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The Legal System Weighs In: Port Drivers are Employees

A Summary of Misclassification Enforcement at the Ports of LA & Long Beach

BACKGROUND

Over the past decade, drivers at the Ports of Los Angeles and Long Beach have been challenging their misclassification as "independent contractors" and proving their rights as employees. As a result of drivers' concerted actions and the enforcement efforts of state and federal agencies, there is now an overwhelming abundance of evidence proving that port drivers are employees. Upon investigating the facts, multiple agencies and courts at both the state and federal levels have determined repeatedly and are continuing to find that drivers are, in fact, employees and therefore protected by employment and labor laws.

Misclassification is an industry-wide, systemic issue. It is estimated that there have been legal misclassification claims pursued on behalf of at least half of the misclassified drivers at the ports of LA and Long Beach – by drivers filing individual wage claims, being part of class action lawsuits, and/or as part of other federal, state, and local agency cases. Many companies have faced multiple lawsuits and administrative claims.

These cases have created some initial changes. In some cases, drivers' collective action and agency enforcement efforts have forced companies to properly and lawfully classify their drivers as employees, which proves that reclassification is possible, and that it is possible for companies to come into compliance with state employment and tax laws. However, these law-abiding companies are undercut by the vast majority of companies that continue to rely on an illegal business model, cutting costs by at least 30% by misclassifying their drivers, and cheating the public of much needed funds by evading payroll taxes.

Simply put, enforcement works, but we need more tools to bring the industry into compliance. SB 338, AB 794, and SB 700 are critical policy measures necessary both to close loopholes that allow companies to profit off of an unlawful business model that exploits workers, and to ensure that drivers can exercise their rights as employees and receive essential employee protections.

Outlined below is a brief summary of key court decisions and agency enforcement action to date. As the summary makes clear, port truck drivers are employees regardless of the employee status test applied – whether it be the streamlined *ABC* test, or other tests making it harder to establish employee status such as the more stringent California Supreme Court *Borello* test, or the most stringent NLRB *SuperShuttle* test.

MISCLASSIFICATION AND WAGE THEFT CLAIMS

Courts and state agencies, including the Labor Commissioner's Office, have made employee determinations on port trucking cases using the *Borello* test, a multifactor test where no single factor carries more weight than another. These decisions using *Borello* have overwhelmingly found port truck drivers to be misclassified.

All of the below cases – Labor Commissioner claims and private lawsuits – are seeking to address violations of the California Labor Code and Industrial Wage Orders, including unlawful deductions and unreimbursed expenses (mostly for truck costs), and failure to provide meal and rest breaks. Many recent cases also include damages for unpaid "nonproductive" hours worked, such as time spent inspecting trucks, under a 2015 CA piece rate law (AB 1513) and at least three individual managers have been named and found to be individually liable under CA's Fair Day's Pay Act (SB 588). Most of the private suits include other causes of action, including willful misclassification and violations of California's Unfair Competition Law.

Labor Commissioner claims

Since 2011, port truck drivers have filed at least 1,105 claims with the CA Division of Labor Standards Enforcement (DLSE) (also known as the Labor Commissioner's office). Of those, the DLSE has issued determinations in close to 500 cases, finding that drivers were, in fact, employees and therefore owed over $60 million in stolen wages and penalties. Approximately 500 other cases filed appear to have been settled prior to hearing or were transferred to court or private arbitration. More than 70 claims remain open or pending hearings.

Private litigation

Port drivers have also been exercising their rights as employees through the court system. Drivers at virtually every market-leading company at the ports have joined class-action suits for misclassification and wage theft, with more than 50 such suits filed. Several of these cases have settled, although the persistent misclassification leaves these companies vulnerable to new claims, and many companies have faced multiple suits. In addition to the class action suits, drivers have also filed dozens of individual or "mass-action" suits involving multiple plaintiffs. Notably, in 2015, 11 drivers filed a "mass-action" misclassification-related lawsuit against their employer Container Connection. In 2016, a judge in California Superior Court, Long Beach District, issued a final judgment determining the drivers were employees and ordering Container Connection to pay the 11 port truck drivers over $2.2 million in damages. While Container Connection eventually paid the damages, continues to misclassify its drivers as independent contractors when in fact they are employees.

AGENCY ENFORCEMENT AND EMPLOYEE DETERMINATIONS

In addition to the courts and the DLSE, other state and federal agencies continue to find port drivers to be employees upon conducting investigations into labor, employment, and tax laws. These decisions include the following:

Federal government action

National Labor Relations Board (NLRB): Region 21 of the NLRB has made merit determinations that drivers from at least eight major port trucking companies were employees – not independent contractors. These have all been under the NLRB's tests for employee status (the FedEx test, and more recently, the *SuperShuttle* test), both of which are more stringent than the *Borello* test used for truck drivers in California.

- In one recent major decision, in March 2020 the NLRB issued a decision affirming a 2017 decision in which an Administrative Law Judge (ALJ) of the NLRB found that a port trucking company operating in the ports of Los Angeles and Long Beach Intermodal Bridge

Transport (IBT) had misclassified its workforce of almost 100 drivers as independent contractors when in fact they were employees. The NLRB found these port drivers to be independent contractors under the more stringent *SuperShuttl*e test. IBT did not appeal this decision and it remains final.

- In November 2020, Region 21 of the NLRB made a determination finding violations of the National Labor Relations Act (NLRA) by one of XPO Cartage's major customers, Toyota. This decision resulted after Toyota threatened a misclassified XPO driver, who NLRB Region 21 found to be an employee of XPO, for supporting a union organizing campaign. In January 2021, the Regional NLRB issued a complaint against Toyota and set a trial date for April 2021.
- Earlier, in 2014, a federal district court judge in California issued a first ever preliminary injunction requiring that employer Green Fleet Systems reinstate wrongfully discharged and unlawfully misclassified port truck drivers as employees, NOT as independent contractors. Thereafter an NLRB ALJ similarly found that not only had Green Fleet committed dozens of violations of federal labor law, but that the terminated drivers--along with numerous other misclassified drivers--were employees and NOT independent contractors. This decision was not appealed by the company and was therefore adopted as final by the NLRB.

US Department of Labor (DOL): The DOL's Wage and Hour Division has conducted multiple investigations of market-leading port trucking companies for misclassification under the Fair Labor Standards Act (FLSA).

- One such investigation resulted in a 2014 consent judgment and order in which the presiding federal judge found the company's California drivers to be employees and ordered it to reclassify them (*Thomas E. Perez, v. Shippers Transport Express, Inc*., Case No. 2:13-cv-04255-BRO-PLA). The company complied with the order and their drivers are now properly classified as employees.
- The DOL's Wage and Hour Division investigated Container Connection from 2009 to 2011 for FLSA violations, and found that Container Connection had violated the FLSA by misclassifying port drivers and failing to pay the minimum wage (Case ID 1634525).

California state government action

CA Employment Development Department (EDD): The EDD identifies misclassified workers in two key ways. The agency conducts individual investigations when workers apply for state disability or unemployment benefits but no wage data appears because they have been paid as an "independent contractor" with a 1099. In addition, the EDD conducts company-wide tax audits to determine and issue assessments for unpaid taxes due to misclassification.

- Just in the past two years, the EDD identified over 3,600 misclassified truck drivers, after conducting over 200 trucking audits and investigating 486 individual claims in 2019 and 2020. These data are inclusive of all trucking industries, including port trucking and drayage.
- The California Unemployment Insurance Appeals Board (CUIAB) has also found drivers to be employees. Just in the past year, at least five drayage truck drivers have been found by five different Administrative Law Judges (ALJs) of the San Diego Office of Appeals of the CUIAB to be employees of XPO Cartage and therefore entitled to unemployment insurance benefits, after having initially and erroneously found to be employees of their coworkers or

themselves by the EDD. Of these five ALJ decisions, two were subsequently appealed and then upheld and affirmed by the CUIAB.

CA Attorney General: Between 2008 and 2009, the CA Attorney General filed lawsuits against six port trucking companies, five of which were settled. The sixth suit, against Pac Anchor, moved forward following a unanimous 2014 ruling by the California Supreme Court that found that that the case was not preempted by federal law. The US Supreme Court declined to review that decision in 2015, clearing the way for the original case to proceed. The case remains pending. (*The People of the State of California v. Pac Anchor*, Case No. BC397600.)

California Division of Occupational Safety and Health (Cal/OSHA):

- On September 16, 2015, a CMI port driver was killed during work hours at the Port of Long Beach. As a result, Cal/OSHA conducted an investigation and found the driver to have been an employee, issuing a citation against CMI in March 2016 citing the following standard: 3314(C) (18B-CA) Servicing Moving Machinery/Equipment. CMI contested the citation and the investigation remains open.
- On March 15, 2021, misclassified drivers for port trucking company Container Connection filed a complaint for multiple violations of Cal/OSHA's Covid Emergency Temporary Standard, including failure to provide masks and ensure social distancing and failure to provide pay to drivers while in quarantine. The complaint is still pending.

City government action

Los Angeles City Attorney: On January 8, 2018, the Los Angeles City Attorney filed lawsuits against three port trucking companies owned by NFI/Cal Cartage, whose trucking enterprise is the largest at the Ports of LA and Long Beach, for violating the Unfair Competition Law (UCL) by misclassifying port truck drivers as independent contractors, evading their obligation to provide benefits to drivers and pay relevant taxes. The case argues that the drivers are employees any way you look at it, whether it be under the *ABC* test or the *Borello* tests. It is well settled that the *Borello* test is not preempted. In the most recent development, the California Court of Appeals rejected NFI/Cal Cartage's argument that applying the ABC test was preempted by the Federal Aviation Administration Authorization Act (FAAAA). In February 2021, the California Supreme Court declined to hear the companies' appeal of that decision. All three cases remain pending. (*The People of the State of California v. CMI Transportation,* Case No. BC689321; *The People of the State of California v. K&R Transportation,* Case No. BC689322; *The People of the State of California v. California Cartage Express,* Case No. BC689320). It should be noted that in cases against each of these NFI companies, the California DLSE previously found port drivers to be employees and not independent contractors under the *Borello* test. These cases subsequently settled for millions of dollars.

Los Angeles Office of Wage Standards: Port drivers for at least three port trucking companies have filed minimum wage claims requesting company-wide investigations of their employers for violating the City's Minimum Wage Ordinance by not paying drivers LA's minimum wage for all hours worked and for failing to provide drivers with paid sick days. The investigations remain pending.