No. 95556-5

**SUPREME COURT OF THE STATE OF WASHINGTON**

GULICK TRUCKING, INC., a Washington corporation,

Petitioner,

v.

WASHINGTON STATE EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

# RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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## I. INTRODUCTION

This case involves a straightforward application of the Employment Security Act's independent contractor test, RCW 50.04.140, to the employment relationship between the Petitioner freight carrier and its truck drivers who own their trucks ("owner-operators"). The Court of Appeals affirmed the Commissioner of the Employment Security Department's ruling that Gulick Trucking, Inc., did not prove all parts of the test. The Court thus upheld the unemployment tax assessment issued to Gulick for the wages it paid to its owner-operators. Substantial evidence supports the Commissioner's findings, and the conclusions are free of error.

Gulick obfuscates this straightforward application of law to facts. First, Gulick argues that this Court's 1945 opinion that relied on common law principles in interpreting the meaning of "control" in the Employment Security Act applies here. But, as this Court acknowledged, the Legislature later amended the Act to explain that unemployment coverage is broader than common law employment relationships. The 1945 case does not apply.

Second, Gulick challenges a long-standing ruling that federally required contract provisions can be considered when evaluating whether owner-operators are free from carriers' "control or direction" under one element of the independent contractor test. *See W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 41 P.3d 510 (2002) (Div. I). Division

III of the Court of Appeals thoroughly analyzed this question and agreed with the long-standing decision. *Swanson Hay Co., et al. v. Emp't Sec. Dep't*, 1 Wn. App. 2d 174, 208-12, 404 P.3d 517 (2017). Here, Division II evaluated and agreed with Division III's ruling and the past Division I precedent. *Gulick Trucking, Inc. v. Emp't Sec. Dep't*, No. 49646-1-II, 2018 WL 509096 at *5-7 (Wash. Ct. App. Jan. 23, 2018) (unpublished). A ruling that adheres to established precedent does not warrant review.

Third, Gulick contends under another element of the independent contractor test that the Commissioner erred in ruling the owner-operators were not engaged in independent businesses, even though there is no evidence they performed work for other carriers or used their own hauling authority.

Last, Gulick claims that treating owner-operators as in covered employment for unemployment insurance purposes will lead to a wholesale "restructuring" of the trucking industry, and thus federal motor carrier law preempts the tax assessment. The Court of Appeals properly rejected these claims. *Gulick Trucking, Inc.*, 2018 WL 509096 at *4.

In short, four levels of review—the administrative law judge, the Department's Commissioner, the superior court, and the Court of Appeals—have rejected Gulick's contentions. This case does not involve any conflict with prior decisions, significant constitutional questions, or

issues of substantial public interest requiring a determination by this Court. RAP 13.4(b)(1), (3), (4). The Court should deny review.

## II. COUNTERSTATEMENT OF THE ISSUES

If review were granted, the following issues would be presented:

1. Did the Commissioner properly assess "control" under Title 50 RCW case law and not common law?

2. Did the Commissioner correctly rule under RCW 50.04.140(1)(a) that Gulick failed to prove its owner-operators were free from its control or direction over the performance of services, when Gulick had the right to full possession and control of owner-operators' equipment, and Gulick required that owner-operators: cooperate fully with dispatch personnel; transport goods in a manner that "promotes the goodwill and reputation of" Gulick; obtain Gulick's express written consent to transport persons or a third party's property; perform regular safety inspections; install and use specific communication equipment; maintain particular insurance coverage that names Gulick as an insured party; meet pickup and delivery appointments; follow temperature requirements; immediately report accidents; comply with federal, state, and local safety laws and Gulick's safety rules and regulations; adequately maintain equipment as defined by Gulick's maintenance guidelines; and refrain from "uncivil or impolite communications" with dispatch?

3. Did the Commissioner correctly rule under RCW 50.04.140(1)(c) that Gulick failed to prove its owner-operators included in the assessment were engaged in independent businesses when they: did not have their own operating authority; could not work for others during the term of the lease or for five-years thereafter without Gulick's express written consent; and were protected from risk of customer non-payment?

4. Does the Federal Aviation Administration Authorization Act, which preempts state laws that relate to the prices, routes, or services of a motor carrier, preempt applying Washington's Employment Security Act to the services of owner-operators, when the Act applies generally to all Washington employers, poses only a minor cost increase, and affects worker classification only under the Act?

## III. COUNTERSTATEMENT OF THE CASE

Gulick Trucking is a freight hauling motor carrier. To complete the hauling services, it contracts with "owner-operators," truck drivers who own their own trucking equipment. Agency Record Vol. 2 (AR2) 858-60, 1086 (Finding of Fact (FF) 3). Gulick entered into lease agreements with the owner-operators, who hauled under Gulick's operating authority issued by the Federal Motor Carrier Safety Administration and Department of Transportation. AR1 97, 327-57; AR2 1086 (FF 4, 5, 6); AR2 1136. The lease agreements contain many provisions governing the owner-operators' relationship with Gulick. When a load is delivered, Gulick collects payment from its customers. AR2 865, 1126. It pays owner-operators bi-weekly, regardless of whether the customer has paid. AR2 866.

Gulick considers its owner-operators to be independent contractors and does not report their wages or pay unemployment taxes on them to the Employment Security Department. The Department audited Gulick to determine whether that classification was correct under the Employment Security Act. AR2 1109. The auditor determined that the services provided by 120 of Gulick's 142 owner-operators amounted to "employment" under RCW 50.04.100 and that they did not meet all parts of the independent contractor test under RCW 50.04.140. AR1 97, 369; AR2 1086 (FF 4.5).

The Department assessed Gulick for unpaid taxes, penalties, and interest on the wages paid to the covered owner-operators. AR1 306-08.

Gulick appealed the assessment to the Office of Administrative Hearings. Gulick moved for summary judgment, arguing federal law preempted applying the Act to the services performed by owner-operators. AR1 4-34. The Administrative Law Judge and, on further review, the Department's Commissioner, denied the motion. AR1 171-73; AR2 1123.

Following an evidentiary hearing, the ALJ affirmed the assessment in an amount stipulated by the parties. AR2 1085-91.[1] The ALJ—and later, the Department's Commissioner—ruled that the lease agreements provide for Gulick's control or direction over the owner-operators' performance of services, thus defeating Gulick's claim for exception under RCW 50.04.140(1)(a), based on various contractual terms:

- Gulick has exclusive possession, control, and use of the trucking equipment during the lease term;
- owner-operators may not transport persons or property for third parties without Gulick's express written consent;
- owner-operators must "cooperate fully with all Carrier's dispatch personnel in performance of the Agreement," and must transport goods "in a manner which promotes the goodwill and reputation of" Gulick;
- owner-operators must pay a $50 fine for failing to meet scheduled pickup or delivery appointments set by Gulick or its customers, failing to follow temperature requirements, or failing to immediately report an accident;
- owner-operators must perform regular safety inspections, note the inspections on driver's logs, and immediately make needed equipment repairs;

[1] The ALJ ruled that the owner-operators were in Gulick's "employment" under RCW 50.04.100. At the Court of Appeals, Gulick abandoned its challenge to this ruling.

- owner-operators must "check the identity, temperature (if temperature controlled), condition and count of all cargo . . . to confirm that said cargo conforms to the bill of lading" and immediately notify Gulick of any damage, shortages, or temperature discrepancies;
- owner-operators must "properly protect and promptly transport and deliver cargo";
- owner-operators must install Qualcomm, a mobile tracking and communication device to communicate load requirements and track contract compliance;
- owner-operators must furnish non-trucking use/bobtail liability insurance with a $1,000,000 liability limit, and name Gulick as insured;
- Gulick can take possession of the truck and complete a delivery if the owner-operator fails to do so; and,
- Gulick can terminate the Agreement if an owner-operator violates federal, state, or local safety laws or Gulick's safety rules and regulations, was convicted of a felony or traffic crime, had a pattern of late pickups and deliveries, became unavailable for dispatch, exhibited a pattern of uncivil or impolite communications with Gulick's employees or customers, or did not adequately maintain equipment as defined by Gulick's maintenance guidelines.

AR2 1086-87 (ALJ findings); AR2 1127-33 (Commissioner's order); AR1 327-37, ¶¶ 1.2-1.6, 5.4, 5.8, 12.5, 13.4, 15.1-15.3, 19.2, 20.1 (contractual terms). Some of these provisions are federally required. The ALJ and Commissioner ruled that under *Western Ports Transportation, Inc. v. Employment Security Department, supra*, the trier of fact can consider federally required controls when applying the independent contractor statute. *See* AR1 172-73; AR2 1088-89; AR2 1131-32. The Commissioner also ruled that Gulick failed to prove that the owner-operators were engaged in independent businesses under RCW 50.04.140(1)(c), because the owner-operators were protected from the risk of non-payment by customers, did

not have their own operating authorities, and could not haul for any third party without Gulick's express written consent during the lease term or for five years thereafter. AR2 866, 1138-39; AR1 328, 334, ¶¶ 5.8, 20.7.

Gulick appealed the Commissioner's order to the Clark County Superior Court, which upheld the order. CP 200-03. Gulick appealed to the Court of Appeals, which again affirmed.

## IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

The issues in this case are factually tied to a specific trucking carrier who challenges a tax assessment; there is no reason for review. First, Gulick failed to show its drivers are independent contractors under the Employment Security Act. That ruling does not involve a conflict with precedent or a question of substantial public interest. RAP 13.4(b)(1), (4). Second, the ruling that federal law does not preempt the assessment is consistent with precedent and presents no constitutional question. RAP 13.4(b)(3).

### A. The Court of Appeals Decision Does Not Conflict with any Washington Supreme Court Decisions

By challenging in all three divisions of the Courts of Appeals the holdings of Division I's 2002 decision in *Western Ports*, several carriers had hoped to create a conflict for review under RAP 13.4(b)(2). But Division III agreed with *Western Ports* in all relevant respects, Division I reaffirmed its holdings, and Division II agreed, too. *Swanson Hay Co.,* 1

Wn. App. 2d 208-12; *MacMillan-Piper Inc. v. Emp't Sec. Dep't*, No. 75534-0-I, 2017 WL 6594805 (Wash. Ct. App. Dec. 26, 2017) (unpublished); *Gulick Trucking, Inc.*, 2018 WL 509096 at *4-6. There are now 16 years of uniform decisions rejecting Gulick's arguments that owner-operators are exempt from unemployment coverage and that federal motor carrier law preempts the Act.

Faced with no real conflicts, Gulick attempts to manufacture a conflict with a 1945 decision of this Court, which interpreted a definition of "employment" in Title 50 RCW that pre-dated the current definition. Gulick also suggests that review is warranted under RAP 13.4(b)(1) because the Court of Appeals decision conflicts with *other* jurisdictions' decisions. This is not grounds for review.

### 1. The Court of Appeals decision does not conflict with *Seattle Aerie No. 1* or any other Washington Supreme Court decision

Gulick argues the Court of Appeals decision conflicts with a case from 1945: *Seattle Aerie No. 1 of the Fraternal Order of Eagles v. Commissioner of Unemployment Compensation and Placement*, 23 Wn.2d 167, 160 P.2d 614 (1945). Pet. 7-9. It contends that *Seattle Aerie* requires the Department to rely on the common law definition of "control" when analyzing the first element of the Act's independent contractor test, RCW 50.04.140(1)(a): whether workers are free from an employer's "control or

direction" over the performance of services. But *Seattle Aerie* was decided just days before the Legislature broadened the definition of "employment" to expressly include "personal service . . . *unlimited by the relationship of master and servant as known to the common law or any other legal relationship* . . . ."[2] RCW 50.04.100 (emphasis added); *Swanson Hay Co.*, 1 Wn. App. 2d at 205-06; *Gulick Trucking, Inc.*, 2018 WL 509096 at *7.

Two years after the statute was amended, this Court acknowledged that its decision in *Seattle Aerie*—at least as to the scope of "employment" in the Employment Security Act—was no longer good law:

> 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.

*Skrivanich v. Davis*, 29 Wn.2d 150, 158, 186 P.2d 364 (1947). The Legislature "did not use the language [of a draft bill] incorporating the 'control' that distinguished servants and independent contractors under Washington common law." *Swanson Hay Co.*, 1 Wn. App. 2d at 207. Accordingly, "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,

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[2] *Seattle Aerie* was decided on June 28, 1945, and the current definition of "employment" became effective on July 1, 1945. Laws of 1945, ch. 35, § 11; ch. 36, § 192.

that are controlling." *Swanson Hay Co.*, 1 Wn. App. 2d at 208; *Gulick Trucking, Inc.*, 2018 WL 509096 at *7 ("the common law understanding of *control* does not apply to cases under Title 50 RCW."). Gulick's continued reliance on *Seattle Aerie* is misplaced. There is no conflict.[3]

Washington courts have recognized that worker classification under the Employment Security Act "'is more likely . . . to be viewed as employment [than in any other context].'" *Gulick Trucking, Inc.*, 2018 WL 509096 (quoting *Swanson Hay Co.*, 1 Wn. App. 2d at 181); *Wash. Trucking Ass'ns, et al. v. Emp't Sec. Dep't, et al.*, 188 Wn.2d 198, 203, 393 P.3d 761 (2017) ("Persons engaged in 'employment' include independent contractors so long as they perform 'personal services' under a contract and an exemption does not apply."); *W. Ports*, 110 Wn. App. at 458 (Act's definition of "employment" is "exceedingly broad"). The common law tests for "employment" and "control" do not apply. There is no conflict.

**2. A conflict with other jurisdictions is not grounds for review**

Gulick suggests review is warranted because the Court of Appeals decision is inconsistent with *other* jurisdictions' decisions. Pet. 12-13 & n.3.

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[3] Gulick also suggests the Court of Appeals decision conflicts with *Kamla v. Space Needle Corporation*, 147 Wn.2d 114, 52 P.3d 472 (2002). Pet. 7. But that case addressed the "retained control" exception to the general rule of non-liability for injuries of a contractor. *Kamla*, 147 Wn.2d at 119. It is not an unemployment case, and it did not discuss Title 50 RCW. Even if the case applied, Gulick exercised for more control than "general contractual rights." *See Kamla*, 147 Wn.2d at 120-21; *see* infra n.9.

This is not a conflict with a decision of *this* Court warranting review under RAP 13.4(b)(1). Moreover, many of the cited cases are not unemployment cases, and other state courts have applied their own laws to different facts. The different results, therefore, are unremarkable.[4]

### B. There Is No Issue of Substantial Public Interest, Nor a Significant Constitutional Question, Requiring This Court's Determination

Gulick claims that the Department aims to "forc[e] carriers to treat owner-operators as employees" and "restructure" the trucking industry. Pet. 1-2, 13, 16-17, 19. As a matter of law, Gulick is wrong. The Court of Appeals ruling is explicitly based on—and limited to—the unique provisions of the Employment Security Act. Considering federally required leasing provisions in applying the "control" element in RCW 50.04.140(1)(a) is consistent with the purpose and plain language of the Act. This is not an issue of substantial public interest, especially when Gulick exerted more control than is federally required. The Court of Appeals ruling concerning the independent business element in RCW 50.04.140(1)(c) is

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[4] *Western Ports* acknowledged that other states have ruled differently concerning owner-operator unemployment coverage. *W. Ports*, 110 Wn. App. at 461-62. *Swanson Hay* properly rejected other states' rulings as both "unhelpful" and "unpersuasive." *Swanson Hay Co.*, 1 Wn. App. 2d at 210-12; *see also Gulick Trucking, Inc.*, 2018 WL 509096 at *5-7 (declining to look beyond the plain language of Washington's statute, which offers "'no textual basis for concluding that the control exercised by an employer must be control it has feely chosen to exercise,'" quoting *Swanson Hay Co.*, 1 Wn. App. 2d at 210).

Besides, courts in some states have since approved of *Western Ports*. *See C.R. England, Inc. v. Dep't of Emp't Sec.*, 7 N.E. 3d 864, 876-78 (Ill. App. Ct. 2014); *SZL, Inc. v. Indus. Claim Appeals Office*, 254 P.3d 1180, 1188 (Colo. Ct. App. 2011).

also based on the Act and facts and, accordingly, does not warrant review. Further, the Court of Appeals correctly rejected Gulick's argument that the Federal Aviation Administration Authorization Act (FAAAA) preempts applying the Employment Security Act to motor carriers. There is no significant constitutional question or issue of substantial public interest for this Court's review. RAP 13.4(b)(3), (4).

### 1. Considering federally mandated controls when applying the Act's independent contractor test has long been the law in Washington, and even if it were not, Gulick exerted control above and beyond the federal regulations

The text of the Employment Security Act supports that federally mandated controls may be considered when evaluating an employer's control over its workers under the independent contractor test, RCW 50.04.140(1)(a). This has long been the law in Washington and was reaffirmed in extensive analysis. *Swanson Hay Co.*, 1 Wn. App. 2d at 208-12; *Gulick Trucking, Inc.*, 2018 WL 509096 at *5 (agreeing with *Swanson Hay*). The issue does not merit review under RAP 13.4(b)(4).[5]

[5] Legislative acquiescence in *Western Ports* signals the Legislature's intent. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 346-47, 217 P.3d 1172 (2009). The Legislature may address whether the Department can consider federal controls when applying the independent contractor test, but it has not done so. In contrast, the Legislature exempted owner-operators from coverage under the Industrial Insurance Act. RCW 51.08.180.

If individuals are in "employment" under RCW 50.04.100, the employer must pay unemployment taxes on their wages, "unless and until it is shown to the satisfaction of the commissioner" 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) (emphasis added). Courts must "liberally construe the [Act], viewing with caution any construction that would narrow coverage." *Penick v. Emp't Sec. Dep't*, 82 Wn. App. 30, 36, 917 P.2d 136 (1996).

In *Western Ports*, Division I concluded that it is permissible to consider federally required controls in applying the RCW 50.04.140 statutory exception test—including the written lease requirements under 49 C.F.R. § 376.12. *W. Ports*, 110 Wn. App. at 453-54. The court explained:

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

*Id.* at 453-54. The court held alternatively that even if it did not consider the federal controls, it would still find Western Ports did not prove this element because it exerted controls beyond those required by law. *Id.* at 454.[6]

Under RCW 50.04.140, "'control' in its plain meaning extends to the right to control, regardless of the source." *MacMillan-Piper, Inc.*, 2017 WL 6594805 at *3; *see W. Ports*, 110 Wn. App. at 452. The Gulick Court followed Division III's reasoning based on plain statutory language. *Gulick Trucking, Inc.*, 2018 WL 509096 at *6; *Swanson Hay Co.*, 1 Wn. App. 2d at 212 ("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."). This straightforward statutory analysis is sound.

Gulick asserts that federal regulations, specifically 49 C.F.R. § 376.12, are inconsistent with the Commissioner's and Court of Appeals decisions. Pet. 11-12. 49 C.F.R. § 376.12(c)(4) provides:

> Nothing in the provision required by *paragraph (1)(c)* of this section is intended to affect whether the lessor . . . is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship *may* exist when a carrier lessee complies with 49 U.S.C. § 14102 and attendant administrative requirements.

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[6] The Commissioner's decision is not a "drastic change" from *Penick*. Pet. 19. *Penick's* holding was about company drivers; the language about owner-operators was dicta. *Penick*, 82 Wn. App. at 41-44. Besides, the *Western Ports* court later decidedly held that an owner-operator was not exempt from coverage under RCW 50.04.140.

(Emphasis added). "[P]aragraph (1)(c) of this section" includes certain required leasing provisions. But this qualifying language in 49 C.F.R. § 376.12(c)(4) "is silent about the other federal lease requirements and safety regulations governing the relationship between motor carriers and owner-operators."[7] *MacMillan-Piper, Inc.*, 2017 WL 6594805 at *3. Therefore, Division II correctly ruled: "49 C.F.R. § 376.12 does not bar the ESD from looking to federally required contract provisions when determining employer control." *Gulick Trucking, Inc.*, 2018 WL 509096 at *6; *see also W. Ports*, 110 Wn. App. at 456-57.[8]

Even if this Court granted review to reevaluate whether federal controls may be considered, any conclusion would be immaterial because multiple contract provisions require compliance with Gulick's policies and procedures beyond those required by federal law.[9] Thus just as in *Western*

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[7] Moreover, the Interstate Commerce Commission's guidance says nothing about barring the state law inquiry from considering the numerous federal regulatory requirements. Rather, the ICC has stated that it "take[s] no position on the issue of independence of lessors." 8 I.C.C.2d 669, 671 (1992). The ICC is "explicitly agnostic on the issue of the carrier-driver relationship." *Remington v. J.B. Hunt Transport, Inc.*, 2016 WL 4975194 at *5 (D. Mass 2016). Besides, the ICC guidance does not supplant the plain language of the Employment Security Act, which "does not limit the evidence of freedom from control or direction to only freely chosen employer control." *Gulick Trucking, Inc.*, 2018 WL 509096 at *6; *Swanson Hay Co.*, 1 Wn. App. 2d at 210-12.

[8] An independent contractor relationship "*may* exist when a carrier lessee complies with 49 U.S.C. § 14102 and attendant administrative requirements." 49 C.F.R. § 376.12(c)(4) (emphasis added). Gulick essentially argues this language means an independent contractor relationship *must* exist when a lessee complies with federal regulations. That is not what it says. Whether an independent contractor relationship exists depends on the context and the specific statutory test. Gulick did not meet the test.

[9] These non-federally required examples of control include the requirement to: cooperate with dispatch; to act in a manner that promotes Gulick's goodwill and reputation;

*Ports*, Gulick still would not have established freedom from control or direction because of these additional controls. Review should be denied.

### 2. The Commissioner properly ruled that the owner-operators were not engaged in independent businesses

The Commissioner properly ruled that the owner-operators included in the assessment were not "engaged in an independently established . . . business" under RCW 50.04.140(1)(c) when the owner-operators: were protected from the risk of non-payment by customers, could not haul for third parties during the lease term or for five years thereafter without Gulick's express written consent, and did not have their own operating authorities. AR2 1138-39; AR2 866; AR1 328, 334, ¶¶ 5.8, 20.7.

Gulick focuses on the lack of motor carrier authority to argue the Commissioner's ruling is wrong, based on an Idaho case. Pet. 15 (citing *W. Home Transp., Inc. v. Idaho Dep't of Labor*, 318 P.3d 940 (Id. 2014)). But under RCW 50.04.140(1)(c) and Washington case law, the pertinent question is whether the owner-operator can continue in business and be economically independent from the motor carrier. *See, e.g.*, *All-State Constr. Co. v. Gordon*, 70 Wn.2d 657, 666, 425 P.2d 16 (1967); *Jerome v.*

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to check the condition and count of cargo and immediately notify Gulick of damage, shortages, or temperature discrepancies; to protect and promptly transport and deliver cargo to consignees; to install and use specific mobile tracking and communication devices; to follow Gulick's safety rules and regulations; and provisions for levies of fines for failing to meet schedules, follow temperature requirements, or immediately report accidents; and more. *See* AR1 327-37, ¶¶ 1.2, 1.3, 1.5, 1.6, 15.1, 15.2, 15.3, 19.2, 20.1.

*Emp't Sec. Dep't*, 69 Wn. App. 810, 815, 850 P.2d 1345 (1993). To do that requires one's own motor carrier authority; without it, the owner-operator who quits or is discharged will be unemployed until he or she finds another carrier to haul for. Thus the Idaho court's focus on whether an owner-operator needs motor carrier authority to haul exclusively for a carrier is inapt. *W. Home Transp., Inc.*, 318 P.3d at 943. The record here establishes that the owner-operators hauled only for Gulick; this is employment for *a motor carrier*, not "service to the motor carrier market." *Id.* at 944.

The Commissioner's ruling under RCW 50.04.140(1)(c) is based on the evidence here and presents no reason for review.[10] RAP 13.4(b)(4).

### 3. The Court of Appeals conclusion that the FAAAA does not preempt a state law like the Employment Security Act is universally accepted, including by this Court

Gulick has raised a theory of federal preemption that depends on the false assumption that the tax will result in "restructuring" the trucking industry. Therefore, Gulick argues, the assessment is preempted by the FAAAA, which provides that a "State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the

[10] Gulick also argues that the Court of Appeals erred in not ruling on the elements of RCW 50.04.140(1)(b), which the Commissioner addressed. Pet. 16. But Gulick does not argue any basis for review under RAP 13.4(b). Review is unwarranted, as Gulick also failed to prove RCW 50.04.140(1)(a) and (c), and Gulick must prove *all* elements in order to show the owner-operators are independent contractors under the Act.

transportation of property." 49 U.S.C. § 14501(c). The FAAAA preempts state laws that aim directly at transportation, or whose impact on transportation is indirect but *significant*. *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 371, 128 S. Ct. 989, 169 L. Ed. 2d 933 (2008). The Court of Appeals correctly rejected Gulick's claim that reclassification under the Act will result in trucking businesses having to treat owner-operators as employees for all other purposes, because having to pay unemployment taxes does not dictate a carrier's prices, routes, or services. *Gulick Trucking, Inc.*, 2018 WL 509096 at *4.[11]

Laws that have a "tenuous, remote, or peripheral" relationship to carrier prices, routes, or services are not preempted. *Rowe*, 552 U.S. at 371. The fact that a law is likely to increase a motor carrier's operating costs "alone does not make such law[] 'related to' prices, routes or services." *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014). Rather,

[11] As a matter of law, "The only employment defined by the act is the employment intended to be covered by the act for the purposes of the act and none other." *State Unemp't Comp. & Placement v. Hunt,* 22 Wn.2d 897, 899, 158 P.2d 98 (1945); *see also W. Ports*, 110 Wn. App. at 458 ("an individual may be both an independent contractor for some purposes, and engaged in 'employment' for purposes of the Act"). This question is well settled. Gulick's claim that the Commissioner ignored "unchallenged expert testimony" of the impact of converting owner-operators to employees is a red herring. Pet. 19-20.

The Commissioner's order does not even result in unemployment coverage of all owner-operators. Here, the Department's auditor excluded the owner-operators who had their own motor carrier authority. AR2 689. Indeed, nothing in 49 C.F.R. § 376.22—which governs leases *among carriers* and does not require the same provisions as 49 C.F.R. § 376.11 and .12—prevents owner-operators from hauling under their own authority as carriers. They may be independent contractors under Title 50 RCW if they do so.

laws that "do not directly or indirectly mandate, prohibit, or otherwise regulate certain prices routes or services—are not preempted by the FAAAA." *Id.* at 647. Where "courts have found preemption, the statute established a binding requirement on how the *service* was to be performed." *MacMillan-Piper, Inc.*, 2017 WL 6594805 at *4. Here, the Act does not regulate the services of a motor carrier.

The impact of having to pay unemployment taxes for owner-operators is indirect and modest. The *highest* unemployment insurance tax rates are 6–6.5 percent of payroll, and not all wages are taxed. RCW 50.29.025; RCW 50.24.010. The potential for a small increase in taxes is far removed from the nearly 100 percent increase in costs associated with the wholesale reclassification of independent contractors as employees for purposes of multiple laws, as was the case in the First Circuit decisions involving the Massachusetts independent contractor law. *See Massachusetts Delivery Ass'n v. Coakley*, 769 F.3d 11, 15 (1st Cir. 2014). The First Circuit cases are "inapplicable." *Swanson Hay Co.*, 1 Wn. App. 2d at 196-98.

The unemployment tax is precisely the kind of "generally applicable background regulation[] that [is] several steps removed from prices, routes, or services" that other courts—including this one—have found not to be preempted. *Dilts*, 769 F.3d at 646 (FAAAA does not preempt California's meal and rest break laws); *Californians for Safe & Competitive Dump Truck*

*Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998) (FAAAA did not preempt California's prevailing wage act, despite motor carrier's assertion the act increases its prices by 25 percent); *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 721 n.9, 153 P.3d 846 (2007) (FAAAA does not preempt state overtime requirements for interstate truck drivers); *Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 357 P.3d 1040 (2015) (SeaTac's $15-per-hour minimum wage law not preempted by nearly identical preemption provision in the Airline Deregulation Act).

Gulick cites no case holding that the FAAAA, or the Airline Deregulation Act on which it is based, preempts any tax. There is sufficient judicial guidance concluding that the impact of a state law like Washington's Employment Security Act on motor carriers' prices, routes, and services is too remote and tenuous to invoke FAAAA preemption. This is not an issue of substantial public importance requiring this Court's determination, nor is it a significant constitutional question. RAP 13.4(b)(3), (4). Gulick's argument for review under the Supremacy Clause is nothing more than a repetition of its mistaken preemption argument. Pet. 20. These claims do not warrant review.

## V. CONCLUSION

The Department respectfully asks the Court to deny review.

RESPECTFULLY SUBMITTED this 25th day of April, 2018.

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**PROOF OF SERVICE**

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

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

2. That on the 25th day of April 2018, I caused to be served a true and correct copy of the **Respondent's Answer to Petition for Review**, as follows to:

Email per agreement

| | |
|---|---|
| Aaron Riensche | ariensche@omwlaw.com |
| Jeffrey Dunbar | jdunbar@omwlaw.com |
| Ogden Murphy Wallace, PLLC | chenry@omwlaw.com |
| 901 5th Ave, Suite 3500 | |
| Seattle, WA 98164-2008 | |

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

DATED this 25th day of April, 2018, at Seattle, WA.

ROXANNE IMMEL, Legal Assistant

## AGO/LICENSING AND ADMINISTRATIVE LAW DIV

## April 25, 2018 - 2:53 PM

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| **Appellate Court Case Number:** | 95556-5 |
| **Appellate Court Case Title:** | Gulick Trucking, Inc., v. State of Washington Employment Security Department |
| **Superior Court Case Number:** | 15-2-04271-1 |

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