

[ORAL ARGUMENT NOT YET SCHEDULED]

No. 07-1391 [Consolidated With No. 07-1436]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FEDEx HOME DELIVERY, A SEPARATE OPERATING DIVISION OF FEDEx
GROUND PACKAGE SYSTEM, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review and Cross-Application for Enforcement
of a Final Order of the National Labor Relations Board

**BRIEF OF AMICI CURIAE
AMERICAN TRUCKING ASSOCIATIONS, INC. AND
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
IN SUPPORT OF PETITIONER**

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March 31, 2008

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici.

All parties, intervenors, and amici appearing before this Court are listed in the Brief for Petitioner.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, *amici curiae* state that:

Amicus curiae the American Trucking Associations, Inc. (“ATA”), a District of Columbia non-profit corporation, is the national trade association of the trucking industry. ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Its membership includes approximately 2,000 direct dues-paying member trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents over 37,000 companies and every size, type, and class of motor carrier operation. ATA has no parent corporation, and no publicly held company owns 10% or more of its stock.

Amicus curiae Chamber of Commerce of the United States of America (“the Chamber”) is the nation’s largest federation of business companies and associations, with an underlying membership of more than three million business and professional organizations of every size and in every sector and geographic


region of the country. The Chamber has no parent corporation, and no publicly held company owns 10% or more of its stock.

(B) Rulings Under Review.

References to the rulings at issue appear in the Brief for Petitioner.

(C) Related Cases.

Amici curiae are unaware of any related cases.



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March 31, 2008

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GLOSSARY

ATA	American Trucking Associations, Inc.
Chamber	Chamber of Commerce of the United States of America
FedEx Home	FedEx Home Delivery Service, A Separate Operating Division of FedEx Ground Package System, Inc.
ICC	Interstate Commerce Commission
<i>NAVL</i>	<i>N. Am. Van Lines, Inc. v. NLRB</i> , 869 F.2d 596 (D.C. Cir. 1989)
NLRB	National Labor Relations Board
OOIDA	Owner-Operator Independent Drivers Association

INTEREST OF THE *AMICI CURIAE*

This brief is submitted on behalf of the American Trucking Associations, Inc. (“ATA”) and the Chamber of Commerce of the United States of America (“the Chamber”) as *amici curiae* in support of petitioner FedEx Home Delivery (“FedEx Home”). This Court granted *amici*’s motion for leave to participate as *amici curiae* on January 2, 2008.

ATA is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the national trucking industry. ATA’s membership includes approximately 2,000 direct dues-paying member trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents over 37,000 companies and every size, type, and class of motor carrier operation.

The Chamber is the nation’s largest federation of business companies and associations, with an underlying membership of more than three million business and professional organizations of every size. The Chamber’s members, which include motor carriers, operate in every industry sector of the economy and throughout the United States and around the globe. The Chamber’s members rely on parcel delivery companies and other motor companies to deliver needed raw materials and components and to distribute their products on a timely, efficient,

and cost-effective basis. A central function of the Chamber is to represent the interests of its members in important matters before Congress, the Executive Branch, and the courts of the United States. To that end, the Chamber has filed *amicus* briefs in numerous cases addressing issues of vital concern to the Nation's business community.

Through and on behalf of their respective members, *amici* have strong interests in ensuring that the accepted legal standards for determining worker classification are employed reasonably, uniformly, and predictably by administrative agencies and courts. Worker classification determinations have a significant impact on motor carrier operations and carry significant financial consequences for the trucking industry and the economy as a whole.

This case is of significant interest to *amici* because it may have broad ramifications concerning the use of independent contractors not only in the package delivery business but also in the trucking industry more generally, as well as other sectors of the economy. In the trucking industry, the use of commercial vehicle drivers known as "owner-operators"—independent businesspersons who contract their services and lease their motor vehicle equipment to trucking companies pursuant to 49 U.S.C. § 14102 and related regulations set forth at 49 C.F.R. Part 376 (2007)—is widespread and economically significant.

In light of their extensive involvement with many of the issues pertinent to this case, *amici* are uniquely positioned to explain the context in which worker classification issues in the trucking industry arise and the practical implications of the issues raised in this case.

SUMMARY OF ARGUMENT

Independent contracting is a longstanding and pervasive feature of the trucking industry. For decades, independent contractors who own their own vehicles—owner-operators—and other independent contractor drivers have been widely used by trucking companies to meet fluctuations in demand, provide needed equipment at considerable savings in costs, and address longstanding shortages of experienced drivers. In addition, a number of trucking companies have structured their business model around the use of independent contractors, having recognized that the experience, maturity, energy, and initiative of the independent owner-operator can be harnessed to the mutual advantage of trucking companies and independent contractors, alike.

In order to assure the stability of the pool of experienced owner-operators—and to grow the size of that pool—trucking companies long have taken steps to make the contracting relationship mutually beneficial. Such activities have benefited both the trucking companies and the independent contractors.

This is the context in which worker classification determinations in the trucking industry should be made. Based on these longstanding practices, in evaluating the existence of entrepreneurial opportunities in connection with worker classification decisions, the primary focus of the inquiry should be much more on whether the workers have an opportunity for entrepreneurial *gain*, than on the risk of *loss*. Such an analysis would recognize the mutually beneficial initiatives taken by trucking companies to facilitate the stability and growth of the independent contractor workforce and to advance the shared business objectives of the companies and independent contractors—meeting customer demand and growing their respective businesses. It also would contribute to predictability and uniformity of worker classification determinations in the trucking industry.

In addition, this Court has recognized that, in evaluating whether a company is exercising control over the manner and means of performance, the exercise of control in order to satisfy customer demands or meet regulatory requirements is not an indicia of an employment relationship. This is critical because government regulation of trucking operations is pervasive and customer demands may have a significant impact on the performance of a trucker's work in a variety of respects, including scheduling and work attire. Thus, it is crucial to avoid confusing steps taken to assure compliance with government regulation or customer demand with supervision over the manner and means of performance.

ARGUMENT

I. THE USE OF INDEPENDENT CONTRACTORS IN THE TRUCKING INDUSTRY IS MUTUALLY BENEFICIAL TO TRUCKING COMPANIES AND CONTRACTORS

Independent contractors, most of whom have a significant ownership interest in their vehicles (owner-operators), are widely used by trucking companies. Their participation in trucking operations is long-standing. *See* Ex Parte No. MC 43 (Sub-No. 12), *Leasing Rules Modifications*, 47 Fed. Reg. 53858, 53860 (Nov. 30, 1982) (“Prior to the Motor Carrier Act of 1935, motor carriers regularly performed authorized operations in non-owned vehicles. To a large extent, ownership of these vehicles was vested in the persons who drove them, commonly referred to as owner-operators.”). Indeed, over 55 years ago, the Supreme Court noted the extensive use by the trucking industry of leased equipment supplied and operated by owner-operator truckers. *American Trucking Ass’ns, Inc. v. United States*, 344 U.S. 298, 303 (1953) (“Carriers subject to [Interstate Commerce] Commission jurisdiction have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands.”).

Estimates of the number of independent drivers and owner-operators vary. The Owner-Operator Independent Drivers Association (“OOIDA”)—the international trade association representing independent owner-operators and professional drivers—boasts more than 160,000 members in the U.S. and Canada

(see OOIDA's homepage article, "What is OOIDA?," at http://www.oida.com/about_us/about_us.html). According to an article in *Fleet Owner Magazine*, a Vehicle Inventory and Use Survey issued by the U.S. Census Bureau and Department of Commerce estimated that there were 390,000 owner-operators as of 2002. Terrance Nguyen, *Gauging the Owner-Operator Population*, *Fleet Owner* (Dec. 13, 2004), available at http://fleetowner.com/news/owner_operator_population_121304/).¹

¹ In the same article, an OOIDA spokesman estimated that there might be as many as 500,000 owner-operators in the U.S. Unfortunately, the government statistics we have reviewed do not provide a clear picture of the number of independent contractor truck drivers. The 2008 Statistical Abstract of the United States, for instance, states that there are 756,000 "self-employed workers" in the "production, transportation, and material moving occupations." See U.S. Census Bureau, Section 12: Labor Force, Employment, and Earnings, Statistical Abstract of the United States: 2008, at 383 (Table 587), <http://www.census.gov/prod/2007pubs/08abstract/labor.pdf> (last visited Mar. 31, 2008). Truck drivers, presumably, are a subset of "production, transportation, and material moving occupations," and the category "self-employed workers" may be both under- and over-inclusive with regard to independent contractor drivers. The Bureau of Labor Statistics' *Contingent and Alternative Employment Arrangements, February 2005* indicates that 3.9% of 10.342 million independent contractors—that is, 403,338—were in "[t]ransportation and material moving occupations." See Bureau of Labor Statistics, *Continent and Alternative Employment Arrangements, February 2005*, Table 8 (July 27, 2005), <http://www.bls.gov/news.release/conemp.t08.htm>. An analysis based on tabulations of microdata from the Census Bureau's 2002 Current Population Survey estimated the number of self-employed persons who report their occupation as truck drivers to be approximately 300,000. GlobalInsight, Inc., *The U.S. Truck Driver Shortage: Analysis and Forecasts* 8 (May 2005), available at <http://www.truckline.com/NR/rdonlyres/E2E789CF-F308-463F-8831-0F7E283A0218/0/ATADriverShortageStudy05.pdf>.

What is clearer, however, is that independent contractors—many of whom are owner-operators—are used in most, if not all, sectors of the trucking industry, including long-haul trucking, household goods moving, intermodal operations, and package delivery services. Equally clear are the reasons that independent contracting is attractive to trucking firms and independent contractors, alike.

For trucking companies, independent contractors—especially owner-operators—provide a number of advantages. Independent owner-operators often are mature drivers who are highly skilled and motivated. The availability of such owner-operators and their equipment (through leases of equipment to carriers with operating authority) enables trucking companies to save on equipment and capital costs and provides flexibility to meet fluctuations in demand for trucking services. As the Supreme Court explained almost 33 years ago,

[d]emand for a motor carrier's services may fluctuate seasonally or day by day. Keeping expensive equipment operating at capacity, and avoiding the waste of resources attendant upon empty backruns and idleness, are necessary and continuing objectives. It is natural, therefore, that a carrier that finds itself short of equipment necessary to meet an immediate demand will seek the use of a vehicle not then required by another carrier for its operations, and the latter will be pleased to accommodate. Each is thereby advantaged.

Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys., 423 U.S. 28, 35 (1975).²

In addition, owner-operators and other independent contractors typically share the trucking companies' interests in meeting customer demand and increasing revenues and profits. As Adam Smith might have predicted, by successfully and skillfully performing the contracted-for services, the independent contractor grows his or her own business and, at the same time, facilitates the success of the trucking company. The mutuality of the interests of the trucking company and the independent contractor, as well as the energy and maturity that independent contractors bring to their work, have not been lost on the trucking companies. Indeed, a number have made reliance on independent contractors a central feature of their business models.

For the owner-operator and other independent drivers, independent contracting provides numerous advantages. For one thing, studies show high

² In *Brada Miller*, the Court referred to leasing arrangements between two “carriers”—that is, firms with operating authority (certificates) under Federal law. See 49 C.F.R. § 376.2 (a) (2007) (defining an “[a]uthorized carrier” as a “person or persons authorized to engage in the transportation of property as a motor carrier under the provisions of 49 U.S.C. 13901 and 13902”). It bears noting, however, that in many lease arrangements an owner-operator who does not have his or her own operating authority leases a vehicle to a carrier with such operating authority. The Court’s reference to leases between authorized carriers was pertinent in *Brada Miller* because both *Transamerican* and *Brada Miller* were authorized carriers. See *Brada Miller*, 423 U.S. at 33 n.6.

levels of job satisfaction among independent contractors generally. As one study noted, “[t]he overwhelming majority of *independent contractors* were very happy in their arrangement and had entered it voluntarily. About 84 percent of independent contractors reported that they preferred their arrangement to a traditional one in February 1999. * * * The majority of independent contractors preferred this arrangement rather than being someone else’s employee, regardless of prior labor force status.” Marisa DiNatale, *Characteristics and preference for alternative work arrangements, 1999*, Monthly Labor Review 28, 46 (March 2001), available at <http://www.bls.gov/opub/mlr/2001/03/art2full.pdf>; see also Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements, February 2005*, at 4, <http://www.bls.gov/news.release/conemp.nr0.htm> (“Fewer than 1 in 10 independent contractors said they would prefer a traditional work arrangement.”).³

Independent contractors in the trucking industry reap both the general benefits of independent contracting and the benefits that arise from long-standing practices in the trucking industry. Because business start-up costs in the trucking industry are comparatively modest, consisting principally of the cost of a power

³ The Bureau of Labor Statistics reported that “[i]n February 2005, there were 10.3 million independent contractors (7.4 percent of total employment) * * * .” Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements, February 2005*, at 1 (July 27, 2005), <http://www.bls.gov/news.release/conemp.nr0.htm>.

unit and various licensing and insurance fees, trucking affords independent contractors a great opportunity to start and build up their own businesses. In doing so, owner-operators sometimes receive assistance from trucking companies in locating financing for purchasing trucks and necessary equipment and in obtaining insurance. Enterprising owner-operators can purchase additional trucks and trailers and employ drivers and other staff to carry out their business. While most will not have the success—or ambition—of J.B. Hunt, who started with five trucks and seven trailers in 1969 and took his company public in 1983 (*see* J.B. Hunt Transport Services, Inc., “About the Founder,” <http://www.jbhunt.com/aboutus/founder.html> (last visited Mar. 27, 2008)), independent contracting in the trucking industry allows owner-operators to live out their own version of the American dream, enabling them to be their own bosses, obtain capital and assistance necessary to succeed as independent business people, and determine how much time they want to devote to work.

Owner-operators and independent drivers also benefit from the fact that trucking companies have long recognized the value of having experienced drivers who understand company practices and the requirements imposed by regulations and customer demands. Faced with chronic shortages of such experienced drivers, trucking companies often offer a variety of programs and inducements to promote the viability and stability of the owner-operator workforce and to attract new

drivers and equipment to the trucking industry. Thus, as noted above, some trucking companies assist in locating financing for purchases of trucks. Similarly, trucking companies can use their superior size to assist independent contractors in obtaining lower cost insurance than they might be able to obtain on their own, as well as other equipment and sundries needed for owner-operator operations.

The independent contractor clearly benefits from these practices, but so, too, do the trucking companies because those practices stabilize (and increase) the pool of owner-operators whose skills and availability are critical to the trucking companies, and, as this Court has previously noted, enables independent contractors to “complete their contracted tasks.” *N. Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 604 (D.C. Cir. 1989) (“*NAVL*”).⁴

⁴ Assistance to independent contractors and other business partners is not unique to the trucking industry. For instance, restaurant chains and motor vehicle manufacturers often provide assistance to their franchisees to facilitate their success. According to an “i-brochure” on its website, Subway® provides “[a]ccess to formulas, systems & publications”; “[l]easing assistance”; “[s]tore design guidance”; “[e]quipment ordering guidance”; [t]raining program & Operations Manual”; and “[r]epresentatives at opening & periodic intervals.” See Subway® Franchise I-Brochure, <http://www.subway.com/subwayroot/Development/05/dev/Brochure/i-brochure/> (last visited Mar. 27, 2008). Toyota has a “Dealer Development Program” that provides “investment capital, operational support and management training for qualified candidates. This multi-disciplinary approach helps to lay the foundation for more minorities and women to become successful Toyota, Lexus and Scion dealers.” http://www.toyota.com/about/our_commitment/diversity/dealers/dealer_development_program.html (last visited Mar. 27, 2008).

In light of the need to assure the continued availability of skilled drivers and the flexibility that owner-operators and other independent drivers provide for addressing the changing demands of a dynamic marketplace, the steps taken by trucking companies to make the contracting endeavor mutually beneficial make eminent sense. Worker classification decisions should be made with this context in mind, and certainly should not be skewed to discourage such win-win arrangements. As we explain below, this Court’s precedents provide ample resources for rational, predictable worker classification decision-making that is sensitive to this contextual background.

II. THIS COURT’S PRECEDENTS PROVIDE AN APPROPRIATE FRAMEWORK FOR THE WORKER CLASSIFICATION QUESTION AT ISSUE IN THIS CASE

As this Court has recognized, in resolving worker classification issues, the context of the employment relationships at issue must be given due consideration. *See, e.g., NAVL*, 869 F.2d at 599-600 (assessing factors such as “local business practices regarding supervision”); *id.* at 602 (distinguishing case involving taxi cab drivers, in part because restrictions imposed by cab company “combined with restrictions imposed by the nature of the taxi business, supported the finding of employee status” in cab case, but were absent in *NAVL*). Indeed, in *NAVL*, the Court stated that “[t]he determination to be made is, of course, a contextual one, producing the result that a particular element of worker discretion . . . will yield

different consequences for the worker’s ability to control the manner and means of the job’s performance in different contexts, and thus also yield differing ultimate legal conclusions.” *Id.*

Similarly, the Supreme Court has stated that “[t]here are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor. * * * [T]here is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.” *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968) (footnote omitted).

A. In Applying the Entrepreneurial Opportunity Test to Worker Classification Issues in the Trucking Industry, the Primary Focus Should Be on Opportunities for Entrepreneurial Gain, Rather than Risks of Loss.

As we have explained in the previous section, a mutually beneficial pattern of promoting successful entrepreneurship among independent drivers and owner-operators has developed in the trucking industry as a result of a dynamic marketplace marked by fluctuating demand, chronic or recurring shortages in experienced truck drivers, and longstanding practices of relying on the energy and enterprise of substantial numbers of independent drivers and leased equipment. In worker classification cases, this Court has given increasing weight to the existence

of entrepreneurial opportunities. *See Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002) (embracing a “shift of emphasis” in worker classification cases “to entrepreneurialism”); *C.C. E., Inc. v. NLRB*, 60 F.3d 855, 860-861 (D.C. Cir. 1995); *NAVL*, 869 F.2d at 599-600. As the Court noted in *Corporate Express Delivery Systems*, a focus upon “whether the putative independent contractors have a significant entrepreneurial opportunity for gain or loss” “better captures the distinction between an employee and an independent contractor” than a blinkered consideration of “the employer’s control of the means and manner of the work.” *Corp. Express Delivery Sys.*, 292 F.3d at 780 (internal quotation marks omitted).

In applying an entrepreneurial opportunity test to worker classification issues in the trucking industry, courts and the NLRB should be sensitive to the longstanding practices of the industry. Thus, the fact that many trucking companies make efforts to facilitate the opportunity for entrepreneurial *gain* should not be deemed to weigh against the classification of entrepreneurs who avail themselves of such efforts as independent contractors. Rather, in applying the entrepreneurial opportunity test to trucking industry worker classification issues, the primary focus should be on whether putative independent contractors have a significant entrepreneurial opportunity for *gain*.

This orientation to the entrepreneurial opportunity test in the trucking industry is warranted because, as noted above, many trucking companies seek to attract and assist owner-operators by various means, including facilitating financing, training, and access to resources that contribute to the owner-operators' success and stability as independent business people. These practices have developed as reasonable responses to business conditions in the trucking industry—for instance, the chronic shortages of experienced drivers and the need to ensure the preservation of an experienced fleet of owner-operators who can provide high levels of customer service, increase the companies' market share, and enable companies to respond to changes in demand.

An experienced independent contractor who is familiar with a trucking company's procedures, freight requirements, customer needs, and with applicable Federal and State regulations is extremely valuable. The ability to call on such a driver when needed can be crucial to a trucking company's long-term success. In addition, having such experienced drivers available saves companies significant costs associated with training new drivers and familiarizing them with routes, customers, and freight requirements. Thus, trucking companies understandably attempt to make the contracting endeavor mutually beneficial. These practices should not be discouraged or penalized, and therefore, they should not be viewed

as inconsistent with the existence of entrepreneurial opportunity and independent contractor status.

This Court's precedent supports this view. For instance, in *NAVL*, this Court concluded that North American Van Lines' "support to drivers to allow them to finance the purchase of their cabs," "provision of truck service centers on the highways for the driver's use," and "system of advancing funds to drivers for operating (and other) expenses" did not establish the existence of an employee relationship. *NAVL*, 869 F.2d at 603. Rather, these practices "reflect NAVL's efforts to support the drivers' efforts to establish their businesses and complete their contracted tasks, as opposed to an effort to assert control over the details and manner of performance." *Id.* at 604. So in the trucking industry more generally, attempts to make the contracting relationship mutually beneficial should not be viewed as incompatible with the existence of entrepreneurial opportunity and should not be given significant weight in worker classification determinations.

Finally with regard to the existence of entrepreneurial opportunity, a further point bears emphasis. As the Court recognized in *C.C. Eastern*, the fact that few workers may have availed themselves of entrepreneurial opportunities does not mean that those opportunities do not exist. *See C.C. E., Inc.* 60 F.3d at 860-861. As the Court stated, "it is the worker's retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right that is most

relevant for the purpose of determining whether he is an independent contractor.” *Id.* at 860. The interests of predictability and uniformity of treatment of similarly situated workers strongly support this conclusion. Workers who have identical entrepreneurial rights should not be subject to different worker classification determinations merely because the workers at one location have failed to avail themselves of the identical opportunities that more enterprising workers in other locations have utilized for entrepreneurial gain.

B. Restrictions on Work Performance Based on Customer Demands or Needs Are Not Indicative of an Employment Relationship.

This Court also has recognized the distinction between control over the manner and means of performance and steps to assure achievement of the shared ends of performance. Thus, the Court has stated that “[i]t is important, however, to distinguish such company supervision from the company efforts merely ‘to monitor, evaluate, and improve the results or ends of the worker’s performance.’” *C.C. E., Inc.*, 60 F.3d at 858 (quoting *NAVL*, 869 F.2d at 599). Furthermore, in analyzing whether a company exercises supervision over the “means and manner” of work, rather than merely monitors, evaluates, and improves the results or ends of the work performance, this Court has accepted prior NLRB precedent holding “that where a company’s control over an aspect of the workers’ performance is motivated by a concern for customer service, that control does not suggest an employment relationship because it is ‘addressed to the ends to be achieved * * *

rather than the means to achieve that result.” *Id.* at 859 (quoting *Cent. Transp., Inc., et al.*, 299 N.L.R.B. 5, 13, 1990 WL 122535, at *14 (1990)).

This insight is critical because many (if not all) sectors of the trucking industry are highly competitive, customer satisfaction is paramount to success, and customer satisfaction is directly determined by the ability to meet customer demands. Customer requirements determine a broad range of practices and procedures. For instance, customer demand frequently determines the scheduling of pickups and deliveries and the driver’s hours of work. In the post-9/11 world, where concerns about security are heightened, customers also frequently insist that personnel delivering and picking up shipments at office buildings, residences, and work sites arrive at specific times and locations and wear uniforms, badges, or other insignia. *Cf., e.g.*, Internal Revenue Service, *Employment Tax Guidelines: Classifying Certain Van Operators in the Moving Industry* 23, <http://www.irs.gov/pub/irs-utl/van-ops.pdf> (last visited Mar., 27, 2008) (hereinafter “IRS Van Operator Tax Guidelines”) (“Commonly, the company instructs the Van Operator and helpers to wear a uniform imprinted with its name or insignia in the presence of the customer. Instructions on wearing uniforms or insignia generally originate with the Company’s desire to assure the customer that the Van Operator and helpers are who they purport to be * * * . Thus, the instruction ordinarily is intended to ensure customer security rather than to control the operator. In view of

the underlying purpose, an instruction to wear a uniform in the customer's presence is a neutral factor.”).

C. Restrictions on Work Performance Based on Regulatory Requirements Are Not Indicative of an Employment Relationship.

This Court also has recognized that “restrictions upon a worker’s manner and means of performance that spring from government regulation (rather than company initiatives) do not necessarily support a conclusion of employment status. Indeed, employer efforts to ensure the worker’s compliance with government regulations, even when those efforts restrict the manner and means of performance, do not weigh in favor of employee status.” *NAVL*, 869 F.2d at 599 (citation omitted). This conclusion is important in cases involving worker classification issues in the trucking industry because the trucking industry is pervasively regulated, and to a large extent the burden of assuring compliance with regulatory requirements rests on the motor carrier under whose authority the freight is moved, rather than on the truck driver who may have violated the regulations. Thus, as the Internal Revenue Service has noted in its guidelines for classifying certain van operators in the moving industry, “federal and state regulations make the Carrier responsible for the compliance of the Van Operators and vehicles (including power units) in the Carrier’s service. The Carrier may be subject to fines and penalties if it uses a Van Operator or vehicle that does not comply with governmental regulations. Accordingly, the Carrier must require a Van Operator to follow all

governmental regulations covering such areas as inspection, repair, and maintenance of the vehicle, driving of the vehicle, maximum driving and on-duty time, weighing procedures, and testing for alcohol and controlled substances.” IRS Van Operator Tax Guidelines at 21 (citations omitted).

The regulatory context in which trucking operations are conducted includes, among others, safety, maintenance, and inspection rules; rules relating to receipts and bills of lading; equipment standards; placarding standards; leasing regulations; hours-of-service regulations; commercial drivers license standards; driver training regulations; driver qualification standards; requirements relating to minimum financial responsibility and insurance; rules relating to notification and reporting of accidents; rules governing drug and alcohol testing; and rules governing the identification and handling of hazardous materials. *See, e.g.*, IRS Van Operator Tax Guidelines at 5-6; 49 C.F.R. Parts 373, 376, 380, 382, 383, 385, 387, 390, 391, 392, 393, 395, 396, 397, 399 (2007).⁵

Because of the pervasive regulatory matrix in which trucking operations are conducted, independent contractors in the trucking industry cannot be expected to

⁵ There also are many regulations that apply to particular segments of the trucking industry. For instance, transporters of household goods are subject to estimating rules; rules regulating weighing practices, reasonable dispatch, insurance for public liability and cargo, annual performance reports, packing and unpacking, shipping documentation, and dispute settlement; and regulations governing lease and interchange of vehicles. IRS Van Operator Tax Guidelines at 5; *see also* 49 C.F.R. Part 375 (2007).

have the freedom of action that independent contractors in other, less extensively regulated industries may have. Accordingly, it is essential that supervision to assure compliance with regulations not be conflated with supervision of the manner and means of performance supporting a conclusion of employee status.

CONCLUSION

This Court's precedent supplies an appropriate framework for analyzing the worker classification issue presented by this case. As we have shown, that framework can (and should) be adjusted to account for the economic and regulatory context in which the industry operates, as well as the customer demands that motor carriers face. When these factors are properly considered, the result will be uniform and predictable worker classification decisions that do not upset settled expectations and that preserve the win-win independent contracting arrangements that are pervasive in the trucking industry.

Respectfully Submitted.



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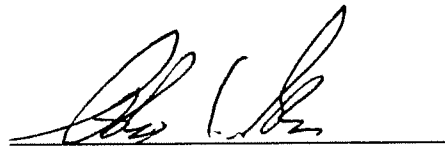
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March 31, 2008

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B) AND
CIRCUIT RULE 32(a)(3)(B)(i)**

I hereby certify that—according to the word-count facility in Microsoft Word—this brief, excluding those portions omitted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), consists of 4,712 words and thus complies with Circuit Rule 32(a)(3)(B)(i).



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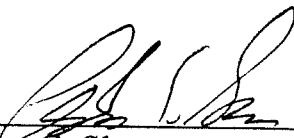
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