NEWSLETTERS

# InterConnect FLASH! No. 16 – Everything Old is New Again

## The InterConnect FLASH! Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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In our December 2010 Flash, we detailed the *Piron, et al. vs. Swift Transportation* lawsuit, which was filed by drivers claiming they were underpaid by Swift. No doubt by now many of you have heard about the Court's decision in late August to allow the lawsuit to move forward as a class action. We believe this news, its implications, and the lawsuit's general lessons so far, bear repeating in this month's issue.

The lawsuit envelopes three types of drivers as potential class members: (1) Owner-operators who drove under written contracts that paid per mile based on the Household Mover's Guide ("HMG"); (2) Owner-operators who drove under written contracts that paid on a "per mile" basis; and (3) Employee drivers, who drove as at will employees, and were paid "per mile" driven. Plaintiffs made two claims: (1) that Swift breached the contracts of employees and owner-operators paid on a "per mile" basis for failure to pay based on actual miles driven; and (2) that Swift breached the covenant of good faith and fair dealing with all drivers for using and not disclosing that using HMG miles results in a mileage calculation less than actual odometer miles.

After the initial motion for class certification was denied by the trial court, that decision was appealed, remanded, and the trial court ultimately granted the motion for class certification. Swift appealed this decision but it was eventually rejected by the Arizona Supreme Court.

Basically, the drivers' argument is that they have been underpaid since 1998 because they should have been paid for actual miles driven rather than point-to-point mileages from the Household Movers' Guide, a situation which resulted in lower paychecks for the drivers. The stakes are high, because Swift is facing the repayment of back pay of as much as seven to ten percent, stretching back over a decade if they ultimately lose the lawsuit. However, simple disclosures by Swift could have easily prevented their on-going headache.

As we have said before in this forum, disclosure, and lots of it, is the key to avoiding such problems. Motor carriers are required to clearly state on the face of the contract with the driver the amount which will be paid by the motor carrier for equipment and driver services. Stating that drivers will be paid on a "per mile" basis without providing specifics as to how this is calculated is a recipe for disaster. At the risk of sounding like a broken record, this lawsuit would not exist if Swift had provided details to all drivers indicating that Swift would use point-to-point HMG miles to pay their drivers, not actual odometer miles driven.

The take-away here is that motor carriers should make sure that their independent contractor operating agreements contain all requirements in the Federal Leasing Regulations, including appropriate and adequate disclosures to drivers. Vague words in a contract are open to different interpretations by all parties and only set up expectations which may or may not be met. However, make sure that your actual conduct mirrors your contractual disclosures or else you have set yourself up for even more problems. We here at Benesch are happy to assist you with an analysis of your independent contractor operating agreements or with any questions you may have about disclosure requirements under the Federal Leasing Regulations.

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