CALIFORNIA'S INDEPENDENT CONTRACTOR CRISIS

UNDERMINING THE OWNER-OPERATOR

The next battle in what some view as a West Coast war on owner-operators has nothing to do with truck emissions. Instead, California's labor law developments, predatory lease-purchase practices and aggressive union organizing are making it increasingly difficult to operate, yet alone thrive, as an independent contractor.

BY TODD DILLS

The independent contractor classification last year took what some see as an uppercut to the chin in the California high court case of *Dynamex v. Superior Court of Los Angeles*. The court used what's commonly known as the "ABC test" to make the determination that light- and medium-duty local delivery contractors for *Dynamex* had been misclassified as independent contractors. They'd been converted from W-2 employees a decade earlier.

The test could have far-reaching consequences because, applied elsewhere, it could change how the Internal Revenue Service and state tax and labor departments look at self-employed owner-operators leased to carriers. Depending on how subsequent judicial and legislative actions play out, it could become much harder to work as an independent-contractor trucker in California, especially in port applications.

Under the ABC test, three conditions must be met to properly classify independent contractors. For trucking, it's part B that's most problematic, requiring an independent contractor to be in a field of work outside the usual course of the carrier's business.

Applied broadly, any trucking entity that employs drivers in company trucks but also maintains a division of independent contractors could be open to legal action for misclassifying its owner-operators. In cases such as *Dynamex*, they could be subject to employee-focused wage and hour rules.

In California, as in many states, those wage and hour rules include meal and rest periods that employers are obligated to provide, pay for and record. Few trucking companies before recent history have bothered with the practice, given the nature of the business.

However, "every state has them" in some form, says Todd Spencer, president of the Owner-Operator Independent Drivers Association. "There are certain things that all employers are required to do."

California ports are a battleground over predatory truck lease-purchase programs, which have helped prompt union organizing efforts and pushback from labor and the state.

Courtesy of Long Beach

Apart from evolving interpretations of break requirements, the owner-operator model in California has been undermined from within by lease-purchase-type arrangements abused by bad actors, particularly in port operations. *USA Today*'s "Rigged" series exposed dramatic examples where ostensibly independent truckers essentially become indentured servants, dependent on the carrier to make increasingly unaffordable lease payments. In many cases, they never fully take ownership of the truck. In the worst cases, they end up making little to no income.

These abuses, particularly in the busy Los Angeles and Long Beach ports, have provided a beachhead for union organizers. Increasingly, drivers with union support or not have targeted carriers with class-action lawsuits seeking misclassification judgments and, then, back pay for newly reclassified employee drivers denied breaks required by California law.

Such suits don't always follow that exact blueprint, as small fleet AB Trucking's story (**page 32**) in Oakland makes clear, but they've proven increasingly successful since a 2014 federal court ruling established the precedent that California law on breaks applies to employee drivers.

For a motor carrier, as with some other businesses, two attractions of the independent contractor status are simplicity and costs — avoiding unemployment-insurance responsibilities and in most cases placing the burdens of tax payment and workers compensation onto the "self-employed" worker. Many of the administrative responsibilities of employment are avoided, including meal and rest breaks.

For the contractor, shouldering those burdens is tolerable because, ideally, the relationship enhances earning potential and operational freedom. Yet for too many that hasn't been the case.

With interstate company drivers long exempted from federal overtime-pay requirements, and with the hours of service rule at odds with state break requirements, trucking has evolved in a bad way, Spencer contends. "We have too many people that long ago quit placing any value whatsoever on a driver's time," he says. Carriers that "grumble" about the state meal and rest breaks situation, he feels, just "don't want to pay [drivers] for that time."

In the wake of related lawsuits out West, there were moves to get Congress – and when that failed, the Federal Motor Carrier Safety Administration – to settle the matter by declaring federal pre-emption of meal and rest break regulations. Those efforts were led by the American Trucking Associations and smaller carrier groups such as the Western States Trucking Association and Specialized Carriers and Rigging Association.

In December, FMCSA issued a declaration that California meal and rest breaks are pre-empted under federal law and that carriers and drivers need not comply with them. Less than a week later, the Teamsters union challenged the agency's action in court. Some watchers believe the legal wrangling could send the issue to the U.S. Supreme Court.

For now, it remains the case for motor carriers based in California or employing state-based drivers that putting compensatory value on all work tasks other than just driving is the best defense against misclassification and meal-and-rest-breaks litigation, says attorney Greg Feary.

"If you can work through a way in which to compensate independent contractors so that the enterprising plaintiff's attorney doesn't see a reason to sue, that's how you limit your risk," says Feary, of the Scopelitus Garvin Light Hanson & Feary firm. A "big issue is California is there is no wage averaging — plaintiffs' attorneys make an argument that if the truck's not

The ABCs of independent contractors

A 2018 California Supreme Court ruling provided what legal watchers say ultimately could become a new legal standard in the state for determining whether a worker should be classified as an employee or an independent contractor. If a company cannot satisfy all three conditions of the ruling's ABC test, its contractors could be ruled unlawfully misclassified:

(A) *that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;*

(B) *that the worker performs work that is outside the usual course of the hiring entity's business; and*

(C) *that the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.*

moving, and the driver's being paid on the basis of it moving, they're not getting paid at all" for times when it's not. "They're not making minimum wage" for that time because it's not directly compensated.

Spencer acknowledges the Teamsters' role in leading some of the litigation that's occurred. He takes Feary's advice further: "The best play on organized labor is to treat your folks right, to pay them well," he says. Trucker income 30 to 40 years ago "was significantly higher overall than what it is now," in part due to organized labor. "We've been moving in the wrong direction for a long time."

From a very-small-fleet perspective, the leased-owner-operator model with percentage pay reflects the value of the relationship between the carrier and the leased owner-operator and avoids the unpaid time issue, notes owner-operator Darril Lightburn. Based in Southern California and one of two operators leased to small-fleet owner-operator Jimmy Nevarez' Angus Transportation, Lightburn says he is paid as a contractor a negotiated lump sum for each move he makes.

"You're making money" according to the entire move, he adds, "and the carrier's making money — that creates more than a win-win for a contractor." Perhaps that also makes it unlikely an attorney can make the successful argument of uncompensated time that Feary highlights.

Lightburn's a negotiator in the arrangement, too, just like Nevarez is with the mostly regular brokers he taps for freight. Nevarez "doesn't call me and say, 'This is where you're going,' " Lightburn says. "We negotiate with each other."

Following Nevarez getting his authority with one truck specializing in SoCal rail intermodal containers – well away from the ports – Angus now runs dry freight in food-grade vans. He knows that developments in California courts could put the leasing arrangement he has with Lightburn and his other contractor in jeopardy, even with it being as traditionally entrepreneurial as it is.

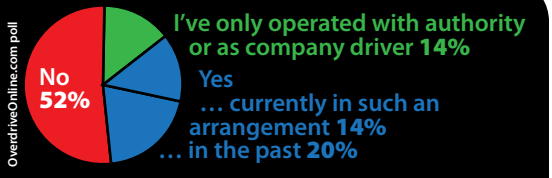
In the wake of the *Dynamex* ruling using the ABC test, the California Chamber of Commerce put together the "I'm Independent" coalition of businesses that view the test as an assault on the contractor model. The coalition staged an outreach to lawmakers in Sacramento last summer.

The coalition "will look to support legislation that clarifies and reforms the test set forth in *Dynamex* so that individuals who choose and want to be freelancers can still do so," says Denise Davis of the chamber.

The SoCal-based Western States Trucking Association is a member. WSTA representative and former owner-operator Joe Rajkovacz notes two bills were introduced in the State Legislature in the wake of the *Dynamex* ruling. One would cut against use of the ABC test; the other would do the opposite.

WSTA, too, "filed a federal lawsuit against applying the ABC test to the trucking industry," Rajkovacz says, supporting the argument that the Federal Aviation Administration Authorization Act pre-empts application of the test.

Have you ever been considered a W-2 employee as an owner-operator otherwise leasing equipment to a motor carrier?



A significant minority of owner-operators say they have experienced a leasing arrangement with a motor carrier where they were considered an employee with taxes reported on a W-2 form.

Such a model may grow in prevalence if lawyers and litigants are successful in doing what attorney Greg Feary expects: expanding a recent court ruling so as to define an independent contractor more narrowly. If more owner-operators move into employee status, more opportunities will arise for collective bargaining and union representation for those who see no value in the independent contractor status.

Comments under the poll indicate some owner-operators might not understand the difference between independent contractors and employees. One commenter noted he was an employee of the fleet but received 1099 tax forms rather than a W-2. However, issuance of 1099s indicates the carrier considers that trucker to be an independent contractor, not an employee.

Another comment illustrated what it might take for a carrier exploring an employee-owner-operator model to sway the proudly independent among owner-operators: "If employee is anywhere in my job description, I better have medical, dental, vision, 401(k), paid vacation and all holidays paid, including time and a half after 40 hours! And when I park my truck, I turn in my pre-trip/post-trip to the shop, hang my key on the hook and get in my car and … see y'all in the morning!"

"We do have some precedent in a case out of Massachusetts," he adds. It found the test's problematic B prong could not be applied in a particular delivery-service contractors-related case, citing FAAAA.

The California Trucking Association also filed suit over the *Dynamex* ruling in federal court. Feary speculates neither suit will see action until late this year.

Feary also notes another case, where a federal court in November considered the application of the ABC test to a group of port drayage drivers contracted to XPO. Feary contends the court in that case essentially said applying the ABC test itself to the contractors was in violation of FAAAA's prohibition on any state law that impacts the "prices, routes and services of a motor carrier."

For that single case, the court fell back on the more in-depth, multifactor "Borello test." The single ruling in the XPO case is not precedent-setting. Only if it or another of the lawsuits around federal pre-emption were to reach the appeals stage, and be decided on, would precedent against use of the ABC test be set.

If the screws continue to tighten on the independent contractor status in California and beyond, the future for the approach to leasing owner-operators could tack toward an employment arrangement. Or more likely, it would go in the opposite direction: securing operating authority for most who value their independence.

Rajkovacz has been in discussions with three owner-operator-heavy carriers in California about that potential work-around. Operating as a full-fledged motor carrier, the owner-operator would have contractual agreements with motor carriers' brokerage or freight-forwarder arms.

"Most of these guys have been the targets of Teamster-inspired lawsuits," he says, and "wouldn't ever want to be on a radar that they're engaging us." They nonetheless believe "this is unfortunately a necessary step until there's an outcome from the lawsuits."

Courtesy of Jimmy Nevarez

> "Often, in a contractor-carrier relationship, the writing is on the wall prior to the point of failure. Many just choose not to read."
>
> — ***Small fleet operator Jimmy Nevarez*** *believes contractors who fail and later sue their carrier create problems "for legitimate carriers like myself that actually provide a value to owner-operators leased onto my operating authority."*

The Teamsters challenge to FMCSA's pre-Christmas assertion of federal pre-emption of California's break rules will be decided in the same Ninth Circuit federal appeals court that in 2014 established the meal and rest breaks precedent for employee drivers.

OOIDA hopes to elevate the conversation around the issues to the national stage with the new Congress. They see Rep. Peter DeFazio of Oregon, a Democrat who will assume leadership of the House Transportation Committee, as more attuned to trucking and truckers. "I think there will be opportunities to talk about all of this in congressional hearings this year," Spencer says.

In January, too, the Supreme Court issued a ruling in a lease-purchase driver's case against Prime that could eventuate in more misclassification suits seeing the light of day in court, rather than being forced into private arbitration. (See p. XX.)

Spencer adds that leased-to-independent conversions could be viable for businesses that feel threatened by the ABC test. He pointed also to operations in which owner-operators lease their equipment to carriers that pay them as W-2 employees, citing a Seattle-based small-carrier member with employee owner-operators. The owner handles compensation by separating a percentage for employee driver pay and another percentage to pay for equipment use.

Spencer views California, especially with its predatory lease-purchase-type arrangements, as something of a ground zero for changing dynamics harmful to owner-operators. "What goes on in California is probably some of the most dramatic examples of where independent contractor relationships are basically used and abused."

It's easy to see, he adds, "the detrimental effects it's had through the years, in terms of basically undermining the future viability of small-business truckers. It lowers the floor for everyone."

A SMALL FLEET VS. THE TEAMSTERS

BY TODD DILLS

Five-truck fleet AB Trucking owner Bill Aboudi had 11 employees at the time he was visited by a high-level executive with the International Brotherhood of Teamsters. It was around 2007, he recalls, as union efforts to organize drayage drivers at California's Port of Oakland began to ramp up.

"We'd like you to sign this one-page contract," the executive told him. It said Aboudi's company would become a union fleet when 90 percent of the port truckers agreed to do the same.

"I said, 'I can't sign this. You're using me as bait for other truckers,' " says Aboudi, an early 1980s Palestinian-American immigrant. The fleet owner, well respected in what is something of a tight-knit community serving the Oakland port, believed the union "wanted to use me as a poster child ... My father started as an owner-operator, started his own trucking company. That's the American way."

In the years around the 2008 recession, the Teamsters had attempted to marshal community groups in Oakland as well as port truckers into a "Coalition for Clean & Safe Ports" grassroots effort with an overt environmental and safety message, Aboudi recalls. Less obvious, perhaps, was his take on the real goal of that effort, which fell short of its aims.

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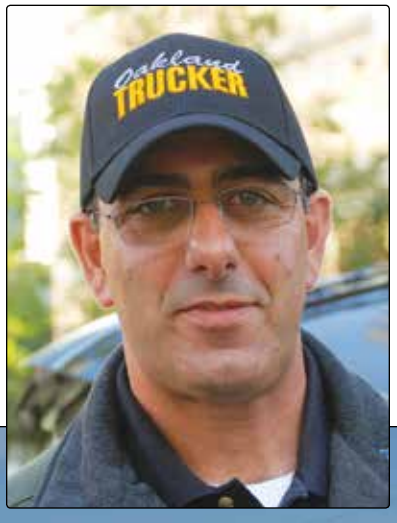
"I wanted to join," but discussions revealed that the "end result is union" for all port truckers, much like what was attempted in Los Angeles and Long Beach at the time. The Southern California ports attempted to bar the use of independent contractors there and got the local community on board, later running afoul of the Federal Aviation Administration Authorization Act, also interpreted by some to trump California's meal and break regulations.

Aboudi told the union, "I disagree with your assessment that all these guys" – the majority of truckers serving the Oakland ports were owner-operator independent contractors at the time, he estimates – "actually want to be employees."

Teamsters did not respond to *Overdrive*'s request for an interview.

Aboudi now has a few owner-operators leased and others he can contract with as needed. But at the time, he commonly offered informal, free, unpaid training to prospective truckers.

After the meeting with the union representative and clashes during the nascent coalition's meetings, Aboudi's training efforts came back to bite him when he found himself the target of a lawsuit. Two lead plaintiffs from among his former drivers alleged the unpaid trainees were misclassified and the drivers had been denied California-required meal and rest breaks. The court eventually certified a class of about 75 drivers employed by AB over



Courtesy of Bill Aboudi

"I was good until 2007. In 2008, I became the monster."

— **AB Trucking owner Bill Aboudi**, *summarizing what happened as Teamsters began their organizing efforts in California's Port of Oakland, where he operates*

time. All were contacted by the court, with a third of that number responding, and 10 opting out of the class, Aboudi says.

His company wasn't the only target. "A lot of the bigger companies, they just cash out," he says. The "first one rolled over and paid out $500,000 to get it to go away. … I know a guy in Fresno that paid out $1 million over two years in installments just to end it."

After appealing the case as high as he could, Aboudi and AB Trucking were found liable. AB Trucking's website shows a $1.3 million judgment that includes slightly more than $370,000 for Weinberg Roger & Rosenfeld, the law firm representing the drivers.

Had his case reached federal court, it could have set the precedent that employee drivers domiciled in California needed to account with their employers, and be compensated, for a 10-minute rest period every four hours and on-duty meal periods.

Instead, it was the similar *Dilts v. Penske Logistics* case that set the precedent. Now carriers not doing administrative due diligence around employee driver breaks open themselves up to lawsuits, which have been relatively easy pickings for savvy attorneys over the nearly five years since the *Dilts* decision. Aboudi says the Federal Motor Carrier Safety Administration's recent declaration of pre-emption of those rules doesn't help him, but could help others in the future.

Aboudi mortgaged everything he's got to stay in business in light of his legal expenses. He's no longer doing any training and he's completing more paperwork related to meal and rest breaks.

"We have to force our guys to log in when they take their breaks," he says, and they've "got to have a piece of paper to sign" that they took them. "It's a waste of time and energy, and I've got a lot of good drivers that don't milk the clock."

New emissions deadline will ban more trucks

For port-truck owner-operators and those running elsewhere in California, Jan. 1, 2023, is the day by which trucks must be emissions-compliant with a 2010 or newer emissions-specification engine.

The requirement will bring more trucks under the purview of the California Air Resources Board's Statewide Truck and Bus Rule and Drayage Rule. The rules now ban trucks powered by engines of earlier emissions specifications than the year 2007, with limited exceptions, on slightly different timelines.

Owner-operator Darril Lightburn says the Truck and Bus Rule was more or less responsible for putting him out of business when he couldn't afford to upgrade his pre-2007 truck. "I had to go from an owner-operator back to a company driver," he recalls. After saving as much as possible for six months, he returned to working as an owner-operator.

Leased to small fleet Angus Transportation, Lightburn brings in $80,000-$90,000 in annual income after expenses, versus less than half that during his company-driver tenure in Southern California. He's owned a 2009 International ProStar for four to five years now.

Lightburn Express owner-operator Darril Lightburn, 47, specializes locally in Southern California with a 2009 International ProStar leased to Jimmy Nevarez' Angus Transportation small fleet as an independent contractor.

Lightburn's begun eyeing an upgrade to a newer model, he says, as is AB Trucking owner Bill Aboudi for his five 2009 company vehicles serving the Oakland port. Aboudi believes compliance with CARB's rule should be much easier this time around for many port operators. "Perfect sweet spot for truck prices is in the $40K range," he says. "2013 and 2014 models are hitting that now."

Of the 8,700 or so trucks registered in the Oakland port, he says, about "half of them probably meet that requirement today. With other trucks, operators are trying to get as many miles out of them as they can."

California's next emissions deadline in 2023 will ban trucks with powertrains of 2009 and older emissions specifications from operating at the ports and elsewhere in the state.

Courtesy of Port of Oakland

Some of the worst predatory lease-purchase programs are at the West Coast ports, but also elsewhere. Too often, companies use these schemes to extend their bottom line and build their fleets, never allowing the driver the possibility of success. In such programs, drivers take nearly all the risk on a four- or five-year contract. He or she may make every payment and still not walk away with the truck.

GOOD-FAITH DISCLOSURES IN LEASE-PURCHASES

By Overdrive Extra blogger Clifford Petersen. Leased to Christenson Transportation, he has also worked as a freight broker and CDL instructor.

Jim Allen

A participant in a lease-purchase program deserves to be informed of the truck's repair and maintenance history.

Sure, the company takes on some risk, too. A driver could tear up the equipment and in a walk-away lease turn the keys in with little consequence. But you can be sure that the company will report such actions on the driver's DAC employment history. Even then, the company will fix the equipment and lease it, most likely never reporting any accident or repairs to the new driver.

I once leased a truck that had been in an accident where the sleeper was torn off the truck and the dash had been horseshoed around the driver. I never would have known it until the time of resale if I had not spent so much time with repairs at the OEM. The problem: A '94 International sleeper had been replaced with a '95 model, creating an electrical nightmare.

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Perhaps it is time we push for fair disclosure. Drivers have just as much right to make an informed decision as any other consumer.

Would you be willing to jump into a lease with a company that has a low completion rate and a low retention rate? Would you be willing to spend $150K on a truck that had been in a major accident? If this information was made available to drivers, perhaps we would see the predatory lease programs fall by the wayside, and drivers electing this route would have one less hurdle as they fight for success. Perhaps carriers, instead of dumping thousands of dollars into recruiting, would concentrate on retaining.

The Owner-Operator Independent Drivers Association played a major role in codifying the existing truth in leasing regulations in 49 Code of Federal Regulations Part 376.12. Maybe it is time for an update to cover good-faith disclosures in lease-purchase contracts. Maybe it's time to start eliminating predatory practices within our industry. The major carriers always are screaming about a level playing field, yet they dictate the boundaries. Let's change that.

Potential items in a "truth in lease-purchase" addition to the truth in leasing regulations

• Trucking companies must report and disclose all maintenance and repair records of equipment leased or bought by interested parties.

• Trucking companies must disclose all accident records and related repairs of equipment leased or bought by interested parties.

• Trucking companies must show the estimated book value of all equipment leased or sold to interested parties based upon condition, miles, year, make and model, repair history and accident history.

• Trucking companies offering lease-purchase programs to CDL drivers must keep records of their retention and completion rates, reporting to a third-party entity; such documentation must be submitted to a national fair-leasing data bank and made public.

What's missing? Send your ideas to tdills@randallreilly.com.