CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
P O Box 944275
SACRAMENTO CA 94244-2750

RWI TRANSPORTATION LLC
c/o JAHMAL T DAVIS, ESQ
Petitioner

Precedent Benefit
Decision No. P-T-511

EMPLOYMENT DEVELOPMENT DEPARTMENT
Appellant

DECISION

Attached is the Appeals Board decision in the above-captioned case issued by Board Panel members:

MICHAEL ALLEN

ROBERT DRESSER

ELLEN CORBETT

Pursuant to section 409 of the California Unemployment Insurance Code, AO-380199 (T) is hereby designated as Precedent Decision No. P-T-511.

Adopted as Precedent: September 13, 2016

The Employment Development Department (EDD) appealed from the decision of the administrative law judge that granted Petitioner's petition for reassessment.

ISSUE STATEMENTS

The issues in this case are whether:

(1) Workers were performing service for Petitioner as employees pursuant to California Unemployment Insurance Code (code), section 621, subdivision (b), to whom wages for employment were payable pursuant to code section 926;

(2) Workers' entire service, performed for Petitioner both within and without California, was employment localized in California pursuant to code section 603 or otherwise subject to coverage in California pursuant to code section 602;

(3) Petitioner is an employer liable for contributions to the California Unemployment Fund and withholdings for Personal Income Taxes (PIT), plus interest, as assessed by EDD pursuant to code section 1127; and,

(4) EDD's assessment against Petitioner is preempted by the Federal Aviation Administration Authorization Act (FAAAA), 49 U.S.C. section 14501(c).

FINDINGS OF FACT

EDD commenced an audit on or about April 16, 2014 to determine whether Petitioner was an employer owing contributions to the California Unemployment Fund (accrued and payable for unemployment insurance, disability insurance, and employment training) as well as withholdings for PIT based on wages paid to employees. EDD initiated the random audit after noting Petitioner was a registered California employer reporting subject wages paid to a single California employee while also issuing an Internal Revenue Service (IRS) Form 1099 to multiple California addresses. EDD identified 98 California resident long-haul tractor drivers (drivers) performing services for Petitioner during the 2012 audit test year. EDD ultimately determined Petitioner had misclassified drivers as

independent contractors, and had not paid code-mandated contributions or made code-mandated deductions based on wages paid to them as employees.

On August 4, 2014, EDD mailed a Notice of Assessment dated July 28, 2014, finding Petitioner liable for unpaid contributions and driver PIT totaling $2,380,444.49, including interest as calculated through August 4, 2014. EDD calculated the assessment based on available information about drivers' wages during the audit period, which began April 1, 2011 and ended March 31, 2014. The following facts pertained to Petitioner and drivers during the audit period.

Petitioner operates as an interstate freight transportation motor carrier under the authority and regulation of the United States Department of Transportation (USDOT) (and its sub-agency, the Federal Motor Carrier Safety Administration). Petitioner utilizes drivers to accomplish its regular business of hauling produce from shippers in California and Arizona to receivers in various other states. Petitioner's executive vice-president testified it operates in multiple states, generally south of Interstate 80. Petitioner also provides services to other customers in various states, utilizing drivers to move non-produce freight on their return trips to California. Petitioner could not conduct its business without the services performed by drivers.

Petitioner maintains its headquarters office in Kentucky; none of the employees who work there are drivers. Petitioner has one acknowledged employee in California who manages its California terminal/trailer yard. (Petitioner also has terminals/trailer yards with a managing employee in a few other states.) Petitioner contends that during its company history of over 50 years it has never employed drivers and that all its drivers are "owner-operators" working as independent contractors.

Owner-operator drivers who work as independent contractors are a recognized, organized group within the trucking industry. Petitioner's expert witness provided statistical information about owner-operator drivers: they are estimated to comprise somewhat over 10 percent of all interstate truck drivers who are subject to the authority of the USDOT; approximately 90 percent of them only possess and drive one tractor; they represent the vast majority of drivers engaged in the specialty area of interstate produce transport.

The act of driving a tractor does not differ, whether a driver is an employee or an independent contractor. All interstate tractor drivers must possess the knowledge, experience and skills necessary to obtain and maintain a commercial driving license. They must be familiar with the many rules and regulations applicable to interstate tractor drivers. They must be capable of operating a large

vehicle safely over long distances through various road, traffic and weather conditions.

Petitioner has relationships with shipping and receiving customers and the necessary infrastructure to communicate with them and coordinate freight movement. Such customers choose to deal directly with motor carriers equipped to manage all logistics, rather than interacting with numerous individual drivers. Because it is difficult for average owner-operator drivers to negotiate independently with those customers to provide transport services, most owner-operator drivers yoke themselves to authorized motor carriers such as Petitioner to get work.

Petitioner requires individuals who wish to perform services for it as drivers to submit an "employment" application, although Petitioner does not allow anyone the option to apply to work as an employee driver, only as an owner-operator. If their application is accepted by Petitioner, drivers must sign an "independent contractor" contract to work. Federal regulations allow motor carriers such as Petitioner to utilize independent contractor drivers rather than employee drivers, but mandate the existence of such a contract and specify some of its terms if they choose to do so. Petitioner's contract with drivers contains many additional terms which are not required by USDOT but instead are specific to Petitioner's business needs and preferences. Petitioner drafted the contract and its terms are not negotiable by drivers.

The contract between Petitioner and each driver is effective for a period of one year but renews automatically unless terminated by either party. Petitioner may terminate a contract with a driver, with or without cause, upon written notice. Drivers may terminate the contract with Petitioner upon thirty day written notice to Petitioner or a shorter time frame if Petitioner agrees.

Pursuant to federal regulations, Petitioner must verify the past three years of employment history and safe driving history of any driver operating under its authority. Petitioner is responsible to retain driver files including applications, motor vehicle reports, prior employment verifications, road tests, hours of service, random draw drug and alcohol test results, bills of lading, receipts and other paperwork for a minimum of three years. Petitioner is subject to USDOT audit and can be fined or shut down for failure to comply with regulations.

As a motor carrier, Petitioner is required to obtain USDOT operating authority, which is permission from the federal government to transport loads in interstate commerce, and USDOT numbers, which allow the federal government to track its safety performance. As acknowledged by Petitioner's witnesses, this is a costly and complicated process not usually undertaken by the average owner-operator

driver. Federal regulations require Petitioner's drivers to operate under its USDOT operating authority and numbers. Additionally, every state in which a motor carrier operates has its own permit requirements, which Petitioner acquires and maintains on behalf of its drivers.

In addition to their driving services, drivers provide the tractor portion of the tractor-trailer for Petitioner's use. Petitioner owns trailers but no tractors. Petitioner offers driver assistance in purchasing and maintaining a tractor via a relationship it maintains with a third party financing company. Petitioner may advance the down payment on behalf of drivers or make the down payment on the tractor for drivers as a "signing bonus." Petitioner provides drivers the option to take the tractor payment out of driver's pay and make it directly to the financing company on the driver's behalf. Drivers are ultimately responsible to make the lease or purchase payments; they bear the consequences of non-payment, lease termination, or own the tractor if or when paid for in full.

By contract and regulatory requirements, each driver's tractor is leased to Petitioner for its "exclusive possession, use and control." USDOT regulations require the tractor to bear signage identifying the carrier for which driver is operating; by contract, Petitioner supplies that signage to drivers. By contract, Petitioner also retains the right to place advertisements on drivers' tractors. By contract, Petitioner retains the right to assign other drivers to operate the tractor if a driver cannot complete an assignment. If Petitioner learns from driver or another motor carrier that driver is going to operate under the other motor carrier's USDOT authority, Petitioner terminates its own contract with that driver. Drivers are obligated to return all Petitioner property when the contract terminates. Drivers can subsequently return to perform services for Petitioner by executing a new contract.

By regulation, Petitioner must maintain liability insurance on drivers' tractors when they are being driven for Petitioner. Drivers pay for "bobtail" insurance to cover the property value of the tractor itself and liability coverage for when they are not driving the tractor for Petitioner. Petitioner covers the trailer and cargo insurance. Petitioner requires drivers to possess a workers' compensation policy or acceptable occupational accident policy.

Petitioner typically acquires and pays for the various necessary state permits and plates for drivers running under its authority and does not charge driver for these annual costs as long as driver works continuously for Petitioner. Petitioner secures and provides drivers with gas cards which drivers may use to purchase fuel and other items such as oil filters. Petitioner will pay the card issuer directly and deduct the charges from drivers' pay. Drivers may set up the same gas card for use as a bank card, on which Petitioner will deposit drivers' pay. Drivers may

also opt to use their own payment methods for fuel and supplies and receive their pay directly; Petitioner alleged an unspecified number do so.
Drivers pay for the cost of tractor maintenance, tires and mechanical repairs. If necessary, Petitioner will advance money to drivers for these items then offset the costs against drivers' payment. Petitioner will reimburse drivers for any money they spend on trailer maintenance, repair and washing; trailer refrigeration fuel; scale costs to weigh a trailer; yard admission fees; pallet purchases; and "lumper" or driver-invoiced loading/unloading services.

Drivers are responsible to pay fuel taxes in the states in which they drive, as calculated by actual miles driven. Petitioner calculates the taxes due in each state based on data collected by the Petitioner-owned device installed in each driver's tractor. Petitioner pays the fuel taxes then charges drivers back as a deduction from drivers' pay.

Drivers can hire co-drivers but per regulations Petitioner has to clear and authorize them to run under Petitioner's authority in the same way drivers were cleared and authorized. Petitioner will only pay the driver who owns the tractor, but pays that driver slightly more per mile and leaves it to driver how to split the pay with co-driver.

Drivers are not required to begin or end work at, or report to, the Petitioner's California terminal/trailer yard, unless they need to pick up or drop off a Petitioner's trailer there. They can park their personal vehicles or tractors there, but most do not. They may arrange to have their tractors serviced there. Drivers may also go there if they need assistance from the terminal/trailer yard manager. While the California terminal/trailer yard manager does not issue assignments to drivers, he testified he facilitates communication between them and Petitioner and provides services including: assisting new drivers with completing their application and contract with Petitioner; sending drivers to a clinic for drug screening; answering drivers' questions; emailing or faxing for drivers; printing load or other documents for drivers; arranging for drug testing as needed; and helping drivers submit paperwork required by Petitioner for driver payment and by USDOT for recordkeeping.

Drivers await assignments in their home state of California. Petitioner's dispatchers, who are employees located in its headquarters office in Kentucky, transmit written assignment offers to drivers using the Petitioner-owned device installed in each driver's tractor. An assignment offer includes information such as the cargo, customer shipper and receiver locations where driver must pick up and deliver goods, the Petitioner-identified route, mileage pay calculation, and completion deadlines. Drivers can accept or decline assignments without consequence, except that if they do not work they do not earn any money. Once

a driver accepts an offered assignment by responding to the dispatcher via the tractor-installed device, driver commences the trip from California to the shipper location.

Drivers are often offered regular or repeat assignments. Petitioner usually sets up assignments so that most can be completed in three to five days. That allows drivers to return home to California every week and to submit the necessary paperwork to receive payment each Thursday. Driver witness Flores testified he usually commenced his assignments from his home in California and delivered to destinations in Indiana, Kentucky, Ohio, and Illinois. Driver witness Estrella testified he hauled produce from California "all the way to the east coast." Petitioner's safety director testified drivers deliver mainly to the tri-state area (Indiana, Kentucky, Ohio) but also acknowledged drivers going to multiple other states. The safety director also asserted that drivers are not required to go to any of Petitioner's terminals.

While drivers are en route with a delivery they are contractually mandated to contact Petitioner twice each day during specified hours to communicate regarding the status of the delivery. Petitioner monitors tractor location and driving activity by satellite through the installed device. Petitioner also continuously communicates with drivers en route about possible return trip assignments on behalf of its non-produce customers.

Petitioner pays drivers by the mile based on a route determined by its chosen software program. Drivers have the discretion to travel a different route than suggested by the software program so long as it will allow them to complete the assignment by the deadline set by Petitioner. If drivers choose an alternate route, Petitioner still only pays them based on the mileage determined by its software program. Drivers may take breaks en route when they choose, as long as they can complete the assignment by the deadline set by Petitioner.

Once drivers accept an initial assignment, they make contact with the produce shippers to arrange pick up (in order to assure the produce is ready at the shed/cooler, rather than still in the fields). Drivers get a bill of lading from each shipper, certify what is loaded on the trailer, and transport the goods and the bill of lading to the receivers. Once the receivers have signed off on the bill of lading, drivers must submit it and other required paperwork to Petitioner in order to be paid for the assignment. The paperwork includes a trip report/overview cover sheet drivers must complete with specified information; some of the information is required from Petitioner by USDOT, other information is for Petitioner purposes only. Petitioner mandates drivers transmit this paperwork using a Petitioner-specified electronic scanning system which is available at truck stops or in

Petitioner's terminals. There is a fee associated with the scanning service which Petitioner charges back to drivers.

Once Petitioner receives the trip paperwork it issues payment to drivers, typically once per week. Petitioner pays drivers regardless of when or whether Petitioner's customers have paid Petitioner for its services. Petitioner performs all the accounting for drivers, keeping track of credits and charges to produce a detailed, itemized "settlement sheet" with a bottom line of the pay due drivers for each assignment. By contract, if drivers do not meet Petitioner requirements such as checking in twice daily while making pick-ups and meeting delivery deadlines, Petitioner may take deductions from drivers' pay.

Many drivers covered by the assessment had a long history of driving exclusively for Petitioner; for example, one driver testified he had been driving for Petitioner exclusively for 18 years. The vast majority of them owned only one tractor and did not have their own motor carrier authority or number through USDOT. Most drivers did not have their own businesses independent of the services they provide to the Petitioner. Petitioner contended that some drivers had established a DBA or LLC, had co-drivers, or owned more than one truck and hired drivers. Petitioner offered testimony to this effect based on witness belief and recollection, and presented a spreadsheet it created identifying a few drivers as possible examples.

EDD calculated the assessment based on information available to it at the time of the audit in April 2014, most of which was supplied to it by Petitioner. Petitioner drew information about drivers' earnings in part from IRS form 1099s it issued to drivers up through 2013. Petitioner issued 1099s to drivers up through 2013 but stopped filing them after 2011. After 2013, Petitioner started issuing drivers annual "settlement statements" instead.

Petitioner and EDD acknowledged that the IRS form 1099s and annual settlement statements provided information about gross driver earnings. From the commencement of the audit and continuing even after the issuance of the assessment, EDD repeatedly offered Petitioner the opportunity to submit additional information so that the assessment could be adjusted so as to be based on net driver earnings. Instead of doing so, at the hearing, a witness for Petitioner testified to a method he had devised for estimating drivers' net earnings and recalculating the assessment. Much of the information upon which he testified he relied was derived from source documents and materials in Petitioner's possession, but which Petitioner never provided to EDD.

Personal Income Tax (PIT) withholding accounts for over 80 percent of the assessment total. At Petitioner's request, subpoena duces tecum were issued to

the California Franchise Tax Board in an attempt to obtain proof that drivers had paid their own PIT on earnings during the audit period. If they did so, Petitioner would be entitled to an abatement of PIT liability. The Franchise Tax Board did not respond to the subpoenas. EDD would abate the assessment based on proof or sworn statements from drivers themselves indicating they had paid their PIT, but Petitioner failed to acquire or provide such.

REASONS FOR DECISION

I. Were drivers employees of Petitioner performing services in employment for wages?

EDD assessed Petitioner for contributions to the California Unemployment Fund based on drivers' wages. Code section 976 provides that contributions shall accrue and become payable by employers "with respect to wages paid for employment." Contributions assessed are for unemployment insurance (code § 976), disability insurance (code § 984) and employment training (code § 976.6). EDD also assessed Petitioner for withholding of drivers' PIT (code § 13020).

Liability for such contributions depends on whether drivers were performing services as employees or independent contractors. (*Empire Star Mines v. California Employment Commission* (1946) 28 Cal.2d 33, 43.) Legislation imposing unemployment insurance taxes is premised upon a relationship of employer and employee; a principal for whom services are rendered by an independent contractor does not come within the scope of its provisions. (*Ibid.*)

California unemployment insurance taxes accrue only on amounts paid as remuneration for services rendered by employees. The relationships of employer and employee and of principal and independent contractor have long been recognized to be mutually exclusive. They cannot exist simultaneously with respect to the same transaction. The proof of the one status automatically precludes the existence of the other. Accordingly, the services of an independent contractor are not "employment" within the meaning of code section 601, and the remuneration paid for such services is not taxable. (Precedent Decision P-T-2.)

Thus, the first issue to be resolved in this case is whether drivers were employees of Petitioner performing services in employment for wages during the audit period.

Code section 601 defines "employment" as service, including service in interstate commerce, performed by an employee for wages or under any contract of hire, written or oral, express or implied. Code section 621, subdivision (b) provides that "employee" includes any individual who, under the usual common law rules

applicable in determining the employer-employee relationship, has the status of an employee.

California follows common law rules to determine whether a worker is performing service as an employee. (code § 606.5.) Nevertheless, the courts have continued to interpret, evolve and expand upon those common law rules over time. California courts have confirmed that they, as well as administrative agencies, should interpret issues arising under code section 621, subdivision (b) "in light of comparable, complementary and overlapping criteria developed in caselaw. . .". (*Messenger Courier Assn. of the Americas, v. California Unemployment Ins. Appeals Bd.* (2009) 175 Cal. App. 4th 1074, 1092.) Thus, we apply those criteria to the case at hand, as follows.

A. Right to control the manner and means or details of the work

The primary test in determining whether service was rendered in employment is the right of the alleged employer to control the manner and means of accomplishing the desired results. (*Empire Star Mines Co., Ltd. v. California Employment Commission*, *supra,* 28 Cal.2d at p. 43.)

In *Hillen v. Industrial Accident Commission* (1926) 199 Cal. 577, 580, the court asserted that one performing work and labor for another is presumed to be an employee in the absence of evidence to the contrary.

Petitioner argues it did not control the manner and means by which drivers transported goods between Petitioner's customers. Petitioner's arguments are similar to those of the defendant in *Arzate v. Bridge Terminal Transport, Inc.* (2011) 192 Cal. App. 4th 419. Like the plaintiffs in *Arzate*, Petitioner's drivers used their own trucks, paid some of their own expenses, could decline dispatches, decided when and where to take meal and rest breaks, and could have leased more than one truck and hired other drivers. (*Id.* at p. 427.) Petitioner argues that this evidence overcomes the presumption that drivers were servants. Yet the evidence also reveals that Petitioner directed drivers where to pick up and drop off produce and by when, subjected drivers to a twice-daily check-in requirement, required them to submit paperwork containing information beyond what was required of Petitioner by the USDOT, and mandated the use of certain stations via which drivers had to submit paperwork which was required to complete the job and to receive payment. Petitioner retained control over these significant details of the work, which strongly indicates employment. However, as the *Arzate* court noted, there are multiple factors beyond control of "manner and means" which must be considered. (*Ibid.*)

Courts "have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements." (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350.)
In *State Compensation Ins. Fund v. Brown* (1995) 32 Cal.App.4th188, 202 the Court recognized that the right of control "retains significance, but is no longer determinative."

B. Right to discharge at will

Although not conclusive, a right to discharge a worker at will is strong evidence of an employer/employee relationship. (*California Employment Stabilization Commission v. Morris* (1946) 28 Cal.2d 812, 819.)

Petitioner by contract retains the right to terminate drivers with or without cause, at will, with written notice. This factor evidences an employee/employer relationship but is not conclusive.

C. Secondary factors beyond right to control manner and means

In seminal cases such as *Empire Star Mines v. California Employment Commission* (1946) 28 Cal.2d 33, *Tieberg v. California Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 950, and *S. G. Borello & Sons, Inc. v. Department of Industrial Relations, supra,* 48 Cal.3d at p. 350, the California Supreme Court has consistently considered factors beyond the common law employment criteria of the right to control the manner and means of accomplishing the result desired, and the right to discharge at will. In *Messenger Courier Assn. of the Americas, v. California Unemployment Ins. Appeals Bd., supra,* 175 Cal. App. 4th at p. 1090, the Court reiterated those secondary factors for consideration as follows:.

1. Is the one performing services engaged in a distinct occupation or business?

Petitioner asserts drivers were engaged in their own distinct occupation and business, which indicates they were independent contractors. Petitioner's witnesses testified that independent contractor "owner-operator" drivers are recognized in the industry, have their own national association and are authorized to operate by law. Petitioner's expert witness further indicated that approximately 90 percent of all "owner-operator" drivers only own and drive one tractor and do so under the USDOT operating authority of a motor carrier such as Petitioner. Petitioner pointed out that some drivers had established "DBA"s or "LLC"s, had multiple tractors and hired other drivers. However, if true, those facts alone would be insufficient to conclude those drivers were not functioning as

employees of Petitioner. Nevertheless, the evidence revealed that the vast majority of Petitioner's drivers only owned or leased one tractor, did not have co-drivers or hire other drivers, and drove exclusively and continuously for Petitioner. In reality, the only business drivers were engaged in was the Petitioner's business, and this factor weighs toward finding drivers to be employees.

2. Is it the kind of occupation in the locality that the work is usually done under the direction of the principal or by a specialist without supervision?

Petitioner's expert witness testified that "owner-operator" independent contractor drivers are estimated to make up somewhat over 10 percent of interstate truck drivers subject to the authority of the USDOT; inversely, this means that upwards of 90 percent of interstate truck drivers work instead as employees. On the other hand, Petitioner's witness also indicated that "owner-operator" independent contractor drivers are disproportionately utilized in the interstate transport of produce. Balancing this evidence, we deem this factor to be neutral in the assessment of whether drivers were employees.

3. What skill is required in the particular occupation?

Petitioner argued that drivers were engaged in a high-skill occupation, which indicates they were independent contractors. We acknowledge that drivers are required to have certain skills beyond those of an average worker. However, all interstate tractor drivers require the same skills regardless of whether they are classified as employees or independent contractors. We note that even where skill is required, if the occupation is one which ordinarily is considered an incident of the business establishment of the employer, there is an inference that the actor is a servant. (Rest.2d Agency, § 220, p. 489.) Thus, this factor supports a finding of employment.

4. Does the principal or the worker supply the instrumentalities, tools, and the place of work for the person doing the work?

Petitioner contends that drivers supplied their own instrumentalities, tools, and place of work, also citing drivers' lease, purchase or ownership of their tractor as evidence drivers had substantial investment in their own business as independent contractors. However, the evidence demonstrates that Petitioner paid for or advanced funds to drivers for almost everything necessary for them to perform services, later deducting some payments or advances from drivers' pay. In some instances, Petitioner would even make the tractor down payment for drivers and arrange for payments on the tractor lease or purchase to come out of

driver's pay. Drivers did not have to possess, acquire or bring any significant resources into the relationship with Petitioner in order to perform services for it. This factor further supports a conclusion that drivers were functioning as employees.

5. What is the length of time for which the services are to be performed?

Petitioner executed a one-year contract with drivers which renewed automatically unless terminated by one of the parties. This resulted practically in an indefinite term of service and the evidence indicated many drivers had been engaged continuously in exclusive service to the Petitioner. This factor indicates an employment relationship.

6. Is the method of payment by the time or by the job?

Petitioner paid drivers by the miles driven while on assignment, which it argues is more equivalent to being paid by the job than by time, and thus supports a finding drivers were independent contractors. Conceding this general rule, we also recognize there was a time element to drivers' payment, as Petitioner designed driving assignments to meet specified delivery deadlines and to be completed within a certain number of days. Nevertheless, even while crediting this factor as indicative of independence, we deem it relatively inconsequential in resolving the issue of drivers' status when weighed appropriately with and against all other factors.

7. Do the parties believe they are creating the relationship of employer-employee?

Because drivers signed Petitioner's "independent contractor" contract, Petitioner insists the parties knew they were not creating an employer-employee relationship. Petitioner further argues that drivers preferred to be independent contractors.

That the parties may have mistakenly believed they were entering into the relationship of principal and independent contractor is not conclusive. (*Grant v. Woods* (1977) 71 Cal.App.3d 647, 654.) While a contractual provision that a worker is an independent contractor is persuasive evidence of the intended relationship, it is not controlling and the legal relationship may be governed by the subsequent conduct of the parties. (*Brown v. Industrial Accident Commission* (1917) 174 Cal. 457, 460.)

In this case, drivers had no choice but to sign the contract if they wished to perform services for Petitioner. Moreover, the belief, intent or even preference of

the parties is not controlling where the actual conduct of these parties demonstrates their legal relationship was that of employer-employee, as concluded below.

8. Is the work a part of the regular business of the principal?

The work performed by drivers was part of the regular business of Petitioner, the interstate transport of produce and other goods. This is a powerful indication of an employment relationship. In recent history, this single factor has become by far the most significant to courts when analyzing whether a worker is an employee or independent contractor.

Increasingly, the "modern tendency is to find employment when the work being done is an integral part of the regular business of the employer and the worker does not furnish an independent business or professional service relative to the employer." (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd.* (1991) 235 Cal.App.3d 1363, 1376, citing *S. G. Borello & Sons, Inc. v. Department of Industrial Relations, supra,* 48 Cal.3d at p. 357 (internal citations omitted).)

In *JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App. 4th 1046, the Court held that delivery drivers were employees under workers' compensation law. It held that the company was in the delivery business and that the delivery drivers performed the work of this business. (*Id.* at p. 1064.) It concluded that the individual factors utilized to evaluate employment status were not to be mechanically applied and that, "[T]he functions performed by the drivers, pick-up and delivery of papers or packages and driving in between, did not require a high degree of skill. And the functions constituted the integral heart of JKH's courier service business. By obtaining the clients in need of the service and providing the workers to conduct it, JKH retained all *necessary* control over the operation as a whole." (*Ibid.*)

In *Air Couriers Internat. v. Employment Development Dept.* (2007) 150 Cal.App.4th 923, the company was in the business of package delivery. The drivers used their own vehicles and paid their own driving expenses. They delivered to the company's customers under the direction of the company's dispatchers. They could select their own routes, but the company established pick-up and delivery deadlines and required the drivers to use company-furnished forms in order to receive payment. The company billed its customers and collected payment. The drivers generally worked continuously for the company and were paid at regular intervals. Although the drivers could turn down jobs, this was done infrequently because of the fear that the company would stop providing work. The drivers did not have their own businesses or work in a

separate profession. The court held the drivers were employees because the company "exerted control over the drivers to coordinate and supervise the company's basic function: timely delivery of packages." (*Id.* at p. 939.)

In the present case, drivers furnished no independent business or professional service relative to Petitioner. Absent the services of drivers, Petitioner could not have conducted its regular business, rendering drivers' work an integral part of Petitioner's business. As acknowledged in *Santa Cruz, JHK Enterprises and Air Couriers,* the modern tendency is to find employment under these circumstances, as we do in this case.

While considering the relevant evidence and applying the various legal tests in the present case, we were mindful of Petitioner's position that any controls it imposed on drivers required as the result of government regulations are not permitted to be considered as indicia of employment. Petitioner cites to the federal motor carrier regulations:

> Nothing in the provisions required by paragraph (c)(I) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements.

(49 CFR 376.12(c)(4).)

This provision clarifies that requirements imposed by the referenced regulations are intended for purposes other than affecting the status of drivers. It expressly recognizes that drivers may be independent contractors or employees. It acknowledges that an independent contractor relationship *may* exist when a motor carrier complies with regulatory requirements, but does not indicate that it necessarily *does* exist.

Nevertheless, in this case we do not find it necessary to rely on any of the control indicia established by regulatory requirements to conclude drivers were employees of Petitioner. As set forth above, more than ample evidence exists beyond those indicia to find that drivers were employees during the audit period pursuant to code section 621, subdivision (b) providing services in employment pursuant to code section 601. Remuneration payable to drivers for those services constituted wages pursuant to code section 926.

Having reached these conclusions, we now consider Petitioner's argument that, even if drivers were employees performing services in employment for Petitioner, California was not the correct state to issue an assessment on their wages.

II. Was drivers' entire service in employment, performed for Petitioner both within and without California, either localized in California or otherwise subject to coverage in California?

Petitioner argues that drivers' work was not localized in California under code section 603 and was not covered employment in California under code section 602. Petitioner contends California was not the correct state to assess contributions on the wages Petitioner paid drivers during the audit period.

Code section 602 states:

> "Employment" includes an individual's entire service, performed within, or both within and without, this State if:
>
> (a) The service is localized in this State; or
>
> (b) The service is not localized in any state but some of the service is performed in this State and (1) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this State; or (2) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

Code section 603 provides:

> Service is localized within a state if:
>
> (a) The service is performed entirely within the state; or
>
> (b) The service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; for example, is temporary or transitory in nature, or consists of isolated transactions.

In this case, the parties acknowledged, and we agree, that drivers' service was not "localized" in California under code section 602(a), as defined in code section 603; drivers performed services both in and out of California and the services

performed out of California were not merely incidental to those performed in California. Thus, it is necessary to proceed to code section 602(b) and consider whether drivers had a base of operations in California, where they undisputedly performed some services.

The United States Department of Labor (USDOL) has issued Unemployment Insurance Program Letters explaining that the objective of "localization of work" provisions in state unemployment insurance laws is to cover under one state law all of the service performed by an individual for one employer, wherever it is performed. (U.S. Department of Labor, Unemployment Insurance Program Letter (UIPL) No. 291 (July 1, 1952) reissued with UIPL No. 20-04 (May 10, 2004.) In the early years of the unemployment insurance program each state agreed to enact uniform provisions like code section 602. The intent is to avoid duplication of coverage or gaps in coverage under state unemployment laws.

The UIPLs set forth principles providing guidance on the manner and sequence of applying the states' statutory provisions relating to "localization of work" as follows:

> Only if the service is not localized in any state is any other test necessary. If the service is not localized, it is necessary to determine the individual's base of operations state and whether any work is performed in that state. In other words, questions must be asked: Does the individual have a base of operations in this state? Is a service performed here?
>
> The "base of operations" is the place, or fixed center of more or less permanent nature, from which the individual starts work and to which the individual customarily returns in order to receive instructions from the employer, or communications from customers or other persons, or to replenish stocks and materials, to repair equipment, or to perform any other functions necessary to exercise the individual's trade or profession at some other point or points. The base of operations may be the employee's business office, which may be located at his residence, or the contract of employment may specify a particular place at which the employee is to receive his direction and instructions. This test is applicable principally to employees, such as salesmen, who customarily travel in several states.

(U.S. Department of Labor, Unemployment Insurance Program Letter (UIPL) No. 291 (July 1, 1952) reissued with UIPL No. 20-04 (May 10, 2004.)

Mirroring the language of the UIPLs, Precedent Tax Decision No. P-T-148 confirmed "base of operations" means a more or less permanent place from which the worker starts work and to which the worker customarily returns to receive instructions or perform functions related to the rendition of the worker's services.

The definition of "base of operations" focuses entirely on the activities of the employee and makes no mention whatsoever of the employer, including where the employer has its headquarters or place(s) of business. (*Walco Leasing v. Bilich* (Minn.Ct.App. 1986) 383 N.W.2d 374, 378 ("[T]he focus of the term 'base of operations' is upon the employee - - i.e. where the employee receives his directions, where he starts and ends his work, where he is hired, etc.").

California was the fixed place from which drivers submitted their initial employment application and signed the contract required to work for Petitioner; started and ended work assignments; customarily returned to service equipment and perform other tasks necessary to exercise their trade; and waited to receive assignments and instructions from Petitioner. Drivers also interacted with the terminal/trailer yard manager in California as needed (including receiving directions from him on matters such as reporting for drug testing). Based on drivers' activities, California was their base of operations, either at their respective residences or wherever they parked their tractors in California when not driving for Petitioner.

Petitioner argues instead that drivers' base of operations was in Kentucky. However, drivers had only the most tenuous relationship with Kentucky based solely upon Petitioner's choice to locate its headquarters and dispatchers there. Petitioner could have chosen to locate its headquarters or dispatchers anywhere and it would not have affected drivers' activities. In its brief on appeal and during oral argument, Petitioner improperly attempted to offer new evidence that drivers always ferried produce from California and Arizona directly to a Petitioner warehouse in Kentucky. Not only is this contention conspicuously absent from the record, it is wholly contradicted by it. Although we do not accept or credit this new evidence, even if we did, it would not change our finding that California is drivers' base of operations, because by law the "base of operations" has nothing to do with the employer, its headquarters or place(s) of business. Therefore, Kentucky was not drivers' base of operations. As cautioned by the UIPLs, "base of operations" must be carefully distinguished from "place of direction and control", the latter being a test we do not properly reach unless the employee has no "base of operations" in a state in which he performs some services (P-T-148).

Localization of work laws were designed "to center the coverage of the work in the one state in which it would be most likely that he would seek work if he

became unemployed" (P-T-148, citing *Kunz v. Catherwood* (App.Div. 1968) 294 N.Y.S.2d 103, 106). In this case, drivers who became unemployed or disabled would be most likely to file claims for benefits and seek work in California. It cannot be said that any state other than California, including Kentucky, has a superior or even comparable claim to drivers' wages. To hold otherwise would subvert the very intent of the law.

California was the proper state to assess contributions based on wages Petitioner paid to drivers during the audit period. Because drivers' base of operations was in California and drivers performed services in California, drivers' entire service, performed both within and without California, was covered employment in California under code section 602(b)(1).

III. Is Petitioner liable for contributions assessed by EDD pursuant to code section 1127?

Petitioner argues EDD's assessment is inaccurate for several reasons. First, Petitioner asserts some drivers did have their own businesses and as such should be considered independent contractors and thus excluded from the assessment. Second, Petitioner disputes the assessment calculation as incorrectly based on drivers' gross versus net earnings. Third, Petitioner alleges drivers paid their own PIT and thus Petitioner should be entitled to abatement of that substantial portion of the assessment.

With regard to Petitioner's first assertion, from the time of the audit, Petitioner had ample opportunity to provide information to EDD that certain drivers should be excluded from the assessment but failed to do so. For instance, Petitioner could have: subpoenaed certain drivers to testify, or provided sworn statements from them, indicating they had their own businesses, customers, or multiple trucks and/or drivers in their employ; produced copies of public record documents by which certain drivers established DBAs or LLCs; provided images of driver business logos displayed on tractors or elsewhere tending to show independence; offered testimony or sworn statements from other motor carriers to whom certain drivers also provided service by virtue of owning more than one truck or having drivers in their employ.

Petitioner's second dispute with the assessment calculation, that it is based on gross versus net driver earnings, is legitimate. However, Petitioner itself bears the responsibility of providing EDD with the necessary information identifying net driver earnings. Petitioner testified and argued at length about the extensive amount of documentation and data it is required to create and maintain by the USDOT; it could and should have shared that information and other business records with EDD but for unknown reasons chose not to do so. The testimony

provided by Petitioner's witness, concerning his method of calculating driver net earnings and the amounts at which he arrived, was not a satisfactory substitute and did not provide either EDD or this Board any credible basis for adjusting the assessment.

Petitioner's third allegation, that if drivers paid their own PIT for earnings during the audit period it is entitled to an abatement of that portion of the assessment, is true. Yet, Petitioner has had many months since the audit in which to secure from drivers proof or sworn statements to establish PIT payment but failed to do so. This is the responsibility of Petitioner, not EDD or this Board. Absent such proof, there can be no abatement.

We note the Petitioner has the burden of proof in a tax matter, particularly as the party attacking the employment relationship. (*Isenberg v. California Employment Stabilization Com.* (1947) 30 Cal.2d 34, 38; *Aladdin Oil Corp. v. Perluss* (1964) 230 Cal.App.2d 603, 610; *Smith v. Department of Employment* (1976) 62 Cal.App.3d 206, 213.) Petitioner only offered brief testimony based on vague and unsupported witness recollection with regard to its arguments concerning the assessment's inaccuracy. Because Petitioner offered weaker and less satisfactory evidence when it was within its power to produce stronger and more satisfactory evidence with regard to the accuracy of the assessment, the limited testimony it offered is viewed with distrust. (Evidence Code, § 412.)

If EDD is not satisfied with any return or report made by any employing unit of the amount of employer or wage earner contributions, it may compute the amount required to be paid upon the basis of facts contained in the return or reports or may make an estimate upon the basis of any information in its possession and make an assessment of the amount of the deficiency. (Unemployment Insurance Code, § 1127.)

Petitioner did not make satisfactory returns and reports to EDD with regard to drivers during the audit period. Pursuant to code section 1127, EDD was permitted to compute and estimate the amount to be paid on the basis of the only information available to it. Petitioner remains liable for the assessment. While we will not disturb it, Petitioner is not precluded from working with EDD to provide the additional information necessary for adjustments or abatements.

IV. Is EDD's assessment against Petitioner preempted by the FAAAA?

Finally, Petitioner argues EDD's assessment is preempted by the FAAAA, which provides:

> . . . [A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.

(49 U.S.C. § 14501(c)(1).)

Federal preemption is based on the United States Constitution's mandate that the "Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby. . ." (U.S. Const., art. VI, cl. 2.) A state law that conflicts with federal law is said to be preempted and is "without effect." (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516 [112 S. Ct. 2608].)

The appeals board is not required to turn a deaf ear because an issue is raised which involves application of the Constitution. While to declare legislation in violation of the Constitution is an exercise of judicial power beyond the proper scope of administrative adjudication, it is within our proper scope to determine whether an administrative agency is applying legislation in a constitutional way. (Precedent Decision P-T-31.)

Thus, while we make no finding as to the constitutionality of the code sections under consideration, we do find EDD applied them in a constitutional manner, relying upon existing judicial authority that the FAAAA does not preempt comparable state laws involving motor carriers.

The US Supreme Court has established parameters concerning the preemptive power of the FAAAA. The Supreme Court noted ". . . (1) that '[s]tate enforcement actions having a connection with, or reference to,' carrier 'rates, routes, or services' are pre-empted'; (2) that such pre-emption may occur even if a state law's effect on rates, routes, or services 'is only indirect.' (*Rowe v. New Hampshire Motor Transport Ass'n*, (2008) 552 U.S. 364, 368 [128 S. Ct. 989] (internal citations omitted).)The Court later cautioned that "related to" did not mean the sky was the limit and that the addition of the words "with respect to the transportation of property" massively limited the scope of preemption ordered by the FAAAA. (*Dan's City Used Cars, Inc. v. Pelkey* (2013) 569 U.S. __ [133 S. Ct. 1769, 1778].)

While the Ninth Circuit Court of Appeals has not resolved specifically whether the FAAAA preempts California or other states from assessing contributions to their unemployment funds, it has addressed preemption in cases of comparable context that we find most relevant and helpful in resolving the present issue.

In *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca* (9th Cir. 1998) 152 F.3d 1184, 1189, the Court held that California's prevailing wage law had no more than an indirect, remote, and tenuous effect on, and thus was not "related to", the motor carriers' prices, routes, and services within the meaning of the FAAAA's preemption clause.

Holding more recently that California's meal and rest break laws were not preempted by FAAAA, the Court declared:

> [The meal and break laws] do not set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly or indirectly. They are "broad law[s] applying to hundreds of different industries" with no other "forbidden connection with prices [, routes,] and services." They are normal background rules for almost *all* employers doing business in the state of California. And while motor carriers may have to take into account the meal and rest break requirements when allocating resources and scheduling routes – just as they must take into account state wage laws or speed limits and weight restrictions, the laws do not "bind" motor carriers to specific prices, routes, or services. Nor do they "freeze into place" prices, routes, or services or "determin[e] (to a significant degree) the [prices, routes, or] services that motor carriers will provide." Further, applying California's meal and rest break laws to motor carriers would not contribute to an impermissible "patchwork" of state-specific laws, defeating Congress' deregulatory objectives.

(*Dilts v. Penske Logistics, LLC* (9th Cir. 2014) 769 F.3d 637, 647, cert. den., (2015) 135 S. Ct. 2049 (internal citations omitted.).)

The California Supreme Court addressed this issue in *People ex rel. Harris v. PAC Anchor Transportation, Inc. (*2014) 59 Cal.4th 772. The People took action against a trucking company for violations of the unfair competition law (UCL). (*Id.* at p. 775.) The People contended that by misclassifying its drivers as independent contractors, the trucking company illegally lowered its costs of doing business through failing to pay unemployment insurance and unemployment training fund taxes and by failing to withhold state disability insurance and state income taxes. (*Id.* at p. 776) Thus, the case implicated the same code provisions by which EDD levied its assessment in the present case.

The Court held the People's action was not preempted by the FAAAA, noting:

> The sections of the Labor Code and the Unemployment Insurance Code that anchor the People's UCL claim make no reference to motor carriers, or the transportation of property. Rather, they are laws that regulate employer practices in all fields and simply require motor carriers to comply with labor laws that apply to the classification of their employees.

(*Id.* at p. 785.)

The Court further expressed that "nothing in the congressional record establishes that Congress intended to preempt states' ability to tax motor carriers, to enforce labor and wage standards, or to exempt motor carriers from generally applicable insurance laws." (*Id.* at p. 786.) "California labor and insurance laws and regulations of general applicability are not preempted as applied under the FAAAA." (*Ibid.*)

The provisions of the code at issue in the present case are in no way "related to" the transportation of property. The code does not conflict with the provisions or intent of the FAAAA. Interstate motor carriers such as Petitioner are only impacted by the code's generally applicable provisions to the same extent as any other subject California employer. As noted in *Dilts*, Petitioner routinely operates under and complies with many other California laws which could be said to affect interstate motor carrier prices, routes and services in an equal, if not more direct and substantial way. Any influence the code provisions may have on motor carrier prices, routes or services are as indirect, tenuous and remote as that of California's prevailing wage, meal and rest break laws and UCL prohibitions. As the Courts have held application of those laws to interstate motor carriers is not preempted by the FAAAA, we likewise hold neither is EDD's assessment against Petitioner under the provisions of the code.

DECISION

The decision of the administrative law judge is reversed. Drivers were performing service for Petitioner as employees pursuant to code section 621, subdivision (b), to whom wages for employment were payable pursuant to code section 926.

Although drivers' service was not localized under code section 603, driver's entire service for Petitioner, performed within and without California, is subject to coverage in California pursuant to code section 602.

Petitioner is an employer liable for contributions to the California Unemployment Fund, and for PIT withholding, plus interest, as assessed by EDD pursuant to code section 1127.

The assessment is not preempted by the FAAAA, 49 U.S.C. section 14501(c).