case of contract carriers, other documents from which rates and charges are computed, provided that where rates and charges are computed from a contract of a contract carrier, only those portions of the contract containing the same information that would appear on a rated freight bill need be disclosed. The authorized carrier may delete the names of shippers and consignees shown on the freight bill or other form of documentation.

(h) The lease shall clearly specify all items that may be initially paid for by the authorized carrier, but ultimately deducted from the lessor's compensation at the time of payment or settlement, together with a recitation as to how the amount of each item is to be computed. The lessor shall be afforded copies of those documents which are necessary to determine the validity of the charge.

(i) The lease shall specify that the lessor is not required to purchase or rent any products, equipment, or services from the authorized carrier as a condition of entering into the lease arrangement. The lease shall specify the terms of any agreement in which the lessor is a party to an equipment purchase or rental contract which gives the authorized carrier the right to make deductions from the lessor's compensation for purchase or rental payments.

(j) (1) The lease shall clearly specify the legal obligation of the authorized carrier to maintain insurance coverage for the protection of the public pursuant to FMCSA regulations under 49 U.S.C. 13906. The lease shall further specify who is responsible for providing any other insurance coverage for the operation of the leased equipment, such as bobtail insurance. If the authorized carrier will make a charge back to the lessor for any of this insurance, the lease shall specify the amount which will be charged-back to the lessor.

(2) If the lessor purchases any insurance coverage for the operation of the leased equipment from or through the authorized carrier, the lease shall specify that the authorized carrier will provide the lessor with a copy of each policy upon the request of the lessor.

Also, where the lessor purchases such insurance in this manner, the lease shall specify that the authorized carrier will provide the lessor with a certificate of insurance for each such policy. Each certificate of insurance shall include the name of the insurer, the policy number, the effective dates of the policy, the amounts and types of coverage, the cost to the lessor for each type of coverage, and the deductible amount for each type of coverage for which the lessor may be liable.

(3) The lease shall clearly specify the conditions under which deductions for cargo or property damage may be made from the lessor's settlements. The lease shall further specify that the authorized carrier must provide the lessor with a written explanation and itemization of any deductions for cargo or property damage made from any compensation of money owed to the lessor. The written explanation and itemization must be delivered to the lessor before any deductions are made.

(k) If escrow funds are required, the lease shall specify:

(1) The amount of any escrow fund or performance bond required to be paid by the lessor to the authorized carrier or to a third party.

(2) The specific items to which the escrow fund can be applied.

(3) That while the escrow fund is under the control of the authorized carrier, the authorized carrier shall provide an accounting to the lessor of any transactions involving such fund. The carrier shall perform this accounting in one of the following ways:

(i) By clearly indicating in individual settlement sheets the amount and description of any deduction or addition made to the escrow fund; or

(ii) By providing a separate accounting to the lessor of any transactions involving the escrow fund. This separate accounting shall be done on a monthly basis.

(4) The right of the lessor to demand to have an accounting for transactions involving the escrow fund at any time.

(5) That while the escrow fund is under the control of the carrier, the carrier shall pay interest on the escrow fund on at least a quarterly basis. For purposes of calculating the balance of the escrow fund on which interest must be paid, the carrier may deduct a sum equal to the average advance made to the individual lessor during the period of time for which interest is paid. The interest rate shall be established on the date the interest period begins and shall be at least equal to the average yield or equivalent coupon issue yield on 91-day, 13-week Treasury bills as established in the weekly auction by the Department of Treasury.

(6) The conditions the lessor must fulfill in order to have the escrow fund returned. At the time of the return of the escrow fund, the authorized carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in the lease, and shall provide a final accounting to the lessor of all such final deductions made to the escrow fund. The lease shall further specify that in no event shall the escrow fund be returned later than 45 days from the date of termination.

(l) An original and two copies of each lease shall be signed by the parties. The authorized carrier shall keep the original and shall place a copy of the lease on the equipment during the period of the lease unless a statement as provided for in § 376.11(c)(2) is carried on the equipment instead. The owner of the equipment shall keep the other copy of the lease.

(m) This paragraph applies to owners who are not agents but whose equipment is used by an agent of an authorized carrier in providing transportation on behalf of that authorized carrier. In this situation, the authorized carrier is obligated to ensure that these owners receive all the rights and benefits due an owner under the leasing regulations, especially those set forth in paragraphs (d)–(k) of this section. This is true regardless of whether the lease for the equipment is directly between the authorized carrier and its agent rather than directly between the authorized carrier and each of these owners. The lease between an authorized carrier

and its agent shall specify this obligation.

[44 FR 4681, Jan. 23, 1979, as amended at 45 FR 13092, Feb. 28, 1980; 47 FR 28398, June 30, 1982; 47 FR 51140, Nov. 12, 1982; 47 FR 54083, Dec. 1, 1982; 49 FR 47851, Dec. 7, 1984; 51 FR 37406, 37407, Oct. 22, 1986; 52 FR 2412, Jan. 22, 1987; 57 FR 32905, July 24, 1992; 62 FR 15424, Apr. 1, 1997]

Subpart C—Exemptions for the Leasing Regulations

§ 376.21 General exemptions.

Except for § 376.11(c) which requires the identification of equipment, the leasing regulations in this part shall not apply to:

(a) Equipment used in substituted motor-for-rail transportation of railroad freight moving between points that are railroad stations and on railroad billing.

(b) Equipment used in transportation performed exclusively within any commercial zone as defined by the Secretary.

(c) Equipment leased without drivers from a person who is principally engaged in such a business.

(d) Any type of trailer not drawn by a power unit leased from the same lessor.

[44 FR 4681, Jan. 23, 1979. Redesignated at 61 FR 54707, Oct. 21, 1996, as amended at 62 FR 15424, Apr. 1, 1997]

§ 376.22 Exemption for private carrier leasing and leasing between authorized carriers.

Regardless of the leasing regulations set forth in this part, an authorized carrier may lease equipment to or from another authorized carrier, or a private carrier may lease equipment to an authorized carrier under the following conditions:

(a) The identification of equipment requirements in § 376.11(c) must be complied with;

(b) The lessor must own the equipment or hold it under a lease;

(c) There must be a written agreement between the authorized carriers or between the private carrier and authorized carrier, as the case may be, concerning the equipment as follows:

(1) It must be signed by the parties or their authorized representatives.

(2) It must provide that control and responsibility for the operation of the equipment shall be that of the lessee from the time possession is taken by the lessee and the receipt required under § 376.11(b) is given to the lessor until: (i) Possession of the equipment is returned to the lessor and the receipt required under § 376.11(b) is received by the authorized carrier; or (ii) in the event that the agreement is between authorized carriers, possession of the equipment is returned to the lessor or given to another authorized carrier in an interchange of equipment.

(3) A copy of the agreement must be carried in the equipment while it is in the possession of the lessee.

(4) Nothing in this section shall prohibit the use, by authorized carriers, private carriers, and all other entities conducting lease operations pursuant to this section, of a master lease if a copy of that master lease is carried in the equipment while it is in the possession of the lessee, and if the master lease complies with the provisions of this section and receipts are exchanged in accordance with § 376.11(b), and if records of the equipment are prepared and maintained in accordance with § 376.11(d).

(d) Authorized and private carriers under common ownership and control may lease equipment to each other under this section without complying with the requirements of paragraph (a) of this section pertaining to identification of equipment, and the requirements of paragraphs (c)(2) and (c)(4) of this section pertaining to equipment receipts. The leasing of equipment between such carriers will be subject to all other requirements of this section.

[49 FR 9570, Mar. 14, 1984, as amended at 49 FR 47269, Dec. 3, 1984; 49 FR 47851, Dec. 7, 1984; 62 FR 15424, Apr. 1, 1997; 63 FR 40838, July 31, 1998]

§ 376.26 Exemption for leases between authorized carriers and their agents.

The leasing regulations set forth in § 376.12(e) through (l) do not apply to leases between authorized carriers and their agents.

[47 FR 28398, June 30, 1982, as amended at 62 FR 15424, Apr. 1, 1997]

time of day possession is transferred, shall be given as follows:

(1) When possession of the equipment is taken by the authorized carrier, it shall give the owner of the equipment a receipt. The receipt identified in this section may be transmitted by mail, telegraph, or other similar means of communication.

(2) When possession of the equipment by the authorized carrier ends, a receipt shall be given in accordance with the terms of the lease agreement if the lease agreement requires a receipt.

(3) Authorized representatives of the carrier and the owner may take possession of leased equipment and give and receive the receipts required under this subsection.

(c) . The authorized carrier acquiring the use of equipment under this section shall identify the equipment as being in its service as follows:

(1) During the period of the lease, the carrier shall identify the equipment in accordance with the Commission's requirements in part 1058 of this chapter (Identification of Vehicles).

(2) Unless a copy of the lease is carried on the equipment, the authorized carrier shall keep a statement with the equipment during the period of the lease certifying that the equipment is being operated by it. The statement shall also specify the name of the owner, the date and length of the lease, any restrictions in the lease relative to the commodities to be transported, and the address at which the original lease is kept by the authorized carrier. This statement shall be prepared by the authorized carrier or its authorized representative.

(d) . The authorized carrier using equipment leased under this section shall keep records of the equipment as follows:

(1) The authorized carrier shall prepare and keep documents covering each trip for which the equipment is used in its service. These documents shall contain the name and address of the owner of the equipment, the point of origin, the time and date of departure, and the point of final destination. Also, the authorized carrier shall carry papers with the leased equipment during its operation containing this information and identifying the lading and clearly indicating that the transportation is under its responsibility. These papers shall be preserved by the authorized carrier as part of its transportation records. Leases which contain the information required by the provisions in this paragraph may be used and retained instead of such documents or papers. As to lease agreements negotiated under a master lease, this provision is complied with by having a copy of a master lease in the unit of equipment in question and where the balance of documentation called for by this paragraph is included in the freight documents prepared for the specific movement.

(2) [Reserved]

[44 FR 4681, Jan. 23, 1979, as amended at 49 FR 47269, Dec. 3, 1984; 49 FR 47850, Dec. 7, 1984; 50 FR 24649, June 12, 1985; 51 FR 37406, Oct. 22, 1986]

§ 1057.12 Written lease requirements.

Except as provided in the exemptions set forth in subpart C of this part, the written lease required under § 1057.11(a) shall contain the following provisions. The required lease provisions shall be adhered to and performed by the authorized carrier.

(a) The lease shall be made between the authorized carrier and the owner of the equipment. The lease shall be signed by these parties or by their authorized representatives.

(b) The lease shall specify the time and date or the circumstances on which the lease begins and ends. These times or circumstances shall coincide with the times for the giving of receipts required by § 1057.11(b).

(c)

. (1) 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.

(2) Provision may be made in the lease for considering the authorized carrier lessee as the owner of the equipment for the purpose of subleasing it under these regulations to other authorized carriers during the lease.

(3) When an authorized carrier of household goods leases equipment for the transportation of household goods, as defined by the Commission, the parties may provide in the lease that the provisions required by paragraph (c)(1) of this section apply only during the time the equipment is operated by or for the authorized carrier lessee.

(4) 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. 11107 and attendant administrative requirements.

(d) The amount to be paid by the authorized carrier for equipment and driver's services shall be clearly stated on the face of the lease or in an addendum which is attached to the lease. Such lease or addendum shall be delivered to the lessor prior to the commencement of any trip in the service of the authorized carrier. An authorized representative of the lessor may accept these documents. The amount to be paid may be expressed as a percentage of gross revenue, a flat rate per mile, a variable rate depending on the direction traveled or the type of commodity transported, or by any other method of compensation mutually agreed upon by the parties to the lease. The compensation stated on the lease or in the attached addendum may apply to equipment and driver's services either separately or as a combined amount.

(e) The lease shall clearly specify which party is responsible for removing identification devices from the equipment upon the termination of the lease and when and how these devices, other than those painted directly on the equipment, will be returned to the carrier. The lease shall clearly specify the manner in which a receipt will be given to the authorized carrier by the equipment owner when the latter retakes possession of the equipment upon termination of the lease agreement, if a receipt is required at all by the lease. The lease shall clearly specify the responsibility of each party with respect to the cost of fuel, fuel taxes, empty mileage, permits of all types, tolls, ferries, detention and accessorial services, base plates and licenses, and any unused portions of such items. The lease shall clearly specify who is responsible for loading and unloading the property onto and from the motor vehicle, and the compensation, if any, to be paid for this service. Except when the violation results from the acts or omissions of the lessor, the authorized carrier lessee shall assume the risks and costs of fines for overweight and oversize trailers when the trailers are pre-loaded, sealed, or the load is containerized, or when the trailer or lading is otherwise outside of the lessor's control, and for improperly permitted overdimension and overweight loads and shall reimburse the lessor for any fines paid by the lessor. If the authorized carrier is authorized to receive a refund or a credit for base plates purchased by the lessor from, and issued in the name of, the authorized carrier, or if the base plates are authorized to be sold by the authorized carrier to another lessor the authorized carrier shall refund to the initial lessor on whose behalf the base plate was first obtained a prorated share of the amount received.

(f) The lease shall specify that payment to the lessor shall be made within 15 days after submission of the necessary delivery documents and other paperwork concerning a trip in the service of the authorized carrier. The paperwork required before the lessor can receive payment is limited to log books required by the Department of Transportation and those documents necessary for the authorized carrier to secure payment from the shipper. In addition, the lease may provide that, upon termination of the lease agreement, as a condition precedent to payment, the lessor shall remove all identification devices of the authorized carrier and, except in the case of identification painted directly on equipment, return them to the carrier. If the identification device has been lost or stolen, a letter certifying its removal will satisfy this requirement. Until this requirement is complied with, the carrier may withhold final payment. The authorized carrier

may require the submission of additional documents by the lessor but not as a prerequisite to payment. Payment to the lessor shall not be made contingent upon submission of a bill of lading to which no exceptions have been taken. The authorized carrier shall not set time limits for the submission by the lessor of required delivery documents and other paperwork.

(g) When a lessor's revenue is based on a percentage of the gross revenue for a shipment, the lease must specify that the authorized carrier will give the lessor, before or at the time of settlement, a copy of the rated freight bill or a computer-generated document containing the same information, or, in the case of contract carriers, any other form of documentation actually used for a shipment containing the same information that would appear on a rated freight bill. When a computer-generated document is provided, the lease will permit lessor to view, during normal business hours, a copy of any actual document underlying the computer-generated document. Regardless of the method of compensation, the lease must permit lessor to examine copies of the carrier's tariff or, in the case of contract carriers, other documents from which rates and charges are computed, provided that where rates and charges are computed from a contract of a contract carrier, only those portions of the contract containing the same information that would appear on a rated freight bill need be disclosed. The authorized carrier may delete the names of shippers and consignees shown on the freight bill or other form of documentation.

(h) The lease shall clearly specify all items that may be initially paid for by the authorized carrier, but ultimately deducted from the lessor's compensation at the time of payment or settlement, together with a recitation as to how the amount of each item is to be computed. The lessor shall be afforded copies of those documents which are necessary to determine the validity of the charge.

(i) The lease shall specify that the lessor is not required to purchase or rent any products, equipment, or services from the authorized carrier as a condition of entering into the lease arrangement. The lease shall specify the terms of any agreement in which the lessor is a party to an equipment purchase or rental contract which gives the authorized carrier the right to make deductions from the lessor's compensation for purchase or rental payments.

(j) (1) The lease shall clearly specify the legal obligation of the authorized carrier to maintain insurance coverage for the protection of the public pursuant to Commission regulations under 49 U.S.C. 10927. The lease shall further specify who is responsible for providing any other insurance coverage for the operation of the leased equipment, such as bobtail insurance. If the authorized carrier will make a charge back to the lessor for any of this insurance, the lease shall specify the amount which will be charged-back to the lessor.

(2) If the lessor purchases any insurance coverage for the operation of the leased equipment from or through the authorized carrier, the lease shall specify that the authorized carrier will provide the lessor with a copy of each policy upon the request of the lessor. Also, where the lessor purchases such insurance in this manner, the lease shall specify that the authorized carrier will provide the lessor with a certificate of insurance for each such policy. Each certificate of insurance shall include the name of the insurer, the policy number, the effective dates of the policy, the amounts and types of coverage, the cost to the lessor for each type of coverage, and the deductible amount for each type of coverage for which the lessor may be liable.

(3) The lease shall clearly specify the conditions under which deductions for cargo or property damage may be made from the lessor's settlements. The lease shall further specify that the authorized carrier must provide the lessor with a written explanation and itemization of any deductions for cargo or property damage made from any compensation of money owed to the lessor. The written explanation and itemization must be delivered to the lessor before any deductions are made.

(k) If escrow funds are required, the lease shall specify:

(1) The amount of any escrow fund or performance bond required to be paid by the lessor to the authorized carrier or to a third party.

(2) The specific items to which the escrow fund can be applied.

(3) That while the escrow fund is under the control of the authorized carrier, the authorized carrier shall provide an accounting to the lessor of any transactions involving such fund. The carrier shall perform this accounting in one of the following ways:

(i) By clearly indicating in individual settlement sheets the amount and description of any deduction or addition made to the escrow fund; or

(ii) By providing a separate accounting to the lessor of any transactions involving the escrow fund. This separate accounting shall be done on a monthly basis.

(4) The right of the lessor to demand to have an accounting for transactions involving the escrow fund at any time.

(5) That while the escrow fund is under the control of the carrier, the carrier shall pay interest on the escrow fund on at least a quarterly basis. For purposes of calculating the balance of the escrow fund on which interest must be paid, the carrier may deduct a sum equal to the average advance made to the individual lessor during the period of time for which interest is paid. The interest rate shall be established on the date the interest period begins and shall be at least equal to the average yield or equivalent coupon issue yield on 91-day, 13-week Treasury bills as established in the weekly auction by the Department of Treasury.

(6) The conditions the lessor must fulfill in order to have the escrow fund returned. At the time of the return of the escrow fund, the authorized carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in the lease, and shall provide a final accounting to the lessor of all such final deductions made to the escrow fund. The lease shall further specify that in no event shall the escrow fund be returned later than 45 days from the date of termination.

(l) An original and two copies of each lease shall be signed by the parties. The authorized carrier shall keep the original and shall place a copy of the lease on the equipment during the period of the lease unless a statement as provided for in § 1057.11(c)(2) is carried on the equipment instead. The owner of the equipment shall keep the other copy of the lease.

(m) This paragraph applies to owners who are not agents but whose equipment is used by an agent of an authorized carrier in providing transportation on behalf of that authorized carrier. In this situation, the authorized carrier is obligated to ensure that these owners receive all the rights and benefits due an owner under the leasing regulations, especially those set forth in paragraphs (d)–(k) of this section. This is true regardless of whether the lease for the equipment is directly between the authorized carrier and its agent rather than directly between the authorized carrier and each of these owners. The lease between an authorized carrier and its agent shall specify this obligation.

[44 FR 4681, Jan. 23, 1979, as amended at 45 FR 13092, Feb. 28, 1980; 47 FR 28398, June 30, 1982; 47 FR 51140, Nov. 12, 1982; 47 FR 54083, Dec. 1, 1982; 49 FR 47851, Dec. 7, 1984; 51 FR 37406, 37407, Oct. 22, 1986; 52 FR 2412, Jan. 22, 1987; 57 FR 32905, July 24, 1992]

Subpart C—Exemptions for the Leasing Regulations

§ 1057.21 General exemptions.

Except for § 1057.11(c) which requires the identification of equipment, the leasing regulations in this part shall not apply to:

(a) Equipment used in substituted motor-for-rail transportation of railroad freight moving between points that are railroad stations and on railroad billing.

(b) Equipment used in transportation performed exclusively within any commercial zone as defined by the Commission.

(c) Equipment leased without drivers from a person who is principally engaged in such a business.

conform to all other applicable provisions of the Interstate Commerce Act, but this paragraph shall not be interpreted to limit, revoke, or remove the effect of the exemption granted under paragraph (a) of this section with respect to any payments, services, or commitments made prior to the filing of the rate or contract.

(e) When any person files with the Commission a petition to revoke the exemption granted by this section as to any specific transaction, the rail carrier shall have the burden of showing that, with respect to such transaction, all requirements of paragraph (a) of this section were met, and the carrier reasonably expected, before undertaking such payments, services or commitments, that such payments, services or commitments would result, within a reasonable time, in a contribution to the carrier's going concern value.

(f) This exemption shall remain in effect unless modified or revoked by a subsequent order of this Commission.

[57 FR 11913, Apr. 8, 1992]

PARTS 1040–1069—MOTOR CARRIERS—BROKERS—GENERAL

PART 1043—SURETY BONDS AND POLICIES OF INSURANCE

Sec.

AUTHORITY 49 U.S.C. 10101, 10321, 11701, 10927; 5 U.S.C. 553.

SOURCE: 32 FR 20032, Dec. 20, 1967, unless otherwise noted.

CROSS REFERENCE: Prescribed forms relating to this part are listed in Part 1003 of this chapter.

§ 1043.1 Surety bond, certificate of insurance, or other securities.

(a) (1) No common or contract carrier or foreign (Mexican) motor private carrier or foreign motor carrier transporting exempt commodities subject to subchapter II, chapter 105, subtitle IV of title 49 of the U.S. Code shall engage in interstate or foreign commerce, and no certificate or permit shall be issued to such a carrier or remain in force unless and until there shall have been filed with and accepted by the Commission surety bonds, certificates of insurance, proof of qualifications as self-insurer, or other securities or agreements, in the amounts prescribed in §1043.2, conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles in transportation subject to subchapter II, chapter 105, subtitle IV of title 49 of the U.S. Code, or for loss of or damage to property of others, or, in the case of motor carriers of property operating freight vehicles described in §1043.2(b)(2) of this part, for environmental restoration.

(2) Motor Carriers of property which are subject to the conditions set forth in paragraph (a)(1) of this section and transport the commodities described in §1043.2(b)(2), are required to obtain security in the minimum limits prescribed in §1043.2(b)(2).

(b) No common carrier by motor vehicle subject to subchapter II, chapter 105, subtitle IV of title 49 of the U.S. Code nor any foreign (Mexican) common carrier of exempt commodities shall engage in interstate or foreign commerce, nor shall any certificate be issued to such a carrier or remain in force unless and until there shall have been filed with and accepted by the Commission, a surety bond, certificate of insurance, proof of qualifications as a self-insurer, or other securities or agreements in the amounts prescribed in §1043.2, conditioned upon such carrier making compensation to shippers or consignees for all property

belonging to shippers or consignees and coming into the possession of such carrier in connection with its transportation service: That the requirements of this paragraph shall not apply in connection with the transportation of the following commodities:

Agricultural ammonium nitrate.
Agricultural nitrate of soda.
Anhydrous ammonia—used as a fertilizer only.
Ashes, wood or coal.
Bituminous concrete (also known as blacktop or amosite), including mixtures of asphalt paving.
Cement, dry, in containers or in bulk.
Cement, building blocks.
Charcoal.
Chemical fertilizer.
Cinder blocks.
Cinders, coal.
Coal.
Coke.
Commercial fertilizer.
Concrete materials and added mixtures.
Corn cobs.
Cottonseed hulls.
Crushed stone.
Drilling salt.
Dry fertilizer.
Fish scrap.
Fly ash.
Forest products; viz: Logs, billets, or bolts, native woods, Canadian wood or Mexican pine; pulpwood, fuel wood, wood kindling; and wood sawdust or shavings (shingle tow) other than jewelers' or paraffined.
Foundry and factory sweepings.
Garbage.
Gravel, other than bird gravel.
Hardwood and parquet flooring.
Haydite.
Highway construction materials, when transported in dump trucks and unloaded at destination by dumping.
Ice.
Iron ore.
Lime and limestone.
Liquid fertilizer solutions, in bulk, in tank vehicles.
Lumber.
Manure.
Meat scraps.
Mud drilling salt.
Ores, in bulk, including ore concentrates.
Paving materials, unless contain oil hauled in tank vehicles.
Peat moss.
Peeler cores.
Plywood.
Poles and piling, other than totem poles.
Potash, used as commercial fertilizer.
Pumice stone, in bulk in dump vehicles.
Salt, in bulk or in bags.
Sand, other than asbestos, bird, iron, monazite, processed, or tobacco sand.
Sawdust.
Scoria stone.
Scrap iron.
Scrap steel.
Shells, clam, mussel, or oyster.
Slag, other than slag with commercial value for the further extraction of metals.
Slag, derived aggregates—cinders.
Slate, crushed or scrap.
Slurry, as waste material.
Soil, earth or marl, other than infusorial, diatomaceous, tripoli, or inoculated soil or earth.
Stone, unglazed and unmanufactured, including ground agricultural limestone.
Sugar beet pulp.
Sulphate of ammonia, bulk, used as fertilizer.
Surfactants.
Trap rock.
Treated poles.
Veneer.
Volcanic scoria.
Waste, hazardous and nonhazardous, transported solely for purposes of disposal.
Water, other than mineral or prepared—water.
Wood chips, not processed.
Wooden pallets, unassembled.
Wreck or disabled motor vehicles.
Other materials or commodities of low value, upon specific application to and approval by the Commission.

(c)
Such security as is accepted by the Commission in accordance with the requirements of section 10927, subchapter II, chapter 109, subtitle IV of title 49 of the U.S. Code, shall remain in effect at all times.

[48 FR 51780, Nov. 14, 1983, as amended at 60 FR 63981, Dec. 13, 1995]

§ 1043.2 Security for the protection of the public: Minimum limits.

(a) (1)
means public liability coverage provided by the insurance or surety company responsible for the first dollar of coverage.

(2) means public liability coverage above the primary security, or above any additional underlying security, up to and including the required minimum limits set forth in paragraph (b)(2) of this section.

(b)(1) Motor carriers subject to § 1043.1(a)(1) are required to have security for the required minimum limits as follows:

(i)

Kind of equipment	Transportation provided	Minimum limits
Fleet including only vehicles under 10,000 pounds GVWR.	Commodities not subject to § 1043.2(b)(2)(d).	$300,000

(ii)

Kind of Equipment

Vehicle seating capacity	Effective dates	
	Nov. 19, 1983	Nov. 19, 1985
(1) Any vehicle with a seating capacity of 16 passengers or more	$2,500,000	$5,000,000
(2) Any vehicle with a seating capacity of 15 passengers or less	750,000	1,500,000

(2) Motor carriers subject to § 1043.1(a)(2) are required to have security for the required minimum limits as follows:

Kind of equipment	Commodity transported	July 1, 1983*	July 1, 1984*
(a) Freight Vehicles of 10,000 Pounds or More GVWR.	Property (non-hazardous)	$500,000	$750,000
(b) Freight Vehicles of 10,000 Pounds or More GVWR.	Hazardous substances, as defined in § 171.8, transported in cargo tanks, portable tanks, or hopper-type vehicles with capacities in excess of 3,500 water gallons, or in bulk Class A or B explosives, poison gas (Poison A) liquefied compressed gas or compressed gas, or highway route controlled quantity radioactive materials as defined in § 173.455.	1,000,000	5,000,000
(c) Freight Vehicles of 10,000 Pounds or More GVWR.	Oil listed in § 172.101; hazardous waste, hazardous materials and hazardous substances defined in § 171.8 and listed in § 172.101, but not mentioned in (b) above or (d) below.	500,000	1,000,000
(d) Freight Vehicles Under 10,000 Pounds GVWR.	Any quantity of Class A or B explosives; any quantity of poison gas (Poison A); or highway route controlled quantity radioactive materials as defined in § 173.455.	1,000,000	5,000,000

*NOTE: The effective date of the current required minimum limit in § 1043.2(b)(2)(d) was January 6, 1983, in accordance with the requirements of Pub. L. 97–424, 96 Stat. 2097.

(3) Motor carriers subject to the minimum limits governed by this section, which are also subject to Department of Transportation limits requirements, are at no time required to have security for more than the required minimum limits established by the Secretary of Transportation in the applicable provisions of 49 CFR Part 387—Minimum Levels of Financial Responsibility for Motor Carriers.

(4)

Foreign motor carriers and foreign motor private carriers (Mexican), subject to the requirements of 49 U.S.C. 10530 and 49 CFR part 1171 regarding obtaining certificates of registration from the Commission, must meet our minimum financial responsibility requirements by obtaining insurance coverage, in the required amounts, for periods of 24 hours or longer, from insurance or surety companies, that meet the requirements of 49 CFR 1043.8. These carriers must have available for inspection, in each vehicle operating in the United States, copies of the following documents:

(i) The certificate of registration;

(ii) The required insurance endorsement (Form MCS–90); and

(iii) An insurance identification card, binder, or other document issued by an authorized insurer which specifies both the effective date and the expiration date of the insurance coverage.

Notwithstanding the provisions of § 1043.1(a)(1), the filing of evidence of insurance is not required as a condition to the issuance of a certificate of registration. Further, the reference to continuous coverage at § 1043.7(a)(6) and the reference to cancellation notice at § 1043.7(d) are not applicable to these carriers.

(c)

Security required to compensate shippers or consignees for loss or damage to property belonging to shippers or consignees and coming into the possession of motor carriers in connection with their transportation service, (1)

for loss of or damage to property carried on any one motor vehicle—$5,000, (2) for less of or damage to or aggregate of losses or damages of or to property occurring at any one time and place—$10,000.

[47 FR 55944, Dec. 14, 1982, as amended at 48 FR 43333, Sept. 23, 1983; 48 FR 45775, Oct. 7, 1983; 48 FR 51780, Nov. 14, 1983; 49 FR 1991, Jan. 17, 1984; 49 FR 27767, July 6, 1984; 50 FR 40030, Oct. 1, 1985; 53 FR 36984, Sept. 23, 1988; 54 FR 52034, Dec. 20, 1989; 55 FR 47338, Nov. 13, 1990]

§ 1043.3 Combination vehicles.

The following combinations will be regarded as one motor vehicle for purposes of this part, (a) a tractor and trailer or semitrailer when the tractor is engaged solely in drawing the trailer or semitrailer, and (b) a truck and trailer when both together bear a single load.

§ 1043.4 Property broker surety bond or trust fund.

(a) A property broker must have a surety bond or trust fund in effect for $10,000. The Commission will not issue a property broker license until a surety bond or trust fund for the full limits of liability prescribed herein is in effect. The broker license shall remain valid or effective only as long as a surety bond or trust fund remains in effect and shall ensure the financial responsibility of the broker.

(b) Evidence of a surety bond must be filed using the Commission's prescribed Form BMC 84. Evidence of a trust fund with a financial institution must be filed using the Commission's prescribed Form BMC 85. The surety bond or the trust fund shall ensure the financial responsibility of the broker by providing for payments to shippers or motor carriers if the broker fails to carry out its contracts, agreements, or arrangements for the supplying of transportation by authorized motor carriers.

(c) —when used in this section and in forms prescribed under this section, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, shall mean—Each agent, agency, branch or office within the United States of any person, as defined by the Interstate Commerce Act, doing business in one or more of the capacities listed below:

(1) An insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h));

(2) A commercial bank or trust company;

(3) An agency or branch of a foreign bank in the United States;

(4) An insured institution (as defined in section 401(a) of the National Housing Act (12 U.S.C. 1724(a));

(5) A thrift institution (savings bank, building and loan association, credit union, industrial bank or other);

(6) An insurance company;

(7) A loan or finance company; or

(8) A person subject to supervision by any state or federal bank supervisory authority.

(d) —(1) . Form BMC-84 broker surety bond will be filed with the Commission for the full security limits under subsection (a); or Form BMC-85 broker trust fund agreement will be filed with the Commission for the full security limits under paragraph (a) of this section.

(2) Surety bonds and trust fund agreements shall specify that coverage thereunder will remain in effect continuously until terminated as herein provided.

(i) The surety bond and the trust fund agreement may be cancelled as only upon 30 days' written notice to the Commission, on prescribed Form BMC 36, by the principal or surety for the surety bond, and on prescribed Form BMC 85, by the trustor/broker or trustee for the trust fund agreement. The notice period commences upon the actual receipt of the notice at the Commission's Washington, DC office.

(ii) Broker surety bonds or trust fund agreements which have been accepted by the Commission under these rules may be replaced by other surety bonds or trust fund agreements, and the liability of the retiring surety or trustee under such surety bond or trust fund agreements shall be considered as having terminated as of the effective date

of the replacement surety bond or trust fund agreement. However, such termination shall not affect the liability of the surety or the trustee hereunder for the payment of any damages arising as the result of contracts, agreements or arrangements made by the broker for the supplying of transportation prior to the date such termination becomes effective.

(3) Broker surety bonds and trust fund agreements must be filed with the Commission in duplicate.

[53 FR 10396, Mar. 31, 1988]

§ 1043.5 Qualifications as a self-insurer and other securities or agreements.

(a) The Commission will consider and will approve, subject to appropriate and reasonable conditions, the application of a motor carrier to qualify as a self-insurer, if the carrier furnishes a true and accurate statement of its financial condition and other evidence that establishes to the satisfaction of the Commission the ability of the motor carrier to satisfy its obligation for bodily injury liability, property damage liability, or cargo liability. Application Guidelines: In addition to filing Form B.M.C. 40, applicants for authority to self-insure against bodily injury and property damage claims should submit evidence that will allow the Commission to determine:

(1) The adequacy of the tangible net worth of the motor carrier in relation to the size of operations and the extent of its request for self-insurance authority. Applicant should demonstrate that it will maintain a net worth that will ensure that it will be able to meet its statutory obligations to the public to indemnify all claimants in the event of loss.

(2) Applicant should demonstrate that it has established, and will maintain, an insurance program that will protect the public against all claims to the same extent as the minimum security limits applicable to applicant under § 1043.2 of this part. Such a program may include, but not be limited to, one or more of the following: Irrevocable letters of credit; irrevocable trust funds; reserves; sinking funds; third-party financial guarantees, parent company or affiliate sureties; excess insurance coverage; or other similar arrangements.

(3) Applicant must submit evidence of a current "satisfactory" safety rating by the United States Department of Transportation. Non-rated carriers need only certify that they have not been rated. Applications by carriers with a less than satisfactory rating will be summarily denied. Any self-insurance authority granted by the Commission will automatically expire 30 days after a carrier receives a less than satisfactory rating from DOT.

(4) Applicant must submit such additional information to support its application as the Commission may require.

(b) The Commission also will consider applications for approval of other securities or agreements and will approve any such application if satisfied that the security or agreement offered will afford the security for protection of the public contemplated by 49 U.S.C. 10927.

[48 FR 51780, Nov. 14, 1983 and 51 FR 15008, Apr. 22, 1986, as amended at 52 FR 3815, Feb. 6, 1987]

§ 1043.6 Bonds and certificates of insurance.

(a) Each Form BMC 82 surety bond filed with the Commission must be for the full limits of liability required under § 1043.2(b)(1). Form MCS–82 surety bonds and other forms of similar import prescribed by the Department of Transportation, may be aggregated to comply with the minimum security limits required under § 1043.2(b)(1) or § 1043.2(b)(2). Each Form BMC 91 certificate of insurance filed with the Commission will always represent the full security minimum limits required for the particular carrier, while it remains in force, under § 1043.2(b)(1) or § 1043.2(b)(2), whichever is applicable. Any previously executed Form BMC 91 filed before the current revision which is left on file with the Commission after the effective date of this regulation, and not canceled within 30 days of that date will be deemed to certify the same coverage limits as would the filing of a revised Form BMC

91. Each Form BMC 91X certificate of insurance filed with the Commission will represent the full security limits under § 1043.2(b)(1) or § 1043.2(b)(2) or the specific security limits of coverage as indicated on the face of the form. If the filing reflects aggregation, the certificate must show clearly whether the insurance is primary or, if excess coverage, the amount of underlying coverage as well as amount of the maximum limits of coverage.* Each Form BMC 91MX certificate of insurance filed with the Commission will represent the security limits of coverage as indicated on the face of the form. The Form BMC 91MX must show clearly whether the insurance is primary or, if excess coverage, the amount of underlying coverage as well as amount of the maximum limits of coverage.

(b) Each form B.M.C. 83 surety bond filed with the Commission must be for the full limits of liability required under § 1043.2(c). Each Form B.M.C. 34 certificate of insurance filed with the Commission will represent the full security limits under § 1043.2(c) or the specific security limits of coverage as indicated on the face of the form. If the filing reflects aggregation, the certificate must show clearly whether the insurance is primary or, if excess coverage, the amount of underlying coverage as well as amount of the maximum limits of coverage.

(c) Each policy of insurance in connection with the certificate of insurance which is filed with the Commission, shall be amended by attachment of the appropriate endorsement prescribed by the Commission or the Department of Transportation and the certificate of insurance filed must accurately reflect that endorsement.

[47 FR 55944, Dec. 14, 1982, as amended at 48 FR 43332, Sept. 23, 1983; 48 FR 51781, Nov. 14, 1983; 50 FR 40030, Oct. 1, 1985]

§ 1043.7 Forms and procedures.

(a)

(1)

Endorsements for policies of insurance and surety bonds, certificates of insurance, applications to qualify as a self-insurer, or for approval of other securities or agreements, and notices of cancellation must be in the form prescribed and approved by the Commission.

(2) When insurance is provided by more than one insurer in order to aggregate security limits for carriers operating only freight vehicles under 10,000 pounds Gross Vehicle Weight Rating, as defined in § 1043.2(b)(1), a separate with the specific amounts of underlying and limits of coverage shown thereon or appended thereto, and certificate is required of each insurer.

For aggregation of insurance for all other carriers to cover security limits under § 1043.2 (b)(1) or (b)(2), a separate Department of Transportation prescribed form endorsement and certificate is required of each insurer. When insurance is provided by more than one insurer to aggregate coverage for security limits under § 1043.2(c) a separate Form BMC 32 endorsement and Form BMC 34 certificate of insurance is required for each insurer.

For aggregation of insurance for foreign motor private carriers of nonhazardous commodities to cover security limits under § 1043.2(b)(4), a separate Form BMC 90 with the specific amounts of underlying and limits of coverage shown thereon or appended thereto, or Department of Transportation prescribed form endorsement, and Form BMC 91MX certificate is required for each insurer.

(3)

certificates of insurance will be filed with the Commission for the full security limits under § 1043.2 (b)(1) or (b)(2).

*NOTE: Aggregation to meet the requirement of § 1043.2(b)(1) will not be allowed until the completion of our rulemaking in Ex Parte No. MC-5 (Sub-No. 2),

**NOTE: See NOTE for Rule 1043.6. Also, it should be noted that DOT is considering prescribing adaptations of the Form MCS 90 endorsement and the Form MCS 82 surety bond for use by passenger carriers and Rules §§ 1043.6 and 1043.7 have been written sufficiently broad to provide for this contingency when new forms are prescribed by that Agency.

certificate of insurance will be filed to represent full coverage or any level of aggregation for the security limits under §1043.2 (b)(1) or (b)(2).

endorsement will be used with each filing of or certificate with the Commission which certifies to coverage not governed by the requirements of the Department of Transportation.

endorsement and certificate of insurance and surety bonds are used for the limits of cargo liability under §1043.2(c).

certificate of insurance will be filed to represent any level of aggregation for the security limits under §1043.2(b)(4).

(4) When Security limits certified under §1043.2 (b)(1) or (b)(2) involves coverage also required by the Department of Transportation a prescribed by the Department of Transportation such as, and including, the endorsement is required.

(5) When surety bonds are used rather than certificates of insurance, is required for the security limits under §1043.2(b)(1) not subject to regulation by the Department of Transportation, and or any form of similar import prescribed by the Department of Transportation, is used for the security limits subject also to minimum coverage requirements of the Department of Transportation.

(6) Surety bonds and certificates of insurance shall specify that coverage thereunder will remain in effect continuously until terminated as herein provided, except: (1) When filed expressly to fill prior gaps or lapses in coverage or to cover grants of emergency temporary authority of unusually short duration and the filing clearly so indicates, or (2) in special or unusual circumstances, when special permission is obtained for filing certificates of insurance or surety bonds on terms meeting other particular needs of the situation.

(b) Certificates of insurance, surety bonds, and notices of cancellation must be filed with the Commission in triplicate.

(c) Certificates of insurance and surety bonds shall be issued in the full and correct name of the individual, partnership, corporation or other person to whom the certificate, permit, or license is, or is to be, issued. In the case of a partnership, all partners shall be named.

(d) Except as provided in paragraph (e) of this section, surety bonds, certificates of insurance and other securities or agreements shall not be cancelled or withdrawn until 30 days after written notice has been submitted to the Commission at its offices in Washington, DC, on the prescribed form (Form BMC–35, Notice of Cancellation Motor Carrier Policies of Insurance under 49 U.S.C. 10927, and BMC–36, Notice of Cancellation Motor Carrier and Broker Surety Bonds, as appropriate) by the insurance company, surety or sureties, motor carrier, broker or other party thereto, as the case may be, which period of thirty (30) days shall commence to run from the date such notice on the prescribed form is actually received by the Commission.

(e) Certificates of insurance or surety bonds which have been accepted by the Commission under these rules may be replaced by other certificates of insurance, surety bonds or other security, and the liability of the retiring insurer or surety under such certificates of insurance or surety bonds shall be considered as having terminated as of the effective date of the replacement certificate of insurance, surety bond or other security, provided the said replacement certificate, bond or other security is acceptable to the Commission under the rules and regulations in this part.

CROSS REFERENCE: For list of forms prescribed, see §1003.1(b) of this chapter.

[47 FR 55944, Dec. 14, 1982, as amended at 48 FR 43334, Sept. 23, 1983; 48 FR 51781, Nov. 14, 1983; 50 FR 40030, Oct. 1, 1985; 51 FR 34623, Sept. 30, 1986]

§ 1043.8 Insurance and surety companies.

A certificate of insurance or surety bond will not be accepted by the Commission unless issued by an insurance or surety company that is authorized (licensed or admitted) to issue bonds or underlying insurance policies:

(a) In each state in which the motor carrier is authorized by the Commission to operate, or

(b) In the state in which the motor carrier has its principal place of business or domicile, and will designate in writing upon request by the Commission, a person upon whom process, issued by or under the authority of a court of competent jurisdiction, may be served in any proceeding at law or equity brought in any state in which the carrier operates, or

(c) In any state, and is eligible as an excess or surplus lines insurer in any state in which business is written, and will make the designation of process agent described in paragraph (b) of this section.

[56 FR 28111, June 19, 1991]

§ 1043.9 Refusal to accept, or revocation by the Commission of surety bonds, etc.

The Commission may, at any time, refuse to accept or may revoke its acceptance of any surety bond, certificate of insurance, qualifications as a self-insurer, or other securities or agreements if, in its judgment such security does not comply with these sections or for any reason fails to provide satisfactory or adequate protection for the public. Revocation of acceptance of any certificate of insurance, surety bond or other security shall not relieve the motor carrier from compliance with § 1043.1(d).

[47 FR 55945, Dec. 14, 1982]

§ 1043.10 Fiduciaries.

(a) The terms "insured" and "principal" as used in a certificate of insurance, surety bond, and notice of cancellation, filed by or for a motor carrier, include the motor carrier and its fiduciary as of the moment of succession. The term "fiduciary" means any person authorized by law to collect and preserve property of incapacitated, financially disabled, bankrupt, or deceased holders of operating rights, and assignees of such holders.

(b) The coverage furnished under the provisions of this section on behalf of fiduciaries shall not apply subsequent to the effective date of other insurance, or other security, filed with and approved by the Commission in behalf of such fiduciaries. After the coverage provided in this section shall have been in effect thirty (30) days, it may be cancelled or withdrawn within the succeeding period of thirty (30) days by the insurer, the insured, the surety, or the principal upon ten (10) days' notice in writing to the Commission at its office in Washington, DC, which period of ten (10) days shall commence to run from the date such notice is actually received by the Commission. After such coverage has been in effect for a total of sixty (60) days, it may be cancelled or withdrawn only in accordance with § 1043.7.

[32 FR 20032, Dec. 20, 1967, as amended at 47 FR 49596, Nov. 1, 1982; 47 FR 55945, Dec. 14, 1982; 55 FR 11197, Mar. 27, 1990]

§ 1043.11 Operations in foreign commerce.

No motor carrier may operate in the United States in the course of transportation between places in a foreign country or between a place in one foreign country and a place in another foreign country unless and until there shall have been filed with and accepted by the Commission a certificate of insurance, surety bond, proof of qualifications as a self-insurer, or other securities or agreements in the amount prescribed in § 1043.2(b), conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles in transportation between places in a foreign country or between a place in one foreign country and a place in another foreign country, insofar as such transportation takes place in the United States, or for loss of or damage to property of others. The security for the protection of the public required by

this section shall be maintained in effect at all times and shall be subject to the provisions of §§ 1043.5, 1043.6, 1043.7, 1043.8, 1043.9 and 1043.10. The requirements of § 1043.8(a) shall be satisfied if the insurance or surety company, in addition to having been approved by this Commission, is legally authorized to issue policies or surety bonds in at least one of the States in the United States, or one of the Provinces in Canada, and has filed with this Commission the name and address of a person upon whom legal process may be served in each State in or through which the motor carrier operates. Such designation may from time to time be changed by like designation similarly filed, but shall be maintained during the effectiveness of any certificate of insurance or surety bond issued by the company, and thereafter with respect to any claims arising during the effectiveness of such certificate or bond. The term "motor carrier" as used in this section shall not include private carriers or carriers operating under the partial exemption from regulation in 49 U.S.C. 10523 and 10526.

[47 FR 55945, Dec. 14, 1982]

§ 1043.12 Electronic filing of surety bonds, trust fund agreements, certificates of insurance and cancellations.

(a) Insurers may, at their option and in accordance with the requirements and procedures set forth in paragraphs (a) through (d) of this section, file forms BMC 34, BMC 35, BMC 36, BMC 82, BMC 83, BMC 84, BMC 85, BMC 91, and BMC 91X electronically, in lieu of using the prescribed printed forms.

(b) Each insurer must obtain authorization to file electronically by registering with the Commission. An individual account number and password for computer access will be issued to each registered insurer.

(c) All files to be transmitted must be in an ASCII fixed format, i.e., all records must have the same number of fields and same length. The record layouts for electronic filing transactions are as described in the following table:

ELECTRONIC INSURANCE FILING TRANSACTIONS

Field name	Number of positions	Description	Required F=filing C=cancel B=both	Start field	End field
Record type	1 Numeric	1=Filing 2=Cancellation	B	1	1
Insurer number	8 Text	ICC Assigned Insurer Number (Home Office) With Suffix (Issuing Office), If Different, e.g. 12345–01.	B	2	9
Filing type	1 Numeric	1 = BI&PD 2 = Cargo 3 = Bond 4 = Trust Fund	B	10	10
ICC docket number	8 Text	ICC Assigned MC or FF Number, e.g., MC000045.	B	11	18
Insured legal name	120 Text	Legal Name	B	19	138
Insured d/b/a name	60 Text	Doing Business As Name If Different From Legal Name.	B	139	198
Insured address	35 Text	Either street or mailing address	B	199	233
Insured city	30 Text		B	234	263
Insured state	2 Text		B	264	265
Insured zip code	9 Numeric	(Do not include dash if using 9 digit code).	B	266	274
Insured country	2 Text	(Will default to US)	B	275	276
Form code	10 Text	BMC–91, BMC–91X, BMC–34, BMC–35, etc.	B	277	286
Full, primary or excess coverage.	1 Text	If BMC–91X, P or E = indicator of primary or excess policy; 1 = Full under § 1043.2(b)(1); 2 = Full under § 1043.2(b)(2).	F	287	287
Limit of liability	5 Numeric	$ in Thousands	F	288	292
Underlying limit of liability.	5 Numeric	$ in Thousands (will default to $000 if Primary).	F	293	297
Effective date	8 Text	MM/DD/YY Format for both Filing or Cancellation.	B	298	305

ELECTRONIC INSURANCE FILING TRANSACTIONS—Continued

Field name	Number of positions	Description	Required F=filing C=cancel B=both	Start field	End field
Policy number	25 Text	Surety companies may enter bond number.	B	306	330

(d) All registered insurers agree to furnish upon request to the Commission a duplicate original of any policy (or policies) and all endorsements, surety bond, trust fund agreement, or other filing.

[60 FR 16810, Apr. 3, 1995]

PART 1044—DESIGNATION OF PROCESS AGENT

Sec.
1044.1 Applicability.
1044.2 Form of designation.
1044.3 Eligible persons.
1044.4 Required States.
1044.5 Blanket designations.
1044.6 Cancellation or change.

AUTHORITY: 49 U.S.C. 10329, 10330, and 11705.

SOURCE: 55 FR 11197, Mar. 27, 1990, unless otherwise noted.

§ 1044.1 Applicability.

These rules, relating to the filing of designations of persons upon whom court process may be served, govern motor carriers and brokers and, as of the moment of succession, their fiduciaries (as defined at 49 CFR 1043.10(a)).

§ 1044.2 Form of designation.

Designations shall be made on Form BOC–3,

Only one completed current form may be on file. It must include all States for which agent designations are required. One copy must be retained by the carrier or broker at its principal place of business.

§ 1044.3 Eligible persons.

All persons (as defined at 49 U.S.C. 10102(18)) designated must reside or maintain an office in the State for which they are designated. If a State official is designated, evidence of his willingness to accept service of process must be furnished.

§ 1044.4 Required States.

(a) Every motor carrier (of property or passengers) shall make a designation for each State in which it is authorized to operate and for each State traversed during such operations. Every motor carrier (including private carriers) operating in the United States in the course of transportation between points in a foreign country shall file a designation for each State traversed.

(b) Every broker shall make a designation for each State in which its offices are located or in which contracts will be written.

[55 FR 11197, Mar. 27, 1990, as amended at 55 FR 47338, Nov. 13, 1990]

§ 1044.5 Blanket designations.

Where an association or corporation has filed with the Commission a list of process agents for each State, motor carriers may make the required designations by using the following statement:

Those persons named in the list of process agents on file with the Interstate Commerce Commission by _____

(Name of association or corporation) and any subsequently filed revisions thereof, for the States in which this carrier is or may be authorized to operate, including States traversed during such operations, except those States for which individual designations are named.

§ 1044.6 Cancellation or change.

A designation may be canceled or changed only by a new designation except that, where a carrier or broker ceases to be subject to § 1044.4 in whole or in part for 1 year, designation is no longer required and may be canceled without making another designation.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the Petition for Review in the Washington Supreme Court for Petitioner Swanson Hay Company, Case No. 34566-1-III (consolidated with 34567-0-III and 34568-8-III) to the following parties;

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Original Filed with:
Court of Appeals, Division III
Clerk's Office

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

DATED this 29th day of November, 2017

Becki L. Wheeler

mcneicewheeler
attorneys

To:	Court of Appeals Div III
Fax number:	509 456-4288
From:	McNeice Wheeler
Fax number:	509 928 9166
Date:	11/29/17
Regarding:	No 34566-1-III
Number of pages:	2

Please find the attached declaration of service for the Petitioner's Petition for Review for the above referenced case.

Thank you.