LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com

WEDNESDAY, MAY 5, 2021

PERSPECTIVE

Ruling sets up worker classification test for high court review

By Joshua Lipshutz and Thomas Cochrane

Truckers have been described as America's last cowboys. For more than 70 years, independent owner-operators have moved the nation's freight. They are independent contractors who lease their services and equipment to motor carriers, transporting cargo safely and efficiently throughout the country.

That historic and successful business model is now under attack. Even though Congress had sought to protect the independent owner- operator model by prohibiting states from enacting laws related to a motor carrier's prices or services, California recently passed a law that makes it all but impossible for motor carriers to hire independent contractors. Rather, motor carriers must hire them as employees. In the view of the Legislature, independent truckers should be treated not as entrepreneurs but as wage laborers.

Last week a panel of the 9th U.S. Circuit Court of Appeals gave its blessing to California's attempt to drive independent contractors from the industry. In a split 2-1 decision, the court held that California's law is not preempted by the federal prohibition. The ruling threatens to end what is widely regarded as a successful business model and will raise prices for businesses and consumers in California and throughout the United States.

This dispute — and similar disputes that are playing out in other states that have enacted worker- classification laws like California's — turns on the meaning of the Federal Aviation and Administration Authorization Act of 1994. That statute preempts any state law "related to a price, route, or service of any motor carrier." 49 U.S.C. Section 14501 (c)(1). And since at least the 1950s, motor carriers have routinely provided their shipping services by using independent contractors to carry goods. But the California Legislature, following the lead of the California Supreme Court, recently adopted the "ABC test" for worker classification, which requires three strenuous conditions to be met to achieve independent contractor status.

The legal question, then, is straightforward: Does California's ABC test relate to the prices, routes, or services of a motor carrier? The answer seemed straightforward as well, as the ABC test makes it exceedingly difficult, if not impossible, for motor carriers to provide their shipping services via independent contractors who prize flexibility, as they have for nearly a century. And this, in turn, affects the prices that motor carriers can offer businesses and consumers alike.

But the 9th Circuit panel saw it differently. In *California Trucking Association v. Bonta*, 2021 DJDAR 3957 (9th Cir. Apr. 28, 2021), the court held that California's ABC test is not preempted because it "is a generally applicable labor law" that affects a motor carrier's relationship with its workforce, rather than its customers. Under the 9th Circuit's formulation, such a law receives special treatment in the preemption analysis and is preempted only where it affirmatively "bind[s], compel[s], or otherwise freeze[s] into place the prices, routes, or services of motor carriers," and not if it affects prices, routes, or services in other ways.

As Judge Mark Bennett noted in his dissenting opinion, other courts have reached the opposite conclusion. For example, the 1st Circuit and the Massachusetts Supreme Judicial Court have each held that the FAAAA does preempt the ABC test, because the test discourages the use of independent-contractor truck drivers, and therefore affects motor carriers' prices and services. The 9th Circuit panel dismissed the 1st Circuit's approach as "contrary to our precedent," but its decision compounds an untenable state of affairs: The same law — the ABC test, which has been enacted by states across the country — is preempted by the FAAAA as applied to motor carriers in some jurisdictions, but not in others.

The 1st Circuit and Massachusetts have the better argument under U.S. Supreme Court precedent. The Supreme Court has warned against the 9th Circuit's approach of carving out "laws of general applicability" from preemption, because doing so would "creat[e] an utterly irrational loophole." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992). And the Supreme Court has also repeatedly confirmed that the FAAAA preempts state laws with even indirect effects on prices, routes, or services. E.g., *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008). The CTA panel's reasoning is directly in tension with this precedent.

The Supreme Court will soon take up this issue. Pending before the court is a petition seeking review of the recent ruling in *Cal Cartage Transportation Express, LLC v. California*. There, the California Court of Appeal held — just as the 9th Circuit did — that the FAAAA does not preempt California's ABC law. It remains to be seen what the court will do, but it should confirm that Congress meant what it said when it preempted state laws relating to a motor carrier's prices, routes, or services — thereby hitting the brakes on California's effort to push the nation's independent truckers out of business. ■

Joshua S. Lipshutz *is a partner and* **Thomas Cochrane** *is an associate with Gibson, Dunn & Crutcher LLP. The authors represent the motor carriers in Cal Cartage Transportation Express, LLC v. California, 20-1453 (U.S.), and submitted an amicus brief supporting the California Trucking Association in California Trucking Association v. Bonta, 20-55106 (9th Cir. Apr. 28, 2021).*