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Western Home Transport v. Dept. of Labor Amicus Brief Dckt. 40462

IN THE SUPREME COURT OF THE STATE OF IDAHO

WESTERN HOME TRANSPORT, INC., an Idaho corporation, Appellant/Employer, v. STATE OF IDAHO, DEPARTMENT OF LABOR, Respondent.	Supreme Court Docket No. 40462 Industrial Commission No. 8108-T-2012

AMICUS CURIAE BRIEF

Appeal from the Industrial Commission of the State of Idaho

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

I. INTRODUCTION

The Idaho Motor Transport Association, Inc. ("ITA"), as *amicus curiae*, hereby provides its brief in support of Western Home Transport, Inc.'s ("Western") appeal from the decision of the Industrial Commission of the State of Idaho (the "Commission"). The ITA's mission is to serve and represent the interests of the trucking industry in the State of Idaho. The ITA is interested in the present matter because the Court's decision will have a direct impact on the trucking industry in Idaho as the owner-operator model is an integral component of the industry.

ITA's purpose in submitting its own brief in this matter is not simply to replow ground that has already been covered by Western in its well-written briefs. ITA seeks to provide the Court with additional perspectives regarding the historical background, broader implications, and legal rationale supporting the reversal of the Court's holding in *Giltner, Inc. v. Idaho Department of Commerce and Labor*, 145 Idaho 415, 179 P.3d 1071 (2008). ITA understands that the current matter is on appeal from the decision of the Commission. However, the holding in *Giltner* is at the heart of the Commission's decision.

The task before the Court is to determine whether owner-operators engaged by Western to haul property for shippers should be classified as employees or independent contractors for purposes of the Idaho Employment Security Act. Under the Idaho Employment Security Act, compensation paid to employees is subject to unemployment insurance taxes, while

remuneration paid to independent contractors is not. Idaho Code § 72-1316. The statutory exemption for independent contractors reads as follows:

> (4) Services performed by an individual for remuneration shall, for the purposes of the employment security law, be covered employment unless it is shown:
>
> > (a) That the worker has been and will continue to be free from control or direction in the performance of his work, both under his contract of service and in fact; and
> >
> > (b) That the worker is engaged in an independently established trade, occupation, profession, or business.

Idaho Code § 72-1316(4).

For convenience of reference, the first prong of the statutory test is herein referred to as the "control" prong, and the second prong of the statutory test is herein referred to as the "independence" prong.

In its Decision and Order, the Commission found that Western's relationship with its owner-operators satisfied the control prong. (R. at 28.) That finding has not been challenged by Respondent and therefore should be deemed settled. (*See generally*, Respondent's Br.)

Both Appellant and Respondent direct the Court's attention to the independence prong. Appellant urges the Court to recognize that the facts of this case show that its owner-operators are engaged in an independently established business. Respondent relies on the Court's holding in *Giltner* for the proposition that the owner-operators cannot be engaged in an independently established business because they operate under Western's operating authority.

Appellant acknowledges that the owner-operators operate under Western's operating authority as required by federal law; however, Appellant urges the Court to reverse *Giltner* because, in addition to Appellant's other arguments, *Giltner* is inconsistent with longstanding Idaho case law that was not expressly overruled by *Giltner*, and *Giltner* has an unwise and unjust impact on independent owner-operators and motor carriers. (Appellant's Reply Br. 4–6.)

ITA agrees with Appellant's view and encourages the Court to overturn its holding in *Giltner* because, as discussed below, (i) *Giltner* is manifestly wrong, (ii) *Giltner* has proven to be unjust and unwise, and (iii) reversing *Giltner* would vindicate obvious principles of law and remedy a continued injustice.

II. BACKGROUND

A. THE HISTORY OF THE OWNER-OPERATOR MODEL.

1. The Origin of Lease Agreements Between Owner-Operators and Motor Carriers and Operating Authority.

For as long as there have been trucks, there have been individuals who own and operate trucks for commercial purposes. Initially, these individuals acted as motor carriers simply by buying trucks and agreeing to haul goods for others for a fee. Douglas C. Grawe, *Have Truck, Will Drive: The Trucking Industry and the Use of Independent Owner-Operators Over Time*, 35 Transp. L.J. 115, 117 (2008). Before long, the market had become so saturated with competitive trucking services that rates and profits for such services drastically plummeted.

Id. To stabilize the industry (in part by limiting new entrants), the federal government passed the Motor Carrier Act of 1935 ("Motor Carrier Act"). *Id.* at 117–18.

Under the Motor Carrier Act, the authority of the Interstate Commerce Commission ("ICC") was extended to govern interstate trucking operations. *Id.* By the same Act, motor carriers were required to obtain a certificate of authority from the ICC to conduct motor carrier services. *Id.* at 120; *see also Am. Trucking Ass'ns v. United States*, 344 U.S. 298, 302 (1953). In order to obtain a certificate, motor carriers had to prove both that they were "fit, willing, and able to perform the proposed operations," and that their operations were required by public necessity. Grawe, *supra*, at 120. These requirements created a substantial barrier to new owner-operators seeking to enter the industry, because the small entrepreneurs were not in a position to negotiate the regulatory complexities of the ICC. *Id.* at 120–21.

In response, owner-operators began to "lease" their equipment to motor carriers that were already familiar with the ICC's complex proceedings and who were certified under the ICC's regulations. *Id.* at 122. Under these lease agreements, an owner-operator leases its trucks to motor carriers and provides driver services while the motor carriers provide the operating authority. *Id.* at 122. These lease agreements were mutually advantageous. They enabled the owner-operators to stay in business while enabling the motor carriers to reduce their operating expenses. *Id.* at 126; *see also Am. Trucking Ass'ns*, 344 U.S. at 306.

Motor carriers' use of non-owned equipment through such lease agreements has been long-recognized by the United States Supreme Court as lawful. *Am. Trucking Ass'ns*, 344 U.S.

at 303–04. Congress has also twice recognized this leasing practice as legitimate, enabling the use of such leases to thrive in the national motor carrier industry. *Agric. Transp. Ass'n of Tex. v. King*, 349 F.2d 873, 881 (5th Cir. 1965). Notably, since these initial approvals, none of the ICC (or its successor, the Federal Motor Carrier Safety Administration ("FMCSA")), Congress, or the United States Supreme Court has revised their view that such leasing practices are a valid and lawful component of this country's motor carrier network.

2. Changes to the Lease Agreements: Legal Responsibility for Motor Carriers.

While the leasing agreements between motor carriers and owner-operators were clearly lawful, the leasing agreements were not always without problems. Early on, some ICC-licensed motor carriers sought to use the leasing of vehicles to immunize themselves from lawsuits stemming from vehicle operations and to avoid safety regulations governing equipment and drivers. *Zeringue v. O'Brien Transp., Inc.*, 931 So. 2d 377, 379–80 (La. Ct. App. 2006); *Am. Trucking Ass'ns*, 344 U.S. at 304–05; *see also* Grawe, *supra*, at 122.

To address these problems, while simultaneously protecting the integrity of trucking commerce, the ICC promulgated regulations in 1950 governing the leasing arrangements. *See Saullo v. Douglas*, 957 So. 2d 80, 83 (Fla. Dist. Ct. App. 2007); *Zeringue*, 931 So. 2d at 379–80); *see also* Grawe, *supra*, at 124. The new regulations required motor carriers to assume legal responsibility for the operation of vehicles leased from owner-operators. *Zeringue*, 931 So. 2d at 380. Grawe, *supra*, at 124; *see also Am. Trucking Ass'ns*, 344 U.S.

at 308. The express purpose of these regulations was to ensure safety of operations and the protection of the public:

> It is apparent . . . that sound transportation services and the elimination of the problem of a transfer of operating authority, with its attendant difficulties of enforcing safety requirements and of fixing financial responsibility for damage and injuries to shippers and members of the public, were the significant aims and guideposts in the development of the comprehensive rules.

Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys., Inc., 423 U.S. 28, 37 (1975) (emphasis added); *see also Am. Trucking Ass'ns*, 344 U.S. at 310, 316.[1]

B. TERMINOLOGY.

In order for the Court to make an informed decision on the present matter, it is critical that the Court have a clear understanding of the industry terms used herein. The definitions below will assist the Court in its analysis.

Interstate commerce means trade, traffic, or transportation in the United States (1) between a place in a State and a place outside of such State (including a place outside of the United States); (2) between two places in a State through another State or a place outside of the United States; or (3) between two places in a State as part of trade, traffic, or transportation originating or terminating outside the State or the United States. 49 C.F.R. § 390.5.

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[1] These federal regulations applied (and continue to apply) to owner-operators across the United States, including in Idaho. *See* 49 U.S.C. § 14102; 49 C.F.R. § 376, *et seq.*

Intrastate commerce means any trade, traffic, or transportation in any State which is not described in the term "interstate commerce." 49 C.F.R. § 390.5.

The *leasing regulations* are set forth in 49 C.F.R. §§ 376.11, 376.12 and control the contractual relationship (i.e., the lease agreement) between the motor carrier and the owner-operator. The leasing regulations require that the lease be in writing and clearly designates the responsibility of each party with respect to expenses, including cost of fuel, fuel taxes, empty mileage, permits of all types, tolls, ferries, detention and accessorial services, base plates and licenses, and any unused portions of such items. 49 C.F.R. § 376.12(e). As discussed below, the lease agreement typically provides that these expenses are the responsibility of the owner-operator.

Motor carrier generally means a person providing motor vehicle transportation for compensation. 49 U.S.C. § 13102(14). In order to transport property in interstate commerce, a motor carrier must have both a USDOT number and an MC number (which denotes operating authority) that authorizes transportation of cargo or passengers for compensation. 49 U.S.C. § 13902. Motor carriers are not required to own any trucks. The motor carrier, may, among other things, contract for loads from shippers, obtain trip permissions, dispatch loads, ensure compliance with federal and state regulations, arrange for insurance, handle bookkeeping, own or lease equipment, employ company drivers, and lease trucks from owner-operators who provide drivers for the leased trucks.

Operating authority is the registration required by 49 U.S.C. § 13902 for all motor carriers operating in interstate commerce. FMCSA operating authority is also referred to as an "MC", "FF", or "MX" number, depending on the type of authority that is granted. Unlike the USDOT number application process, a motor carrier may need to obtain multiple operating authorities to support its planned business operations. Operating authority dictates the type of operation a motor carrier may run and the cargo it may carry.

An *owner-operator* is the person or entity (1) to whom legal title to the equipment is issued; (2) that has the right to exclusive use of the equipment; or (3) has lawful possession of registered and licensed equipment in that person's or entity's name. 49 C.F.R. § 376.2(d). Owner-operators are in the business of leasing their trucks to a motor carrier and supplying drivers to operate the leased trucks. The drivers then transport the cargo for the motor carrier. The relationship between a motor carrier and an owner-operator is governed by a written lease that must comply with the leasing regulations. While leased to the motor carrier, the equipment is operated under the motor carrier's operating authority. 49 C.F.R. §§ 376.11, 376.12. The owner-operator's direct customer is the motor carrier. Owner-operators are typically able to determine their own transportation routes, set their own work hours, and accept or reject any load. The owner-operator is responsible for maintaining and repairing its equipment. An owner-operator is typically responsible for all other expenses of the equipment and the motor carrier may charge the owner-operator for any amounts that the motor carrier advances for the payment of such items.

An owner-operator is distinguishable from a *company driver*. A company driver is an employee of the motor carrier. A company driver drives trucks that are owned or leased (other than through an owner-operator lease) by the motor carrier. A company driver earns a wage and is not responsible for any expenses related to the truck being operated or the load being hauled. A company driver has none of the independence that the owner-operator has (e.g., a company driver is not entitled to refuse a load or determine his or her work hours, routes, etc.).

The *shipper* sends or receives property that is transported by a motor carrier. 49 U.S.C. § 13102(13). The shipper contracts with a motor carrier to transport property to the desired destination. Shippers do not contract with owner-operators.

C. STANDARD FOR OVERTURNING PRIOR PRECEDENT.

With regard to the question of whether to overturn *Giltner*, both Appellant and Respondent direct the Court's attention to the appropriate grounds, articulated by the Court in *State v. Humphreys*, 134 Idaho 657, 8 P.3d 652 (2000), for overruling a prior holding.

The points of inquiry are as follows:

1. Is the decision manifestly wrong?

2. Has the holding, over time, proven unjust or unwise?

3. Will reversal vindicate plain, obvious principles of law and remedy a continued injustice? *Humphreys*, 134 Idaho at 660, 8 P.3d at 655.

A finding that any one of the three grounds for reversal exists is sufficient cause for the Court to overturn a prior decision. *Id.*, 8 P.3d at 655. ITA believes, and respectfully urges the Court to find, that all three grounds support the reversal of *Giltner*.

III. ARGUMENT

A. *GILTNER* SHOULD BE OVERTURNED BECAUSE THE ONE-FACTOR TEST ARTICULATED IN *GILTNER* IS MANIFESTLY WRONG.

1. *Giltner* mischaracterizes the business of an owner-operator, leading to the erroneous conclusion that an owner-operator cannot be engaged in an independently established business if it operates under a motor carrier's operating authority.

The chief deficiency of the holding in *Giltner* is that it mischaracterizes the independent business of an owner-operator. In *Giltner*, the Court apparently surmised that the business of the reclassified owner-operators was "[hauling] goods in interstate commerce." *Giltner*, 145 Idaho at 420, 179 P.3d at 1076. This overbroad characterization of the business of owner-operators is more appropriately ascribed to the business of motor carriers. Owner-operators are in the different, albeit related, business of leasing equipment to motor carriers and providing drivers to operate the leased equipment. Owner-operators provide one of many alternative methods for a motor carrier to conduct its business.

Often, owner-operators are thought of as an individual who owns and drives one truck, typically under a long-term relationship with a single motor carrier. However, owner-operators are just as often corporations or limited liability companies as they are individuals and owner-operators may own multiple trucks. Moreover, the principal of the corporation or the limited

liability company may not be the only driver of the owner-operator's equipment or may not be a driver at all. An entrepreneurial owner-operator may have multiple drivers and trucks, which may be leased to different motor carriers. Owner-operators switch motor carriers so often that driver turnover is a constant problem for motor carriers. American Trucking Associations, *Truckload and LTL Driver Turnover Rises in First Quarter of 2013*, http://www.truckline.com/article.aspx?uid=d1fb6033-c5a3-420f-a63d-3f5ac7e836d2 (last visited Aug. 28, 2013).

An owner-operator needs several distinct things in order to operate its independent business (none of which include operating authority). First, the owner-operator needs a truck that it can lease to the motor carrier. This requires a large initial investment of capital to purchase and license the equipment. Second, the owner-operator needs additional capital for necessary maintenance and ongoing repairs, communication equipment, and other operating expenses. Third, the owner-operator must have a driver who is qualified to operate the truck. A qualified driver must have a commercial driver's license and must meet the safety standards established by FMSCA and the owner-operator.

Once the owner-operator has these items in place, it is ready to start its business of leasing equipment to motor carriers and providing drivers to operate the leased equipment. The owner-operator will never need operating authority to operate this independent business. In fact, the only time an owner-operator needs operating authority is in the event that it desires to become a motor carrier in order to contract directly with the shipper or take loads from a

broker. In other words, an owner-operator that has its own operating authority and that contracts directly with a shipper is no longer acting as an owner-operator but is instead acting as a motor carrier.

An owner-operator has not failed to independently establish a business simply because it does not have regulatory authority to service the shipper directly (i.e., operating authority). Shippers are not the owner-operator's direct customer. As previously stated, the owner-operator's customer is a motor carrier who has operating authority and the relationship with the shipper.

The motor carrier often needs additional capacity to meet the needs of its shippers. The independent owner-operator supplies this additional capacity by leasing its trucks and providing a driver, but it is not required to have operating authority to do so. In fact, even if the owner-operator has operating authority, it would transport the shipper's property under the operating authority of the motor carrier pursuant to the leasing regulations. 49 C.F.R. §§ 376.11, 376.12. Upon the termination of the relationship between a motor carrier and an owner-operator, the owner-operator has everything it needs to move on immediately to the next motor carrier who requires the services of the owner-operator's independent business—providing a truck and a qualified, licensed driver.

The failure of the Court to properly characterize the owner-operator's business resulted in the incorrect holding in *Giltner*. Correctly characterizing the owner-operator's business supports the reversal of *Giltner*.

2. *Giltner* draws an inexplicable, and in light of relevant industry laws and circumstances an unsupportable, distinction between owner-operators who have their own operating authority and those who do not.

As stated above, when an owner-operator leases its equipment to a motor carrier, the leasing regulations require that such equipment must be operated under the motor carrier's operating authority while the equipment is leased to the motor carrier. 49 C.F.R. §§ 376.11, 376.12. That being the case, it is hard to understand why *Giltner* draws a distinction between owner-operators based on operating authority—reclassifying those that did not have their own operating authority while not reclassifying those that had their own operating authority. See *Giltner*, 145 Idaho at 420, 179 P.3d at 1176.

Given the constraints of the leasing regulations, all of the owner-operators who leased their trucks to Giltner, whether they had their own operating authority or not, by law must have operated under Giltner's operating authority for the life of such leases. 49 C.F.R. §§ 376.11, 376.12. It is, therefore difficult to understand why, in this context, an owner-operator with its own operating authority was classified differently than an owner-operator without its own operating authority. Because both types of owner-operators were required by law to operate under Giltner's operating authority, drawing a distinction between them was inappropriate.

3. *Giltner* may lead to a further unsupportable distinction between an owner-operator who hauls for an interstate motor carrier and an owner-operator who hauls for an intrastate motor carrier, even though both owner-operators engage in the same independently established business.

The flaws in the reasoning of *Giltner* become more apparent in the context of owner-operators that are engaged by motor carriers that are not operating in interstate commerce. Such intrastate motor carriers are exempt from the federal requirement of having operating authority; however, the business of the owner-operator (i.e., leasing a truck to a motor carrier and providing a qualified, licensed driver) remains constant regardless of whether the motor carrier is required to have operating authority.

If the Court assumes, for the sake of argument, that all factors (excepting operating authority) support a determination that an owner-operator hauling in interstate commerce and an owner-operator hauling in intrastate commerce are each engaged in an independent business, but neither have operating authority, the application of *Giltner* would result in a different outcome for each owner-operator. Under *Giltner*, the owner-operator servicing an interstate motor carrier would be deemed to be an employee for purposes of the Idaho Employment Security Act and the owner-operator servicing an intrastate motor carrier would not be considered an employee for purposes of the Idaho Employment Security Act. This disparate outcome would occur because *Giltner* does not apply to the owner-operator servicing an intrastate motor carrier. Neither the motor carrier nor the owner-operator is required to have operating authority for intrastate loads.

The federal government distinguishes between owner-operators who are involved in interstate commerce and those who are involved in intrastate commerce, requiring the former to have operating authority but not the latter. Of necessity, the federal government makes this distinction because of the limits of its power and authority under the commerce clause. The question relevant to the matter before the Court is whether an owner-operator should be classified differently for purposes of the Idaho Employment Security Act based on a single, dispositive test of whether the owner-operator has operating authority. Such a distinction is not justified. If an owner-operator can have an independently established business without operating authority (because it hauls intrastate), operating authority should not be a dispositive test and *Giltner* should be reversed.

4. The Court's logic in *Giltner* would reclassify independent contractors across industries as employees because nearly all independent contractors rely on their contracting partners for some element essential to their work.

The Court's logic in *Giltner* would render nearly every independent contractor an employee because almost all independent contractors rely on their contracting partners to supply some essential element, without which the independent contractors cannot perform their work.

The Court's logic is captured in the following quotation from the *Giltner* opinion:

> All of the reclassified drivers operated under Giltner's DOT authority. They had no authority to operate without this; they were solely dependent

> on Giltner's DOT authority to haul goods in interstate commerce. Therefore, as a matter of law, they could not be engaged in an independently established trade, occupation, profession or business.

145 Idaho at 420, 179 P.3d at 1176.

A detailed analysis did not accompany the above-quoted excerpt, but the Court's reasoning appears to be that the reclassified owner-operators could not have an independently established business because the owner-operators relied on Giltner to supply a purportedly essential prerequisite to the owner-operators' work.

Imagine the impact such reasoning would have if applied to other industries. For example, in the home building industry, a home builder typically engages a general contractor to secure a building permit and build a house. The general contractor engages various subcontractors, such as carpenters, electricians, plumbers, and masons, to carry out the labor of building the house. The building permit held by the general contractor constitutes essential authority without which the subcontractors cannot do their work. Are the subcontractors, as a matter of law, not engaged in an independently established business because they do not have their own building permit but instead rely on the general contractor's building permit?

Assume, for the sake of argument, that by all other measures the subcontractors are engaged in an independently established business. Are all other considerations to be trumped by the fact that the general contractor supplies essential authority without which the subcontractors cannot do their work? After *Giltner*, this is precisely the cloud that hangs over all independent contractors.

In the home building industry, and in the construction industry generally, a permit obtained by the general contractor is sufficient to cover the work of the subcontractors, and the subcontractors do not need to obtain their own building permit. Likewise, in the trucking industry, a motor carrier's operating authority is sufficient to cover the work of an owner-operator, and the owner-operator does not need to obtain its own operating authority to carry out the owner-operator's business.

5. *Giltner* made a single factor, a factor that is less indicative of actual independence than other longstanding factors, dispositive as to whether an owner-operator is engaged in an independently established business.

In truth, no worker is completely independent in the performance of the worker's labors. Every worker, be it an employee or an independent contractor, depends on the work of others to enable the worker to complete a job. Co-dependence is the hallmark of a modern economy. The statutory exemption to the general rule that remuneration paid to a worker is subject to unemployment tax recognizes that some workers are more independent than others. *See* Idaho Code § 72-1316(4). Presumably, the Idaho Legislature enacted the exemption, with its control and independence prongs, because independent contractors who meet both prongs are in business for themselves and less vulnerable than employees for their livelihood. That being the case, the question of whether a worker is independent should be analyzed giving greatest weight to those factors that make a worker less vulnerable for the worker's livelihood and should not be resolved based on a single, dispositive factor.

For over forty years, this Court has evaluated a worker's independence using several factors, such as the right to hire subordinates, ownership of major items of equipment, whether payment was for the result or for the performance of work, and whether the worker incurs substantial professional expenses that are not reimbursed. *See National Trailer Convoy, Inc. v. Employment Sec. Agency of Idaho*, 83 Idaho 247, 360 P.2d 994 (1961); *Hammond v. Department of Employment*, 94 Idaho 66, 480 P.2d 912 (1971). In each instance, greatest weight has been given to those factors that are most indicative of actual independence.

Respondent's brief herein notwithstanding, the Idaho Department of Labor ("DOL") has heretofore urged the use of fifteen factors to determine whether a worker is engaged in an independently established business. *See* IDAPA 09.01.35.112. One of those factors is whether there exists "special licensing or regulatory requirements for performance of work." IDAPA 09.01.35.112. For the sake of argument, ITA assumes that this factor encompasses operating authority in the trucking context. If the DOL had intended that a disproportionate amount of weight be given to this factor or for any single factor to be dispositive, presumably it would have said so in IDAPA 09.01.35.112.

In its Decision and Order in the present matter, the Commission weighed each of the fifteen IDAPA factors in light of the facts and determined that a strong majority of the fifteen factors pointed to Western's owner-operators being properly classified as independent contractors and not employees. (R. at 22–37.) Notwithstanding such finding, the Commission went on to say that, as a matter of law, per *Giltner*, the owner-operators in this case had to be

classified as employees and not independent contractors because they operate under Western's operating authority. (R. at 35.) The Commission acknowledged that the majority holding in *Giltner* mandated such reclassification despite the existence of "significant evidence to suggest that the owner[-]operators in this case are independent contractors", a result that the Commission deemed "unreasonable . . . particularly to [Western] in this case." (R. at 35.)

The factor the Court made dispositive in *Giltner* (i.e., whether the owner-operator has its own operating authority) is irrelevant after understanding the correct nature of an owner-operator's business, is far outweighed by the importance of the other factors, and is not consistent with the explicit language of IDAPA 09.01.35.112. That being the case, *Giltner* is manifestly wrong, and the Court should therefore reverse the holding in *Giltner* and affirm the application of the multi-factor test.

B. *GILTNER* SHOULD BE OVERTURNED BECAUSE, OVER TIME, IT HAS PROVEN UNJUST OR UNWISE.

1. Due to recent changes in federal law (i.e., MAP-21), motor carriers are prohibited from tendering freight to an owner-operator to haul freight under the owner-operator's operating authority.

Historically, motor carriers could subcontract loads to other motor carriers (including an owner-operator that had its own operating authority). On July 6, 2012, President Obama signed into law P.L. 112-141, the Moving Ahead for Progress in the 21st Century Act ("MAP-21"). Pursuant to MAP-21, effective as of October 1, 2013, an owner-operator who hauls loads for a motor carrier that does not have brokerage authority (which is separate and distinct

from the operating authority at issue in *Western* and *Giltner*) will have to haul such loads under the motor carrier's operating authority—regardless of whether the owner-operator has its own operating authority.

This change effectively prohibits a motor carrier from subcontracting loads to other motor carriers (i.e., an owner-operator may not haul a load under its operating authority unless it receives the load directly from the shipper or a broker). As a result, the distinction that the Court made in *Giltner* between owner-operators that have operating authority and owner-operators that do not have operating authority is no longer applicable, if it ever was. Therefore, *Giltner* should be reversed.

2. Public policy considerations support the regulatory requirement of motor carriers holding the operating authority under which their owner-operators operate.

The public policy advantages of having motor carriers hold operating authority under which their owner-operators operate, some of which are summarized in Appellant's Reply Brief, include the following:

a. The structure of a motor carrier holding operating authority eases administrative burdens on the Department of Transportation by decreasing the number of applications it must process and records it must maintain.

b. The structure of a motor carrier holding operating authority creates an additional layer of protection for shippers and the general public because the motor carrier acts

as another checkpoint for compliance of the owner-operators with the safety regulations applicable to the owner-operators' trucks and drivers.

c. By securing and holding operating authority, in addition to performing other administrative tasks (e.g., contracting for loads, obtaining trip permissions, dispatching loads, collecting taxes, and filing regulatory paperwork), the motor carrier eases the administrative burdens on owner-operators, which encourages owner-operators to continue to work in an industry in which the owner-operators' services are in high demand.

d. The owner-operator model is beneficial to the shipper because it provides clear recourse against the motor carrier with whom it has a contractual relationship, instead of forcing it to pursue an owner-operator with whom it has no such relationship.

In contrast to the foregoing, no public policy advantages to an owner-operator maintaining its own operating authority have been identified in this proceeding. Other than referencing the general benefits of the principle of *stare decisis*, Respondent points to no persuasive public policy reasons for forcing owner-operators to obtain operating authority in order to be exempted from the Idaho Employment Security Act.

3. Imposing unemployment tax on owner-operators is a burden without an equivalent corresponding benefit and may negatively impact Idaho's economy.

If *Giltner* were to be upheld (i.e., if unemployment taxes were to be imposed on the remuneration paid to any owner-operator operating under a motor carrier's operating authority), the Court should ask whether there would be a corresponding benefit equivalent to

the burden such tax would place on the motor carriers and the reclassified owner-operators. It is clear from the record in *Western* that the owner-operators in question consider themselves unequivocally to be independent contractors. (R. at 24.) All but three of them live outside the State of Idaho. (Appellant's Br. at 4.) It seems unlikely that the owner-operators would seek unemployment benefits from the State of Idaho upon the termination of their contract with Western. In addition, owner-operators that stay true to their independent contractor status generally do not seek such benefits. While the imposition of unemployment taxes in this case would certainly enhance the bottom line of the state's employment security fund, the supposed protection to the putative employees is likely to be largely illusory.

Unless *Giltner* is overturned, the owner-operator model will change in Idaho and not for the better. Motor carriers will pass these additional taxes on to owner-operators either directly through charge-backs to their weekly settlements or indirectly through a reduction in the compensation paid to owner-operators. Alternatively, motor carriers may conclude that the risk of additional tax liabilities resulting from Idaho's inconsistent treatment of owner-operators is too high, and therefore, choose not to pursue the owner-operator model or may simply choose to relocate outside of Idaho. In either case, the owner-operators lose. This loss will likely effect an outcome that is the opposite of what the Court intended (i.e., the loss will result in (i) less money in the state coffers because motor carriers are not engaging owner-operators or are relocating outside of Idaho and therefore not paying unemployment taxes on their compensation, and (ii) more owner-operators seeking unemployment benefits because the

motor carriers are not engaging them or because the changes in the model as a result of the additional taxes make the model unworkable).

Failure to reverse *Giltner* also may have a potentially negative impact on the general public as well. Motor carriers already operate on extremely slim margins. If *Giltner* is not overruled, the motor carriers will likely increase rates with their shippers to try to capture any increased expenses that cannot be passed through to the owner-operators. Shippers in turn will raise their prices to the general public. Upholding *Giltner* will have an adverse effect on the owner-operator model, which may increase the cost of doing business and living in the State of Idaho.

4. Preserving an owner-operator's status as an independent contractor serves legitimate business purposes and is not a ploy to dodge taxes levied on employees.

The longstanding business model of motor carriers engaging owner-operators who are independent contractors provides proven benefits to the motor carrier and the owner-operator alike. From the motor carrier's perspective, the independent contractor relationship saves on equipment and capital costs, provides a mature, experienced workforce, and promotes significant operational flexibility. From the owner-operator's perspective, the relationship offers the opportunities and benefits of owning and operating his or her own business and the financial, lifestyle, and entrepreneurial advantages not available to employee drivers. *See* James C. Hardman, *The Employment Classification Issue in the Motor Carrier Industry*, 37 Transp. L.J. 27 (2010); Gregory M. Feary, *Independent Contractor Employment*

Classification: A Survey of State and Federal laws in the Motor Carrier Industry, 35 Transp. L.J. 139 (2008).

The independent contractor business model serves the interests of both motor carriers and owner-operators. As discussed above, the model did not spring from a dubious desire to avoid employment-related taxes, but rather as a means of complying with federal regulations, promoting public policy aims, and maximizing efficiencies for both motor carriers and owner-operators. In fact, evidence suggests that both motor carriers and owner-operators are better off not participating in unemployment insurance and other employee benefit programs. As one eminent industry legal scholar has observed:

> Contrary to the flawed concept that drivers are forced to become independent contractors rather than [company drivers], alternative opportunities exist in the industry.
>
> . . . .
>
> The trucking industry has, in the past twenty-five years, been one in which relatively all motor carriers operated on low profit margins, if not incurring losses, and thus motor carriers have had need to control the costs of operations.
>
> While the use of independent contractors allows motor carriers to avoid employee benefits costs, unemployment and workers' compensation insurance, as well as unemployment taxes, it should not be assumed that independent contractors are necessarily "worse off" from an economic standpoint.
>
> Independent contractors receive contract payments which reflect a substantial amount over a [company driver] basic wage and benefits.

. . . .

> If the monetary rewards as an independent contractor were so "bad" as opposed to that of a [company driver], the contractor has the opportunity to switch to an employee position, and this has not been occurring or, if so, to an insignificant degree.

Hardman, *supra*, at 28–29 (citations omitted).

In exchange for forgoing unemployment and other benefits, the owner-operator receives higher compensation. By choosing to operate under this model, the owner-operator accepts the benefits and the risks of operating as an independent contractor, which the owner-operator typically acknowledges in the lease agreement with the motor carrier. Permitting an owner-operator to take advantage of higher compensation during an engagement with a motor carrier and then allowing that owner-operator to take advantage of unemployment benefits when the engagement ends is unjust not only to the motor carrier, but to other owner-operators who maintain their status as independent contractors and do not claim such benefits.

The business model of an owner-operator hauling loads under a motor carrier's operating authority has been an industry standard for decades. That model was recently further entrenched by the passage of MAP-21. As outlined above, having an owner-operator haul under a motor carrier's operating authority serves the interests of the parties to the hauling transaction and the public. No comparable benefits to an owner-operator hauling under its own operating authority have been suggested in this proceeding.

Giltner unjustly penalizes motor carriers and owner-operators for complying with the leasing regulations, which require owner-operators to haul under the authority of a motor carrier. This penalty undermines the mutual benefits of the owner-operator model. *Giltner* should be reversed given the unjust and unwise nature of its impact on the owner-operator model.

C. *GILTNER* SHOULD BE OVERTURNED BECAUSE REVERSAL WOULD VINDICATE PLAIN, OBVIOUS PRINCIPLES OF LAW AND REMEDY A CONTINUED INJUSTICE.

1. Overturning *Giltner* would vindicate decades-old principles of law and dispel confusion with regard to evaluating the independence prong.

As noted above, for over forty years, the Court has determined whether workers are engaged in an independently established business by weighing multiple factors. The Court used the multi-factor approach under both the common law test and statutory test to determine whether a worker was an independent contractor. The factors most often considered were whether the worker had authority to hire subordinates, whether the worker owned major items of equipment, and whether either party would be liable to the other for peremptory termination of the business relationship. *See National Trailer*, 83 Idaho at 253, 360 P.2d at 998; *Swayne v. Dept. of Employment*, 93 Idaho 101, 105, 456 P.2d 268, 272 (1969); *Hammond*, 94 Idaho at 68, 480 P.2d at 914–15; *Dept. of Employment v. Bake Young Realty*, 98 Idaho 182, 186, 560 P.2d 504, 508 (1977); *J.R. Simplot Co. v. State Dept. of Employment*, 110 Idaho 762, 765, 718 P.2d 1200, 1203 (1986).

Over the years, other factors have also been considered by the Court, such as whether the worker was paid for a result (or by the job) or simply for the performance of work, and whether the worker incurs substantial out-of-pocket professional expenses that are not reimbursed. *National Trailer*, 83 Idaho at 253, 360 P.2d at 998; *Hammond*, 94 Idaho at 68, 480 P.2d at 914–15; *Bake Young*, 98 Idaho at 186, 560 P.2d at 508. When the DOL promulgated its aforementioned fifteen-factor test for the independence prong in 1999, it included all of these factors as well as others.

In the present case, absent *Giltner*, if the independence prong is analyzed by weighing either the multiple factors stated in *Swayne* and its progeny or the fifteen IDAPA factors promulgated by the DOL, the result would be the same. As the Commission intimated, Western's owner-operators will be found to be independent contractors. (R. at 28–35.)

If the majority in *Giltner* evaluated the independence prong using the longstanding multi-factor test, this analysis was not included in the Court's decision. *See Giltner*, 145 Idaho at 420, 179 P.3d at 1076. To ITA's knowledge, *Giltner* represents the only time the Court has reached a conclusion on the independence prong without reference to multiple factors. At the same time, the Court gave no indication that the multi-factor analysis of the independence prong is dead. Reversing *Giltner* would unequivocally affirm the decades-old multi-factor analysis. At the same time, it would dispel uncertainty by confirming that *Hammond*, a case where owner-operators were found to be engaged in an independently established business

even though they did not have their own operating authority, is still good law. *See Hammond*, 94 Idaho 66, 480 P.2d 912.

2. Overturning *Giltner* would be a step toward remedying an injustice on the trucking industry resulting from needlessly diverse, confusing, and conflicting laws and rules that govern the industry.

In deciding the independence prong in *Giltner* solely on the basis that the reclassified drivers operated under Giltner's operating authority, the Court created a new rule that is unique among the states. While courts in a few states have considered operating authority as one of several factors indicative of independence, ITA knows of no other court in any other state that has elevated operating authority to be determinative on its own. In fact, *Giltner* conflicts with longstanding rules of law in Idaho and its sister states for evaluating a worker's independence. IDAPA 09.01.35.112.04; *Excell Construction, Inc. v. Idaho Dept. of Commerce and Labor*, 145 Idaho 783, 786–90, 186 P.3d 639, 643–47 (2008); *National Trailer*, 83 Idaho at 253, 360 P.2d at 998; *Hammond*, 94 Idaho at 68, 480 P.2d at 914–15.

Upholding *Giltner* and its new rule with regard to owner-operator independence would further the diversity of law and regulation that plagues the trucking industry in Idaho. *Giltner* creates confusion in Idaho because it is not consistent with IDAPA 09.01.35.112. Mr. Feary has observed that "there is an inherent conflict between the interstate nature of the trucking business and the intrastate application of workers' compensation and unemployment tax laws."

Feary, *supra*, at 140. The result is an adverse effect on small businesses. Mr. Hardman has noted that:

> The federal and state governments are responsible for the problem that exists in employment classification by passing so many diverse laws and regulations related to employment that it is an overwhelming burden on smaller businesses.
>
> This contradictory legislative and administrative action accounts for the morass of confusing and conflicting decisions that are rendered under such laws and regulations.

Hardman, *supra*, at 28.

Motor carriers and owner-operators are already faced with navigating the many diverse laws referenced above by Mr. Hardman and the other laws referenced herein. *Giltner* creates one more level of uncertainty and complexity for the players in the transportation industry because *Giltner* creates a test that is inconsistent with the existing laws in Idaho. This inconsistency is unjust to owner-operators and motor carriers in Idaho. Overruling *Giltner* and eliminating the confusion and conflict created thereby would remedy this injustice.

3. *Giltner* represents a divergence from the efforts of other states to protect the owner-operator model and results in a continuing injustice upon the motor carriers and owner-operators in Idaho.

ITA urges the Court to review Mr. Feary's and Mr. Hardman's recent surveys of the laws of the 48 contiguous United States on the subject of employment classification in the motor carrier industry. *See* Feary, *supra*, at 139; Hardman, *supra*, at 27. The referenced surveys describe three basic approaches that states have taken in determining whether owner-

operators are independent contractors for purposes of unemployment tax laws. Fourteen states have enacted owner-operator exemptions within their unemployment tax statute. Feary, *supra*, at 149–50. Another group of at least seventeen states, including Idaho, has enacted a two- or three-prong statutory test for determining employment status. *Id.* at 150–51. A third group of states subscribes to common law analyses that vary from state to state but typically involve the weighing of multiple factors. *Id.* at 152–53.

Instead of continuing to rely on the multi-factor test and protecting the owner-operator model, or at least the status quo, *Giltner* has made Idaho an outlier among the states with respect to this issue. If the Court fails to overturn *Giltner*, the Idaho Legislature should follow the fourteen states that have added a specific exemption for owner-operators and include such an exemption in the Idaho Employment Security Act, which would correct the injustice that *Giltner* has imposed on motor carriers and owner-operators in Idaho.

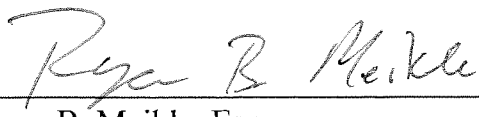
IV. CONCLUSION

For the reasons stated herein, *Giltner* should be overruled because it is manifestly wrong, it has proven to be unjust and unwise, and reversing it would vindicate obvious principles of law and remedy a continued injustice. Without *Giltner* to obstruct the Commission's view of the facts of this case, it appears the Commission would have ruled in favor of Western.

Given that *Giltner* should be overruled for the reasons stated herein, ITA requests the Court to (i) find that Western's owner-operators are independent contractors for purposes of

the Idaho Employment Security Act, and (ii) hold as a matter of law that operating authority is not a dispositive factor in determining whether an owner-operator is engaged in an independently established trade, occupation, profession, or business.

RESPECTFULLY SUBMITTED this 30th day of August, 2013.



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CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing, or by facsimile, with the correct postage thereon, a true and correct copy thereof on this 30th day of August, 2013.

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