

## Articles

# Have Truck, Will Drive: The Trucking Industry and the Use of Independent Owner-Operators Over Time

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## I. INTRODUCTION

In American lore two images stand out. One is the entrepreneur, the person who wants to test his or her own mettle in the marketplace, i.e., be his or her own boss. The other image is the open road, i.e., exploring the great wide open of the American landscape. One profession, one business, combines both. The profession: the independent owner-operator.<sup>1</sup> The independent owner-operator is free to make his or her own decisions, including hauling loads to places throughout the country on what is still, on occasion, an open road. Independent owner-operators are not competing in the same environment today as they were one hundred years ago, but they remain a staple of the transportation industry nonetheless.<sup>2</sup> Regulation and deregulation of the industry, technological advancements, and economic cycles have all impacted the independent owner-operator. In the following pages I will trace the course of the independent owner-operator, traversing from the pre-regulation era, through the Motor Carrier Act of 1935 – the height of regulation into the 1960s, the steady deregulation of the 1970s and 1980s, and into the current defensive of the trade today.

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1. The independent owner-operator is an independent trucker who lacks federal operating authority. As the court in *Central Forwarding, Inc. v. Interstate Commerce Commission* explains:

They are persons owning one or a few trucks who lack [Interstate Commerce Commission] operating authority. Since they cannot transport regulated commodities in interstate commerce in their own right, they rely on two sources of business: (1) they lease their services and equipment to a carrier in order to utilize the carrier's operating authority, or (2) they make hauls exempt from [Interstate Commerce Commission] regulation by transporting agricultural products, working for a private fleet, or transporting goods intrastate.

698 F.2d 1266, 1267 (5th Cir. 1983).

2. In a 2004 study prepared for the American Trucking Associations, a trade group representing trucking companies, Global Insight stated there were 1.3 million long-haul heavy duty truck drivers. See Global Insight, Inc., *The U.S. Truck Driver Shortage: Analysis and Forecasts*, (May 2005) available at <http://www.truckline.com/NR/rdonlyres/E2E789CF-F308-463F-8831-0F7E283A0218/0/ATADriverShortageStudy05.pdf>.

The Owner Operator Independent Drivers Association, the largest trade association representing independent owner-operators, currently cites having more than 160,000 members owning and/or operating more than 240,000 vehicles. OOIDA.com, About Us Page, [http://www.oida.com/about\\_us/about\\_us.html](http://www.oida.com/about_us/about_us.html) (last visited May 20, 2008).

A trade publication, *Transport Topics*, annually publishes a survey of the largest for-hire motor carriers in the industry. The 2007 survey included 100 carriers, of which 83 listed the breakdown of owner-operators versus employee drivers. The carriers cited 59,690 tractors leased from independent owner-operators in their fleets, and seven carriers cited exclusive use of independent owner-operators. See *Top 100 For-Hire Carriers 2007*, TRANSPORT TOPICS (Feb. 14, 2008) <http://www.ttnews.com/tt100/2007/thranking.asp>. In 1978, it was cited that independent owner-operators made up 40 percent of all intercity truck traffic in the United States. See *Cent. Forwarding, Inc.*, 698 F.2d at 1268.

## II. PRE-REGULATION: THE INDEPENDENT OWNER-OPERATOR AND THE TRUCK

The independent owner-operator starts the business with a truck. The truck is the tool of the trade. The truck is the storefront and when it is moving, revenue is coming in. But the truck had to beat a stalwart in the transportation business in order to build a customer base: the horse.<sup>3</sup> The truck came about to compete against the workhorse, and in time the truck, aided by an improvement in road conditions,<sup>4</sup> and performance improvements,<sup>5</sup> overtook the horse in terms of productivity. So with one truck and the desire to move goods, the independent owner-operator was in business.<sup>6</sup> “Everybody wanted to become a trucker. At a time when jobs were scarce, gas prices were at rock bottom, and trucks were reliable enough not to break down all the time.”<sup>7</sup> The independent owner-operator found a local shipper, set the rate, and effectively was a motor carrier. However, in 1935, the United States federal government stepped in and regulated the industry.<sup>8</sup>

At the time, the federal government felt the need to control predatory pricing and what it perceived as unscrupulous business practices.<sup>9</sup> New motor carriers popped up everyday. One person who owned a truck could become a motor carrier simply by hauling one load for a local goods producer. A flood of able drivers and able equipment plummeted rates and owner-operators struggled to last.<sup>10</sup> Having seen something like this before in the railroad industry, the federal government looked to the Interstate Commerce Commission to act.<sup>11</sup> Discriminatory pricing

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3. “The Automobile Club of America, in 1903, sponsored a 40-mile endurance and speed contest between horse-drawn wagons and motorized trucks with only eight of the 12 trucks finishing the course.” Frank N. Wilner, *Astonishing Times*, TRAFFIC WORLD, Apr. 13, 2007.

4. The Good Roads Act, also known as the Federal Road Aid Act of 1916, was passed into law into 1916 “combin[ing] the Progressive goals of economic efficiency and social betterment.” Richard F. Weingroff *Federal Aid Road Act of 1916: Building the Foundation*. U.S. Department of Transportation Federal Highway Administration, available at <http://www.tfhrcc.gov/pubrds/summer96/p96su2.htm> (last visited Feb. 14, 2008).

5. Paul Stephen Dempsey, *Transportation: A Legal History*, 30 TRANSP. L.J. 235, 274 (2003).

6. “A down payment on a truck and a driver’s license were all it took to get into the industry.” *Id.*

7. Leslie Hansen Harps, *The Transformation of Truck Transportation*, INBOUND LOGISTICS, (Sept. 2004) [http://www.inboundlogistics.com/articles/features/0904\\_feature02.shtml](http://www.inboundlogistics.com/articles/features/0904_feature02.shtml).

8. Motor Carrier Act of 1935, Pub. L. 255.

9. William J. Augello, TRANSPORTATION, LOGISTICS AND THE LAW 33 (George Carl Pezold ed., Transportation Consumer Protection Council, Inc. 2001) (2001).

10. Dempsey, *supra* note 5, at 281.

11. Paul Dempsey described the times prior to regulation of the railroad industry in 1887 in his article *Transportation: A Legal History*:

Many railroads went through bankruptcy and reorganization, and the value of their stock was wiped out. Some had issued watered stock in order to raise money fraudu-

and rate abuses ultimately led to the Federal Government regulating rail carriers beginning in 1887 with An Act to Regulate Commerce and through the Interstate Commerce Commission (the "ICC").<sup>12</sup> The ICC's rail history led Congress to act with regard to motor carriers.

The Motor Carrier Act of 1935 extended the reach of the ICC.<sup>13</sup> The Motor Carrier Act of 1935 became law during the height of President Franklin Delano Roosevelt's New Deal. Among the alphabet agencies and programs of the New Deal, the ICC continued to grow, continuing its trend as an exemplary agency.<sup>14</sup> The ICC had substantial power over rail and truck transportation through rule making and rule enforcement.<sup>15</sup> The ICC was in fact a gatekeeper to the industry and a watchdog to those within it.<sup>16</sup>

Since the beginning of regulation, there have been three primary types of carriers in the trucking industry: common carriers,<sup>17</sup> contract

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lently. Many farmers would buy stock in anticipation of lucrative dividends and reasonable transportation costs for shipping their crops to eastern markets. Governments and farmers alike suffered as many railroads went through bankruptcy and reorganization, effectively wiping out the value of the stock sold to investors.

State governments attacked the rail industry for its bribery of public officials, sale of worthless securities, and rate and service discrimination between places and persons. In addition, farmers were left with mortgages, worthless stock, exorbitantly priced or nonexistent transportation, and increased taxes needed to cover local government investments. Midwestern farmers, the primary victims of the rate abuses, assailed the excessively high and discriminatory rates that the railroads charged to carry agricultural products from points of origin, over which carriers had a monopoly, to eastern markets or processing areas. They criticized the railroads' high rates, land grants, and political power. In the meantime, their taxes were increased to cover the parallel investment made by their state and local governments. This led to blind antagonism toward the railroads.

*Id.*

12. An Act to Regulate Commerce (enacted Feb. 4, 1887).

13. Notably, the rail carriers lobbied heavily for the regulation of motor carriers. See Thomas Gale Moore, *Trucking Deregulation*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, Dec. 15, 2007.

14. "In the 20s and 30s the I.C.C. celebrated its anniversaries in Washington's most lavish banquet halls, selling tickets to lawyers and others among its supplicants." David E. Sanger, *A U.S. Agency, Once Powerful, Is Dead at 108*, N.Y. TIMES, Jan. 1, 1996 available at <http://query.nytimes.com/gst/fullpage.html?res=9C0CE5D81539F932A35752C0A960958260&scp=1&sq=sanger+agency+once+powerful+is+dead&st=nyt>.

15. "The Hepburn Act of 1906 [gave] the ICC authority to establish maximum freight rates enforceable by federal courts." Wilner, *supra* note 3.

16. See *United States v. Navajo Freight Lines, Inc.*, 339 F. Supp. 554, 557 (D. Colo. 1971). Here, the court noted that

[e]ntry into the field is strictly limited; a carrier can operate only under an ICC certificate issued upon the finding that the proposed service is in fact required by the present or future public convenience and necessity. Routes are specifically delineated between points fixed in the certificate, and the commodities transportable thereunder may be limited.

*Id.*

17. *Id.* See Motor Carrier Act of 1935, Pub. L. 255 § 203(a)(14). This section provides, The term 'common carrier by motor vehicle' means any person who or which under-

carriers,<sup>18</sup> and private carriers.<sup>19</sup> Private carriers haul goods they themselves produce. Private carriers were exempt from regulation under the ICC once they received a permit.<sup>20</sup> Oftentimes the independent owner-operator tried to meet the definition of a private carrier. The independent owner-operator would dedicate his equipment to one shipper and haul that shipper's goods throughout the country at the direction of the shipper. If the independent owner-operator dealt with a motor carrier, rather than directly with the shipper, then there was a question of fact. That was because common and contract carriers were regulated by the ICC. "Essentially the issue is as to who has the right to control, direct, and dominate the performance of the service. If that right remains in the carrier, the carriage is carriage for hire and subject to regulation."<sup>21</sup> On the other hand, "[i]f it rests in the shipper, it is private carriage and not subject to regulation . . ."<sup>22</sup> Private carriers liked to use independent owner-operators, because they could exercise enough control to maintain the exemption from ICC regulation, while at the same time pass the cost of owning and operating the equipment onto the independent owner-operators. The independent owner-operators liked to have some increased

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takes, whether directly or by lease or any other arrangement to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I.

*Id.*

18. *See id.* at § 203(a)(15). This section provides,

The term 'contract carrier by motor vehicle' means any person, not included under paragraph (14) of this section, who or which, under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation.

*Id.*

19. *See id.* at § 203(a)(17). This section provides,

The term private carrier of property by motor vehicle means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle,' who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

*Id.*

20. *See id.* at § 209(a). This section provides,

No person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business.

*Id.*

21. *United States v. Drum*, 368 U.S. 370, 383, n.25 (1962) (citing *H.B. Church Truck Service Co.*, 27 M.C.C. 191, 195 (1940)).

22. *Id.*

control in their operations and enjoy a chance to increase profits based on improved performance.

The presence of an independent owner-operator in any transaction for transportation services has led to some of the most difficult classifications the ICC has had to make over the years of regulation.<sup>23</sup> The relationship between the independent owner-operator and the person directing the freight could determine what control, if any, the ICC would have.<sup>24</sup> The Motor Carrier Act of 1935 required carriers to prove they were “fit, willing, and able to perform the proposed operations, and that their proposed operations were required by present or future public conveniences and necessity.”<sup>25</sup> If the motor carrier met those requirements, the ICC would issue the motor carrier a “certificate of public convenience and necessity.”<sup>26</sup> The ICC also regulated contract carriers by requiring them to obtain a permit before operating.<sup>27</sup> The contract carrier also had to prove its worthiness for the permit.<sup>28</sup> It was this hurdle, this certificate of public necessity, which made it more difficult for the independent owner-operator to find his or her niche.<sup>29</sup>

23. See *id.* at 415, n.29.

24. For example,

If the vehicles of the owner-operators, while being used by applicant, were operated under its discretion and control, and under its responsibility to the general public as well as to the shipper, then its operations in which such vehicles were employed, come within the phrase ‘or by a lease or any other arrangement’ of section 203(a)(14), and applicant, as to such operations, was a common carrier by motor vehicle.

*Dixie Ohio Express Co., Common Carrier Application*; No. MC 43654, Division 5 Aug. 9, 1939. The ICC in *Dixie Ohio* was charged with determining whether or not the applicant was a common carrier subject to regulation by the ICC despite its use of independent owner-operators.

25. Paul Stephen Dempsey, *The Interstate Commerce Commission – Disintegration of an American Legal Institution*, 34 AM. U.L. REV. 1, 8 (1984).

26. *Id.* at 31.

27. *Drum*, 368 U.S. at 371, *supra* note 21.

28. *Id.* at 374. In *Drum*, the Court noted:

From the beginning underlying principles have been, and have remained, clear. A primary objective of the scheme of economic regulation is to assure that shippers generally will be provided a healthy system of motor carriage to which they may resort to get their goods to market. This is the goal not only of Commission surveillance of licensed motor carriers as to rates and services, but also of the requirement that the persons from whom shippers would purchase a transportation service designed to meet the shippers’ distinctive needs must first secure Commission approval.

*Id.* at 374-75.

29. See Dempsey, *supra* note 25, at 7-8. As Dempsey determined in his article,

The Motor Carrier Act of 1935 required carriers seeking motor common carrier operating authority to prove that they were fit, willing, and able to perform the proposed operations, and that their proposed operations were required by present or future public convenience and necessity. For applicants to meet the burden of proof on the latter criterion, the ICC determined that they had to establish that the proposed operations would serve a useful public purpose responsive to a public demand or need. Having established the public purpose, the applicant then had to show that the purpose could not be served as well by existing carriers and that the applicant could serve that pur-

### III. THE MOTOR CARRIER ACT OF 1935: OWNER-OPERATORS THINK OUTSIDE THE ICC BOX

Now it took more than just a will and a truck to be a motor carrier. The owner-operator had to show the ICC there was a shipper in need of its services, that other carriers already in existence were not able to meet the shipper's needs, and that the owner-operator would be able to protect the public's interests.<sup>30</sup> So the motor carrier was charged with proving its fitness to the federal government. It would document the equipment it owned, the locations it could service, and the freight it could move.<sup>31</sup> The whole point of regulation though was to control the quality and quantity of motor carriers in the industry.<sup>32</sup> The ICC demanded to know what rates were being charged for each load.<sup>33</sup> No one was to get any discounts and no one was to get charged higher rates. The rates were to be published for all to see.<sup>34</sup> Thus, the ICC verified that the rates charged were fair and reasonable for the market.<sup>35</sup> The ICC verified that the motor carrier had equipment available to cover the locations and freight demands it proffered to meet. The ICC verified that the demand for the motor carrier's services actually existed, and that no other existing motor carrier could meet those needs.<sup>36</sup> All of that verification made it cumbersome at best, impossible at worst, for new motor carriers to enter the market.<sup>37</sup> So while independent owner-operators tried to grow their bus-

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pose without impairing the operations of existing carriers in a manner contrary to the public interest.

*Id.*

30. See, e.g., John Joseph Norton Common Carrier Application, 1 M.C.C. 114, 115-16 (1936). Providing that,

[w]here a certificate is sought to engage in the transportation of commodities generally and to serve a public already served by railroad, express, and motor carriers, the burden of proof is upon applicant to show that the latter are not rendering a type or character of service which satisfies the public need and convenience, and that the proposed service would tend to correct or substantially to improve that condition.

*Id.*

31. See Motor Carrier Act of 1935, ch. 398, 49 Stat. 543, 546, 552-53, 558 (1935).

32. See Dempsey, *supra* note 5, at 284-85. Quoting the Federal Coordinator of Transportation: "The most important thing, I think, is the prevention of an oversupply of transportation; in other words, an oversupply which will sap and weaken the transportation system rather than strengthen it." *Id.* at 285.

33. See *Navajo Freight Lines, Inc.*, 339 F. Supp. at 557-58 (citing 49 U.S.C. §§ 316-17; 49 U.S.C. §§ 2-3, 316-17 (1970)). "Every aspect of price competition is controlled; rates, rate practices and shipping customs are strictly regulated." *Id.* at 557.

34. 339 F. Supp. at 557. "All tariffs must be filed, posted and published." *Id.* (citing to 49 U.S.C. § 317).

35. *Id.* (citing to 49 U.S.C. §§ 2-3, 316-17). "Reasonable rates and charges are necessary; discriminatory or special rates or rebates are prohibited, as is discriminatory favoritism to any shipper." *Id.*

36. Dempsey, *supra* note 25, at 7-8.

37. See 339 F. Supp. 554, at 557 (citing to 49 U.S.C. §§ 306-08).

iness from a one-truck operation, they thought outside the ICC's boxes to give themselves a place to start.

The ICC's boxes did not include certain exempt properties such as agricultural products.<sup>38</sup> The independent owner-operator could easily fill the need of produce shippers without economic influence from the ICC, and many owner-operators did fill that need.<sup>39</sup> While hauling produce to the markets was a key niche for the owner-operator to fill, being relegated to exempt properties made it difficult to get home.<sup>40</sup> So the independent owner-operator had to keep thinking of ways to move the truck and keep their storefront open without having to obtain a certificate from the ICC.

To further avoid the grasp of the ICC, the owner-operator could lease the equipment to a motor carrier that already had the ICC's blessing.<sup>41</sup> For instance, a truck owner could lease his equipment to the motor carrier to haul a particular load that the motor carrier had the authority to haul.<sup>42</sup> This way the motor carrier bears all the administrative costs and pays the independent owner-operator for his equipment and his driver. While some motor carriers used this to find a legitimate competitive advantage, "historically, this practice led to abuses which threatened the economic stability of the trucking industry and public interest."<sup>43</sup> "Unscrupulous ICC-licensed carriers would use leased vehicles to avoid safety regulations governing equipment and drivers. Authorized carriers'

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38. See Motor Carrier Act of 1935, ch. 498, 49 Stat. 543, 545 (1935), which states as follows: Nothing in this part, except provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . (6) motor vehicles used exclusively in carrying livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof).

*Id.*

39. *Am. Trucking Ass'ns v. United States*, 344 U.S. 298, 302-03 (1953).

40. *Id.* at 302-06.

41. See *Dixie Ohio Express Co. Common Carrier Application*, 17 M.C.C. 735, 737-741 (1939).

42. See, e.g., *Interstate Commerce Comm'n v. Allen E. Kroblin, Inc.*, 113 F. Supp. 599, 602-03 (D. Iowa 1953). There, the court found that,

In order to haul return loads of non-exempt commodities, it is necessary for the uncertificated carriers to haul them under the certificate of a certificated carrier. In order to haul such loads under the certificate of a certificated carrier, the practice of trip leasing developed. It should be noted, however, that the practice of 'trip leasing' is not confined to uncertificated carriers hauling exempt agricultural commodities. Under the practice of 'trip leasing' an uncertificated carrier who had hauled a load of exempt agricultural commodities from the area of production to a market point would at such point, by means of brokers or otherwise, contact certificated carriers whose certificates permitted them to haul certain non-exempt commodities from such market point to points in the vicinity of the area of production.

*Id.*

43. *Prestige Cas. Co. v. Mich. Mut. Ins. Co.*, 99 F.3d 1340, 1342 (D. Mich. 1996) (citing *Am. Trucking Ass'ns*, 344 U.S. at 304-05).



use of non-owned vehicles also caused public confusion as to who was financially responsible for the vehicles.”<sup>44</sup>

The ICC was still allowing motor carriers to lease equipment though, acknowledging it as a bona fide business practice. The independent owner-operators continued to satisfy the needs of many entrepreneurs wanting to ease their way into the trucking industry on their own terms. In fact,

[T]he ICC, the body charged with responsibility for developing and maintaining a strong national transport system with the full legislative blessing of Congress, recognizes in a formal and vital way that carriers (common or contract) are entitled to obtain needed equipment and augment fleets to care for increases in traffic by means of leases.<sup>45</sup>

For the motor carrier, the benefit was in avoiding the liability to the general public and the cost of the equipment itself. Because the motor carrier did not actually own the equipment, the independent owner-operator bore those risks and costs. Oftentimes, it was the independent owner-operators that allowed motor carriers to, in effect, expand service offerings without asking permission from the ICC. One example was called an interchange involving an independent owner-operator. The independent owner-operator would haul one load for motor carrier A that has certification to move steel from Pittsburgh to Cleveland. Motor carrier A, though, did not have the certification from the ICC to move a load of steel from Cleveland to Chicago; motor carrier B had that certification. The Pittsburgh steel shipper needed to move its steel from Pittsburgh to Chicago and it already had a good relationship with motor carrier A. It did not know motor carrier B and did not wish to do business directly with motor carrier B. It wanted to work with motor carrier A. So the motor carriers would agree to lease the independent owner-operator, along with the owner-operator’s equipment to motor carrier A for the first leg of the trip, and then to motor carrier B for the second leg of the trip. The load would move all the way to Chicago as it needed to, the shipper was able to deal only with motor carrier A, the same driver moved the load for the entire trip, and each motor carrier remained within its operating authority granted by the ICC.<sup>46</sup>

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44. *Prestige Cas. Co.*, 99 F.3d at 1342 (citing *Am. Trucking Ass’ns*, 344 U.S. at 304-05; *Empire Fire and Marine Ins. Co. v. Guaranty Nat. Ins. Co.*, 868 F.2d 357, 362 (10th Cir. 1989)).

45. *Agric. Transp. Ass’n of Tex. v. King*, 349 F.2d 873, 881 (5th Cir. 1965).

46. The United States Supreme Court described this scenario and an alternate scenario in *American Trucking Associations*:

Because of the limiting character of the regulatory system, authorized carriers have developed a wide practice of using non-owned equipment. They have moved in two directions. The first is interchange. This includes those arrangements whereby two or more certificated carriers provide for through travel of a load in order to merge the advantages of certification to serve different areas. In this fashion, a wholly or partially

The ICC caught on to this practice after the passage of the Motor Carrier Act of 1935, issuing interim rules in 1950 to govern these leasing practices as well as equipment actually owned by the motor carriers.<sup>47</sup> The Court in *King* recited the final rules in its assertion that the ICC did in fact have the authority to govern owner-operator leases.

The regulations (§207.4) permit authorized carriers (common or contract) to 'perform authorized transportation in or with equipment which they do not own under the following conditions.' A written contract is required, §207.4(a)(2) prescribing (3) minimum period of 30 days if owner-driver, (4) exclusive possession and responsibility in lessee-carrier, (5) the specific compensation as lease rental, (6) duration, (7)(a) requiring copies of lease to be on vehicle, (b) receipts for equipment, (c) safety inspection, (d) identifying markings on vehicle, (e) pre-employment medical examination of driver and safety instruction, and (f) record of equipment with cargo manifests, etc.<sup>48</sup>

The focus for the ICC was to regulate the motor carrier. By extension that meant requiring aspects of the independent owner-operator's operation, but only through the motor carrier. "Regulation comes from regulating the carrier, not the vehicle-furnisher."<sup>49</sup> These new regulations went to the protection of the public.

ICC regulations now require that every lease entered into by an ICC-licensed carrier must contain a clause stating that the authorized carrier maintain "exclusive possession, control, and the use of the equipment for the duration of the lease," and "assume complete responsibility for the operation of the equipment for the duration of the lease." Further, all authorized carriers must maintain insurance or other form of surety "conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles" under the

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loaded trailer may be exchanged at the established interchange point, or even an entire truck travel the line without interruption, under the guise of a shift in control. The second is leasing. This relates to the use of exempt equipment in authorized operations. Carriers subject to Commission jurisdiction have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands. By a variety of arrangements, the authorized carriers hire them to conduct operations under the former's permit or certificate. Such operators thus travel approved routes with nonexempt property, and in the great majority of instances sever connections with their lessee carrier at the end of the trip.

344 U.S. at 303.

47. *Id.* at 300-01, 307-08. The Court in *American Trucking Associations* also noted, The use of nonowned equipment by authorized carriers is not illegal, either under the Act or the rules under consideration. But evidence is overwhelming that a number of satellite practices directly affect the regulatory scheme of the Act, the public interest in necessary service and the economic stability of the industry, and it is on these that the rules focus.

*Id.* at 303-04.

48. 349 F.2d at 882 n.29 (citing 49 C.F.R. § 207.4 (1964)).

49. *Id.* at 883.

carrier's license.<sup>50</sup>

The United States Supreme Court confirmed this extension of the ICC's authority in *United States v. Drum* in 1965.<sup>51</sup> The ICC now was charged with monitoring the leasing arrangements between the motor carriers and the independent owner-operators. A motor carrier now had to maintain, "exclusive possession, control, and use of the equipment for the duration of the lease."<sup>52</sup> If the equipment was in fact leased to the motor carrier, the lease must be in place for at least 30 days.<sup>53</sup> This prevented independent owner-operators from bouncing from motor carrier to motor carrier for each load to keep their equipment moving. This 30-day lease requirement also hindered the independent owner-operator that hauled exempt freight one way and tried to lease on with an authorized carrier to haul non-exempt back to the starting point.<sup>54</sup>

Consider what the safety standards of the industry without these new regulations from the ICC would have been. With the independent owner-operator bouncing from one motor carrier to the next, or from one shipper to the next, the incentive for safe operations was lost to the incentives to increase income.<sup>55</sup> "Because of the fact that the great bulk of the arrangements cover only one trip, leasing carriers have little opportunity or desire to inspect the equipment used, especially in cases where the agreement is made without the operator's appearance at the carrier's terminal."<sup>56</sup> Although it must be noted that at the time of the *American Trucking Associations* case, the safety data available did not necessarily match this perception of reckless disregard for highway safety by independent owner-operators.<sup>57</sup> Regardless, the leasing of equipment from

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50. *Prestige Cas. Co. v. Mich. Mut. Ins. Co.*, 99 F. 3d 1340, 1342-43 (D. Mich. 1996) (citing 49 C.F.R. §§ 1057.12(c)(1), 1043.1(a) (1986)).

51. *See Drum*, 368 U.S. at 385.

52. Federal Motor Carrier Safety Regulations, Lease and Interchange of Vehicles, 49 C.F.R. § 376.12(c)(1) (1997).

53. *Am. Trucking Ass'ns*, 344 U.S. at 300-01 app. at 321.

54. *See id.* at 317-18. Here, the Court held that

[t]he mere fact that commercial carriers of agricultural products will hereafter be required to establish their charges on the basis of an empty return trip is not the same as bringing them within Commission jurisdiction generally. The exemption extends, by its own words, to carriage of agricultural products, and not to operations where the equipment is used to carry other property. Needless to say, the statute is not designed to allow farm truckers to compete with authorized and certificated motor carriers in the carriage of non-agricultural products or manufactured products for off-the-farm use, merely because they have exemption when carrying only agricultural products.

*Id.* at 318.

55. *Am. Trucking Ass'ns*, 344 U.S. at 305.

56. *Id.*

57. "The conclusion that highway safety may be impaired rests admittedly on informed speculation rather than statistical certainty. A road check examination conducted by the Bureau did not indicate any significant difference in the number of safety violations between leased and owned vehicles." *Id.* at 305 n.7.

independent owner-operators had its advantages for motor carriers. The motor carriers were passing the costs of operating the equipment onto the owner-operators.<sup>58</sup> Passing on that cost led to a competitive price advantage for carriers leasing equipment.<sup>59</sup>

The cost picture of a carrier who depends largely on leased equipment is far different from that of a carrier owning his own trucks. Not only is the former able to undertake operations with relatively slight investment, but his current overhead involved in operating leased equipment is solely administrative, with the owner of the exempt equipment bearing the expense of gas, oil, tires, wages, and depreciation out of his share of the fee. And to refer to the exempt owner's own expenses as determinative of what is a "reasonable" rate would be manifestly impossible as long as the relationships between lessor and lessee are too tenuous, short-termed and informed, and the compensation of each based on a division of revenue.<sup>60</sup>

In exchange for passing on these operational costs, the motor carrier would pay the independent owner-operator a higher rate, whether based on mileage or revenue, to compensate for the risk. Whether there were thirty-day leasing requirements or not, the independent owner-operator had to keep the truck moving. Unless the independent owner-operator wanted to battle the bureaucracy of the ICC to obtain the certificates of public necessity, the independent owner-operator could not solicit freight on his or her own from shippers.<sup>61</sup> The independent owner-operator was forced to rely on the motor carriers with the certificates to provide them with freight to keep the equipment moving, or relegate themselves to hauling exempt goods.<sup>62</sup> Because the owner-operator was independent, he had to bare the costs of his business, i.e., he had to buy the truck, he had to fuel the truck, and he had to maintain the truck.<sup>63</sup> If the truck sat idle, the owner-operator sat idle, and that meant no money coming in. Thus, for the independent owner-operator, jumping from one motor carrier to the next was a necessary business practice to keep money flowing. Being strangled to leases with one motor carrier at a time for at least thirty days would not have been an appealing concept for the independent owner-operator.

Still, operating independently through a lease appealed to many over the administrative headaches of being a full-fledged motor carrier, or the restrictions of being a company driver. As opposed to the company

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58. *Id.* at 332-33.

59. *Id.* at 303, 306.

60. *Id.* at 306.

61. *Id.* at 326-27.

62. *Cent. Forwarding, Inc.*, 698 F.2d at 1267-68.

63. *Id.* at 1268.

driver, the independent owner-operator gets a chance to increase their profits through better decision-making. The company driver will be paid some sort of flat rate for moving a load of goods selected by the company. The motor carrier will tell the company driver when and where to fuel along the way, when and where to maintain or repair the truck, select the type of truck to operate, select the features on the truck, etc. The company driver may have no say in those matters, and any and all profits go to the motor carrier for those decisions.

On the other hand, the independent owner-operator may feel they can do a better job minimizing those costs, selecting preferred loads, selecting preferred routes, and thus maximizing profits. So when the independent owner-operators make those decisions, they get to reap the benefits or suffer the losses. As an example, an independent owner-operator may get better fuel rates in Iowa as opposed to Wisconsin, so they might minimize fuel purchases in Wisconsin and maximize fuel purchases in Iowa. The independent owner-operator may be able to do some maintenance on their own so as to minimize maintenance costs. The independent owner-operator may prefer a highway route through the house instead of an interstate route. This freedom of choice is a core characteristic of the independent owner-operator and it is what gives independent owner-operators the chance to grow their business into greater prosperity, possibly more trucks, more drivers, and even their own operating authority down the road.

The ICC respected these freedoms, and at this point it appeared the ICC had the motor carrier industry covered. The ICC was one of the strongest agencies in the federal government, regulating motor carriers for safety, as well as fair and reasonable business practices.<sup>64</sup> As one commentator pointed out, “destructive competition abated, and during the half century which followed, motor carrier service was ubiquitously available throughout the nation at a price that was ‘just and reasonable.’ Service was safe and dependable to large and small communities throughout the nation.”<sup>65</sup> Through the 1940s and into the 1950s, ICC regulation was at its peak.<sup>66</sup> The independent owner-operator had learned to live with the leasing provisions, high rates, and with the industry stable, the independent owner-operator had found comfort.

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64. See generally *supra* note 63.

65. Paul Stephen Dempsey, *Interstate Trucking: The Collision of Textbook Theory and Empirical Reality*, 20 *TRANSP. L.J.* 185, 187 (1992).

66. *Id.* at 187, 208.

#### IV. THE 1960S AND 1970S – NO FUEL FOR THE TRUCKS, BUT FUEL FOR DEREGULATION GROWS

The comfort of the 1940s and 1950s for the independent owner-operator slowly gave way to a push for deregulation. Beginning in the 1960s public opinion turned against big government and regulated industries.<sup>67</sup> Government bureaucracy was facing a backlash.<sup>68</sup> Adam Smith's teachings were revitalized.<sup>69</sup> And without any act by Congress, or any decision by the courts, the ICC underwent a change in opinion.<sup>70</sup> Dating back to John F. Kennedy, Presidents were pushing agencies away from regulation and encouraging more free market principles.<sup>71</sup> Under President Jimmy Carter in 1978, the ICC began de facto deregulation of the motor carrier industry.<sup>72</sup>

For the independent owner-operator, nothing had changed on paper. Congress had not passed any law deregulating trucking, and the courts had not made any decision deregulating trucking.<sup>73</sup> However, the change in ideology by the ICC did lead to changes for the independent owner-operator. All of the sudden the burden of proving that a motor carrier was "fit, willing and able to perform" services needed by the public was no longer a heavy burden to meet.<sup>74</sup> Motor carriers were simply asking for certificates for public necessity and the ICC was handing them out.<sup>75</sup> The independent owner-operator no longer had to tie himself directly to a motor carrier. The administrative burden put down by the ICC was now one the independent owner-operator could handle. Congress

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67. The ICC did not help its public image when it took enormous amounts of time to make regulatory decisions. "The commission once heard testimony that took up 53,000 pages to transcribe before deciding the proper rates to set for shipping grain. It took 11 years to come to a decision on a railroad merger." Sanger, *supra* note at 14.

68. "By the 1960s critics began to charge that the [ICC] was actually anti-consumer, keeping rates artificially high and becoming far too close to the industry it was supposed to regulate. There were corruption charges, and in the end it was the pro-consumer movement that pressed for deregulation and doomed the agency." *Id.*

69. Daniel Madar, *Handbook of Transportation Policy and Administration* 27-34 (Jeremy F. Plant ed.) (2007).

70. John Hood, *Blessings of Liberty*, POLICY REVIEW, July & Aug. 1997, available at <http://www.hoover.org/publications/policyreview/3573537.html> (stating that opposition to a regulated trucking industry existed during the 1960s and 1970s).

71. "In 1962 President Kennedy delivered a special transportation message to the nation calling for reduced economic regulation." See Traffic World 1907-2007 Special Commemorative Supplement, "Astonishing Times" Frank N. Wilner. Commonwealth Business Media 2007.

72. Dempsey, *supra* note 25, at 4.

73. *Id.* at 18-19.

74. *Id.* at 18.

75. Dempsey, *supra* note 5, at 347 (citing Freeman and Gerson, *Motor Carrier Operating Rights Proceedings – How Do I Lose Thee?*, 11 *TRANSP. L.J.* 13, 15 n.3 (1979) (providing statistics of percentage of applications for operating authority that ICC approved from 1975 until 1979)).

backed up the ICC's new directive (although not to the extent the ICC wanted) with the passage of the Motor Carrier Act of 1980.<sup>76</sup> Congress intended to promote greater competition in the industry by allowing easier entry into the market, simplifying the path through the certification process, and easing restrictions on motor carrier operations.<sup>77</sup> The market became flush with motor carriers, especially small motor carriers with one to five trucks at their disposal, ready and willing to haul freight for shippers.<sup>78</sup> It was no longer the government determining who was best to move freight for the public; rather, it was the shippers making the calls. The shippers now had tremendous influence as to what rates they would pay and what service they would demand, because more and more motor carriers were lining up at their docks willing to serve. The independent owner-operator could sell services directly to the shipping customer; it no longer had to use the services of the motor carrier, once it had the rubber stamp of operating authority from the ICC.<sup>79</sup>

The ease of entry into the market, while challenged heavily by independent owner-operators, namely by the Owner-Operator Independent Driver Association and the American Trucking Association, did lead to more independent owner-operators on the road.<sup>80</sup> More drivers on the road and more capacity available to shippers began to hurt the independent owner-operator trade.<sup>81</sup> During the regulated years, the union drive became a formidable force in the transportation industry. The International Brotherhood of Teamsters, founded in 1903, rose to prominence and exuded tremendous influence in the transportation industry, peaking in the 1960s and 1970s.<sup>82</sup> After deregulation beginning in 1978, competi-

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76. "The 1980 Act left unchanged the applicant's burden of proving fitness, willingness, and ability by codifying an applicant's obligation to establish that the proposed service will serve a useful public purpose, responsive to a public demand or need." Dempsey, *supra* note 25, at 8.

77. Motor Carrier Act of 1980, Pub L. No. 96-296, § 2, 94 Stat. 793, 793 (1980) (codified at 49 U.S.C. § 10101 (1982); see also *Cent. Transp. Inc., v. United States*, 694 F.2d 971, 971 (4th Cir. 1982) (legislative intent of 1980 Act is to mitigate excessive regulation); *Gamble v. ICC*, 636 F.2d 1101, 1103 (5th Cir. 1981) (goals of Act include simplifying certification process and reducing restrictions on operations).

78. "The number of trucking companies – in all three categories set up by the Interstate Commerce Commission – has proliferated from 18,045 in 1980 to 33,283 in 1985, to 45,791 in 1990." Agis Salpukas, *All About Trucking; A Whole Lot of Shaking Going On*, N.Y. TIMES May 5, 1991, available at <http://query.nytimes.com/gst/fullpage.html?res=9D0CE7DE1530F936A35756COA967958260&scp=1&sq=salpukas+all+about+trucking&st=nyt>.

79. "By late 1983 the [ICC] had issued operating authority to more than eighteen thousand new carriers under the 1980 Act, and had issued over sixty thousand new certificates." Dempsey, *supra* note 25, at 30.

80. Owner-Operator Independent Driver Association, *What is OOIDA?* available at <http://www.oida.com>.

81. Dempsey, *supra* note 25, at 31-32.

82. Catherine S. Manegold, *Teamsters' Fate Could Hang on Outcome of Truck Strike*, N.Y. TIMES, Apr. 27, 1994, at A10.

tion increased, shippers pushed back for cheaper rates, and margins for motor carriers thinned.<sup>83</sup> As margins thinned, motor carriers could hardly afford current rates paid to drivers, much less afford to offer any meaningful raises.<sup>84</sup> For motor carriers and independent owner-operators alike, it became more and more important to monitor all operational costs.<sup>85</sup> The independent owner-operator had to closely monitor fuel expenses, truck repair expenses, and personal expenses.<sup>86</sup> Motor carriers would most often compensate the independent owner-operators on either a mileage basis or percentage of revenue basis. If the motor carrier paid the owner-operator a percentage of gross revenue received from the shipper, then the motor carrier had little to worry about in the way of rising fuel costs. Those rising fuel costs had to be absorbed by the owner-operators, leaving less and less leftover from their percentage cut from the shipper. This type of percentage payment system led to investigations and promulgated rules by the ICC in 1974 to try to come up with a form of national fuel surcharge program.<sup>87</sup> The independent owner-operator was still driving the truck, but to stay alive the owner-operator had to continue thinking less as a driver, and more as a businessperson.

As a businessperson, the independent owner-operator has always had to think about fueling the truck. The 1970s made that thought a 24-hour concern for all truck owners.<sup>88</sup> Drastic fuel shortages and fuel price increases were crippling to independent owner-operators.<sup>89</sup> At the time, a motor carrier was locked into set rates with a shipper for at least thirty days.<sup>90</sup> The independent owner-operator's lease with the motor carrier was built on a revenue split of twenty-five percent to the motor carrier and seventy-five percent to the independent owner-operator.<sup>91</sup> The owner-operator was responsible for all of the fuel costs for operating the truck.<sup>92</sup> With the owner-operators forced to stomach the fuel price increase, the motor carriers had no pressure to increase their rates with the shippers; their twenty-five percent share of the revenue was not impacted.<sup>93</sup> Therefore, the independent owner-operator, smaller in business scope than the motor carrier, had little to bargain with, and the motor carrier had little incentive to negotiate with the independent

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83. *Id.*

84. *Id.*

85. *Cent. Forwarding, Inc.*, 698 F.2d at 1268-70.

86. *Id.*

87. *Refrigerated Transp. v. United States*, 390 F. Supp. 845, 846-47 (N.D. Ga. 1975).

88. *Id.*

89. *Id.*

90. *Id.* at 1268.

91. *Id.*

92. *Id.*

93. *Id.*



owner-operator.<sup>94</sup> Feeling trapped with no options, independent owner-operators stopped their trucks twice in the 1970s.<sup>95</sup> Unfortunately, the shutdowns did lead to violence, and while it is debatable whether or not to classify the shutdowns as successful, the shutdowns did lead to action at the federal level.<sup>96</sup>

“In 1973, in response to a strike by the nation’s owner-operators, the Interstate Commerce Commission began hearings, studies, and a rulemaking proceeding regarding the relationships between owner-operators and the motor carriers from whom they lease equipment.”<sup>97</sup> The hearings were discussed at length in *Global Van Lines, Inc. v. Interstate Commerce Commission*.<sup>98</sup> Among the hearings, the 95th Congress found the following:

In 1973 the nation’s independent (owner-operated) truckers experienced their winter of discontent. In a concerted protest, they shut down operations to protest a host of economic problems with which they were beset. The impact was sufficient to set in motion a series of congressional hearings on the plight of independent truckers. . . The various hearings uncovered a number of problems and abuses suffered by independent truckers. The owner-operators were found to be ‘caught in a continuing cost crunch,’ faced with rising costs, inflexible income, difficulties in obtaining long-term financing and questionable industry practices.<sup>99</sup>

The ICC subsequently started its own inquiry and began a rule making process.<sup>100</sup> The notice for the rule making cited ten areas of interest in the leases of independent owner-operators, including:

- (1) Compensation for Equipment and Driver;
- (2) Payment by Authorized Carriers to Lessors for Transportations Services Rendered;
- (3) Providing Copies of Rated Freight Bills at Time of Settlement;
- (4) Responsibility of Authorized Carriers for Fuel Costs and Other Items Associated with Transportation Services Rendered by Lessors;
- (5) Insurance;
- (6) Payment of Detention Charges and Other Accessorial Charges;
- (7) License Plate Fee Proration;
- (8) Escrow Funds;
- (9) Safety Requirements; and
- (10) Additional Areas for Consideration.<sup>101</sup>

In 1979, the ICC promulgated formal rules on the same.<sup>102</sup> The formal

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94. *Id.* at 1268-69.

95. *Id.*

96. One Hellacious Uproar, *TIME*, July 2, 1979, available at <http://www.time.com/time/magazine/article/0,9171,916819,00.html>.

97. *Owner-Operator Indep. Ass’n, Inc. v. Artic Express, Inc.*, 270 F. Supp. 2d 990, 992 (S.D. Ohio 2003).

98. 627 F.2d 546, 547-48 (D.C. Cir. 1980).

99. *Id.*

100. *Id.* at 547.

101. *Id.* at 549.

102. *Id.*

rules stated that “the Commission is inclined to the view that the establishment of minimum standards for leasing contracts is a desirable starting point for an overall revision of the existing leasing regulations.”<sup>103</sup>

While the fuel strike itself turned much of public against truck drivers of all nature,<sup>104</sup> it did lead to positive changes in the treatment of independent owner-operators by motor carriers – at least on paper.<sup>105</sup>

#### V. DEREGULATION: SOME INDEPENDENT OWNER OPERATORS ADJUST THE BUSINESS MODEL

President Jimmy Carter tried to bring those positive changes to the motor carrier industry, and to independent owner-operators especially with the enactment of the Motor Carrier Act of 1980.<sup>106</sup> “I am also particularly pleased that the bill will improve truck service to small communities and enhance business opportunities for independent truckers.”<sup>107</sup> The intent was to limit the involvement of the Federal Government.<sup>108</sup>

In 1996, the most significant remnants of economic regulation were eliminated with the passage of the Interstate Commerce Commission Termination Act of 1996.<sup>109</sup> The ICC was disbanded, and the remaining regulations such as safety regulations, were placed under the eyes of the Surface Transportation Board.<sup>110</sup> In time the U.S. Department of Trans-

103. *Id.* at 548.

104. One Hellacious Uproar, *supra* note 97.

105. It’s Been an Amazing 25 Years: OOIDA 25 Years, [http://www.oida.com/at\\_issue/misc/OOIDA\\_at\\_25.html](http://www.oida.com/at_issue/misc/OOIDA_at_25.html) (last visited Mar. 23, 2008).

106. Motor Carrier Act of 1980 Statement on Signing S. 2245 Into Law, <http://www.presidency.ucsb.edu/ws/index.php?pid=44689&st=Motor+carrier&st1> (last visited Mar. 23, 2008).

107. *Id.*

108. *See* Motor Carrier Act of 1980, 49 U.S.C. § 10101(2) (1980).

The Congress hereby finds that a safe, sound competitive, and fuel efficient motor carrier system is vital to the maintenance of a strong national economy and a strong national defense; that the statutes governing Federal regulation of the motor carrier industry are outdated and must be revised to reflect the transportation needs and realities of the 1980’s; that historically the existing regulatory structure has tended in certain circumstances to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities and others to enter the trucking industry; that protective regulation has resulted in some operating inefficiencies and some anticompetitive pricing; that in order to reduce the uncertainty felt by the Nation’s transportation industry, the Interstate Commerce Commission should be given explicit direction for regulation of the motor carrier industry and well-defined parameters within which it may act pursuant to congressional policy; that the Interstate Commerce Commission should not attempt to go beyond the powers vested in it by the Interstate Commerce Act and other legislation enacted by Congress; and that legislative and resulting changes should be implemented with the least amount of disruption to the transportation system consistent with the scope of the reforms enacted.

*Id.*

109. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.

110. For a more detailed look into the deregulation of the motor carrier industry, *see* U.S. Dept. of Transportation Federal Highway Administration, *Regulation: From Economic Deregu-*

portation established the Federal Motor Carrier Safety Administration (“FMCSA”) to monitor motor carrier safety.<sup>111</sup> For all intents and purposes, the motor carrier industry was free of economic regulation for the first time since 1935.<sup>112</sup> The independent owner-operator still had the obligation to adhere to safety regulations such as the Hours of Service regulations and truck safety regulations, but the economic regulations were formally lifted.<sup>113</sup>

Some owner-operators took the opportunity to obtain authority without the administrative burden of economic regulation, while others continued hauling exempt products or leasing to motor carriers.<sup>114</sup> It is a business decision every owner-operator has to make. Do they want to sell their services, invoice for their services, collect for their services, and maintain safety records, all the while continuing to operate their truck, maintain their truck, and manage the load? If they do, then they have the option to obtain operating authority. If they do not, then they still have the option of hauling exempt freight or leasing to a motor carrier while still maintaining their independence. The independent owner-operator can choose the business model best for them.

## VI. THE FUTURE OF THE INDEPENDENT OWNER-OPERATOR: A BUSINESS MODEL FACING CHALLENGES

Despite being a vital part of the transportation industry for nearly a century, as recognized by the United States Supreme Court,<sup>115</sup> Congress,<sup>116</sup> and representative trade associations,<sup>117</sup> the independent owner-

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*lation to Safety Regulation*, [http://ops.fhwa.dot.gov/freight/theme\\_papers/final\\_thm8\\_v4.htm](http://ops.fhwa.dot.gov/freight/theme_papers/final_thm8_v4.htm) (last visited May 20, 2008).

111. Motor Carrier Safety Improvement Act of 1999, 49 U.S.C. § 101 (1999).

112. The term “deregulation” is used to describe the motor carrier industry since 1980, although some commentators suggest that is not an entirely accurate term. While economic regulations were lifted, many regulations remain and have been strengthened since then such as driver’s license requirements, hazardous materials requirements, and other safety requirements. In an interview with Con-Way Freight’s Jerry Detter, “‘Deregulation is basically a misnomer,’ Con-Way’s Detter notes. In 1980, operating authority was deregulated, enabling companies to operate anywhere they chose to. But beyond that change, ‘there’s still a tremendous amount of regulation,’ he says, including hazmat regulations as well as rules regarding commercial driver’s licenses and certification to operate certain types of equipment and freight. Then there are the Hours of Service regulations, which are still being worked out. On top of all these regulations are increased security requirements. ‘There will be even more regulation, and I think carriers are on the cusp of having to do extensive background checks on all employees, not just new ones, on a regular basis,’ Detter says.” Harps, *supra* note 8.

113. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.

114. *See generally Am. Trucking Ass’n*, 344 U.S. 298.

115. *Id.*

116. *See Regulatory Problems of the Independent Owner-Operator in the Nation’s Trucking Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the House Committee on Small Business: Parts I, II, III, 95th Congress, 2d Sess. (1976-78).*

operator profession is facing new challenges from governments at all levels.<sup>118</sup> While the federal government has the authority to govern the transportation of freight between the states,<sup>119</sup> it is the individual states that could still hamper the relationship of the independent owner-operator and motor carriers. The many independent owner-operators remaining leased on or contracted to larger motor carriers face government challenges today.<sup>120</sup> Just as the motor carrier must meet the safety requirements set forth by the FMCSA,<sup>121</sup> the independent owner-operators must as well. The shippers demand improved service from its motor carriers (and thus its owner-operators) including load tracking and improved security measures.<sup>122</sup>

State agencies, such as unemployment agencies and workers compensation agencies, have begun to take notice of these “requirements” being pushed onto independent owner-operators.<sup>123</sup> The question the agencies want to answer is: “were these independent owner-operators truly independent, or were they in fact employees of the motor carriers?”<sup>124</sup> Unfortunately for the independent owner-operators, more and more often state agencies found that the requirements pushed onto the independent owner-operators by the federal government and shippers stripped the independent status away from the owner-operators. For its part, the federal government has tried to explain the role of federal leas-

117. See, e.g., OOIDA.com, <http://www.ooida.com>.

118. See <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=6186> (statement of Richard A. Samp, House Committee on Ways and Means, May 8, 2007, Chief Counsel of the Washington Legal Foundation) (“The ‘independent contractor’ model of conducting business affairs is coming under increasing assault from government regulations, labor activists, and plaintiffs’ attorneys, who often view the model as an impediment to maximization of tax revenues and to increased unionization of work forces. Such objections are generally wrong headed and overlook the key role that independent contractors play in driving economic growth and business innovation.”).

119. Leadership, Consultation, and Cooperation, 49 U.S.C. § 301 (1998).

120. Motor Carrier Safety Improvement Act of 1999, 49 U.S.C. § 101 (1999).

121. To ensure compliance with motor carrier safety regulations, see Federal Motor Carrier Safety Administration, Regulatory Guidance, <http://www.fmcsa.dot.gov/rules-regulations/rules-regulations.htm>.

122. Joseph O’Reilly, *Becoming a Better Trucking Customer*, INBOUND LOGISTICS (Sept. 2002) [http://www.inboundlogistics.com/articles/features/0902\\_feature01.shtml](http://www.inboundlogistics.com/articles/features/0902_feature01.shtml).

123. “FedEx was fined \$190,000 by [the] Massachusetts’ attorney general for misclassifying 13 drivers as independent workers rather than full-time employees. . . .” *FedEx Facing \$319 Million in Back Taxes After IRS Audit*, TRANSPORT TOPICS (Dec. 26, 2007) <http://www.ttnews.com/articles/basetemplate.aspx?storyid=18901>. “In California the state supreme court let stand a verdict against FedEx Corp. in a case in which drivers for FedEx Ground argued they should be treated as employees, not independent contractors. The drivers were awarded \$11.3 million in damages.” *Id.*

124. “The Internal Revenue Service also is auditing [Federal Express’] trucking unit for the years 2004 to 2006 to see whether workers were wrongly labeled as contractors rather than employees for tax purposes.” *Id.*

ing regulations and its impact on the independent contractor status by issuing regulations to clarify the role of the federal regulations.<sup>125</sup> “Nothing in the provision required by paragraph (c)(4) is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier. An independent contractor relationship may exist when a carrier complies with 49 U.S.C. §1107 and attendant administrative requirements.”<sup>126</sup>

This regulation is not preventing what industry experts see as an attack on the independent owner-operator trade. “American Trucking Associations has launched a campaign to protect the trucking industry’s use of independent contractors, a move officials said is needed to counter recent court decisions and an increasingly ‘hostile’ legislative environment.”<sup>127</sup> This campaign is moving state by state, supporting legislation granting a safe harbor for independent contractors in the motor carrier industry. The industry has considered pursuing a new law at the federal level, but it does not appear to be an advantageous time to pursue such an action. “Consensus of opinion was that it was not the time to go to Congress. The legislative environment is more hostile to the use of owner-operators.”<sup>128</sup> “A bill proposed by Senators Barack Obama and Richard Durbin, both Illinois Democrats, would eliminate ‘safe harbor’ provisions in the tax code for independent contractors and, if passed into law, could force companies to abandon the owner-operator business model.”<sup>129</sup>

To withstand any kind of “attack” on the independent owner-operator, motor carriers must adhere to the laws, rules and regulations of state and federal governing bodies relating to independent contractors. Motor carriers must not simply label drivers as independent contractors to try to limit their tax obligations, reporting obligations, and liability when the motor carriers in fact wants to control every facet of the drivers’ performance.<sup>130</sup> If a motor carrier is going to utilize the services of an independent owner-operator, the motor carrier must adhere to the “Federal Truth in Leasing Regulations,”<sup>131</sup> and must think of the owner-operator

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125. See Committee on Ways and Means, *Statement of Contractor Management Services* <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=6181> (last visited May 20, 2008).

126. 49 CFR Part 397.12(c)(4).

127. Daniel P. Bearth, *ATA to Defend Owner-Operator System*, TRANSPORT TOPICS (Dec. 10, 2007) <http://www.tnews.com/articles/petemplate.aspx?storyid=18812>.

128. *Id.*

129. *Id.*

130. The term “independent contractor” and “independent owner-operator” are at times used interchangeably in the transportation industry.

131. In fact, the Owner-Operator Independent Drivers Association has advocated for numerous drivers that OOIDA felt were mistreated under contractual terms. Furthermore, “[t]he

as a business partner.<sup>132</sup> Among other things, the current Federal Truth in Leasing Regulations require written leases;<sup>133</sup> receipts for equipment specifically identifying the equipment leased to the motor carrier and the duration of such lease;<sup>134</sup> identification of the equipment;<sup>135</sup> records of trips made under the lease;<sup>136</sup> and exclusive possession and responsibilities of the equipment during the lease.<sup>137</sup>

The other assault on the independent owner-operator is the everyday cost of fuel. Soaring diesel prices can cut right into the profits of independent owner-operators.<sup>138</sup> “The [American Trucking Associations] estimates the trucking industry will pay \$109 billion for fuel this year, up more than 5% from last year and more than double that paid four years ago.”<sup>139</sup>

While business costs and government intrusion will continue to impact the owner-operator trade, the impact on daily lives that technological advancements have been cannot be ignored. Independent owner-operators are running businesses on wheels. The cabs of the tractors are wired offices. Shippers and motor carriers track the tractor’s location through satellites, communicate with the independent owner-operators through satellite messaging and cell phones, while the independent owner-operators can process paperwork through laptop computers, wireless Internet access, and scanning documents.<sup>140</sup> That technology helps the business of the owner-operator but it also helps the life of the owner-operator. Cell phones and laptops help independent owner-operators keep in contact with family and friends at home.<sup>141</sup> This balance is an

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Interstate Commerce Commission Termination Act authorized owner-operators to bring private causes of actions against carriers for certain violations of the Motor Carrier Act and its implementing regulations.” *Owner-Operator Indep. Drivers Ass’n, Inc. v. Arctic Express, Inc.* 270 F.Supp.2d 990, 993 (U.S. Dist Ct. S.D. Ohio Eastern, July 2003).

132. As Steven Gundale, the Senior Corporate Communications Manager for Dart Transit Company noted,

You have to start out with the viewpoint that your independent contractors are business owners. They have business needs, and you have to provide a favorable business environment for them, or they won’t stay. On the other hand, give them every tool they need to succeed in business, and you’ll succeed too.

Andy Duncan, *Companies in the Cab*, CCIJ MAGAZINE, Sept. 2007.

133. 49 C.F.R. § 376(a).

134. *Id.* at § 376.11(b).

135. *Id.* at § 376.11(c).

136. *Id.* at § 376.11(d).

137. *Id.* at § 376.11(c).

138. Barbara Hagenbaugh, *Businesses, truckers feel pain of higher diesel prices*, USA TODAY, Nov. 11, 2007.

139. *Id.*

140. See John Latta, *The Highway Way of Life*, TRUCKERS NEWS, March 2004, available at <http://www.etrucker.com/apps/news/article.asp?id=43114>.

141. See *id.*

increasing concern for independent owner-operators.<sup>142</sup>

## VII. CONCLUSION: THE INDEPENDENT OWNER-OPERATOR KEEPS ROLLING ALONG

The transportation industry has changed and continues to change. It adapts to government regulations, technological advancements, political climate, economic cycles, and cultural evolutions. The independent owner-operator is no different. The independent owner-operator has the equipment and the will to do the work. From trip-leasing to keep trucks rolling to shutting down equipment in objection to soaring fuel prices, the independent owner-operator continues to find a way to keep the business moving. Regardless of the recent protectionist philosophy of government or the increased demands of shippers, the past 100 years of independent owner-operator evolution leads me to believe the entrepreneurial spirit will continue to live on in future independent owner-operators. Consumers still want goods, shippers still want to get those goods to them, and trucks will continue to get those goods to those consumers. Independent owner-operators have trucks, and they will drive.

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142. *See id.* Gary Kelley, vice president of driver recruiting at U.S. Xpress, stated, In 1975 when I started there was not as much competition for drivers as there is today. So we could be as tough as we wanted to do. We recruited what company operations departments wanted. We went for people with clean records, an excellent history of stability in jobs, good, solid clean-cut people. And we sent them over the lower 48, and they got home for two or three days every six weeks or so. It was ridiculous. We turned them into nomads with no family life or chance of a family life. But plenty of people wanted the work and brought the dream of the freedom of the highway, and we could recruit to those specifics.

...

A big percentage of the guys behind the [over-the-road] wheel want to be husbands and dads, and women in the driver's seat want to be wives and moms as well as drivers. So companies are changing to accommodate what drivers now want in their lifestyle more than ever before.

*Id.*

