

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS  
AT KANSAS CITY

LARRY BLAIR

and

CHARLIE DAVIS,

On Behalf of Themselves and  
All Other Persons Similarly Situated,

Plaintiffs,

v.

TRANSAM TRUCKING, INC.

Defendant.

CLASS ACTION

Case No: 09-CV-2442 EFM/KGG

**REBUTTAL REPORT OF MICHAEL H. BELZER, Ph.D.**

I, Michael H. Belzer, do hereby declare and state as follows:

1. I hereby incorporate within my rebuttal my original report and attachments in this matter, including but not limited to, paragraphs 1 through 7 plus Exhibits A, B, and C from my original report. Exhibit A to this report is a list of additional documents reviewed for this report.
2. In preparing my rebuttal report and opinions I have reviewed the reports and depositions of defendant's experts Robert Crandall, David Dominitz and William Herster

DECLARATION OF MICHAEL H. BELZER Ph.D,

and the exhibits and other attachments and information referenced in those reports.

Nothing contained in those reports alters the substance of my opinions as set forth in my original report. To the extent that defendant's experts have reached different conclusions than are contained in my original report, I do not believe such opinions are well founded or based on reliable evidence and scientific methods. Rather, defendant's experts have instead cherry-picked certain evidence or failed to acknowledge other relevant evidence in arriving at their flawed conclusions and opinions. This rebuttal report describes at a high level the flaws in the analyses of defendant's expert reports.

3. The reports from TransAm's experts appear to rely on the definition of work, or on-duty time under the Federal Motor Carrier Safety Regulations (FMCSRs), rather than on the definition normally understood in the labor market and as is relevant here under the Fair Labor Standards Act (FLSA). FMCSA is focused on facilitating trucking operations and its interpretation of work is very narrow and concerned primarily (even solely) with safety. Paragraphs 21-23 of the Herster report, as well as statements in his deposition, demonstrate this narrow perspective. Herster's interpretation of "on duty" relies only on the FMCSA's interpretation of work.
4. From FMCSA's safety regulatory perspective, drivers technically may be off duty but this FMCSA duty status does not mean the employee is not working, nor does it mean the employee is not entitled to compensation under the FLSA guidelines. Within FMCSA, the dominant perspective since the beginning has been safety, and FMCSA does not consider that tracking and determining driver employee or contractor status and related compensation is within their purview.

5. In the survey of leased drivers conducted by plaintiffs' experts, about 75% of respondent drivers reported experiencing a roadside inspection in a typical week. In addition, many of the drivers deposed by TransAm also reported that they were frequently pulled over for inspections when they encountered open scales. Many of them, in fact, expressed frustration that the PrePass device for which they were paying, and which they thought would ease their passage through scales, actually prompted them to be pulled over most times they went through scales. While specific documentation does not exist to verify these experiences, which appear consistent across individuals surveyed and across individuals deposed, when state police working in coordination with the Commercial Vehicle Safety Alliance (CVSA) and FMCSA think that a carrier may be a "bad guy",<sup>1</sup> they will target it. A substantial but unknown fraction of these roadside inspections do not result in any record—even a clean one. In other words, when law enforcement finds no violation, they regularly let the drivers go and do not record a stop. This leads to substantial under-reporting of encounters with inspectors and law enforcement. Each

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<sup>1</sup> Repeated comments by FMCSA officials to the National Academies of Science Center for National Statistics (NAS CNStat) Panel on which I currently am serving, which is providing oversight for FMCSA's data gathering and analysis, have emphasized that the FMCSA considers its mission to get unsafe carriers ("bad guys") off the road. Experts inside and outside FMCSA have told this panel that commonly these state police do not record an inspection if the police don't see a violation worth citing. This leads to severely biased violation data recorded in the FMCSA's CSA data. There is nothing random about these inspections, so the reported data strongly oversample both violations and violators.

one of these encounters or inspections removes drivers from the road and costs them time.

6. These state police work independently of the investigators who conduct the terminal audits or investigations, of which TransAm has had three during the past dozen years. In paragraph 26, Herster contests plaintiffs' claim that drivers are pulled over frequently, citing FMCSA Safety Measurement System (SMS) data showing only 2,183 inspections in a two-year period ending on December 30, 2016. Not only are these data systematically flawed, with substantial and irregular under-reporting, but also this period represents only a brief and recent snapshot of safety and compliance inspections spanning multiple iterations of FMCSA policy since 2006. For this reason, the information Herster cites here does not tell us anything about the experiences the drivers have had, including the amount of time in aggregate these drivers have spent being pulled over, waiting for inspections, undergoing inspections, or otherwise being questioned by law enforcement personnel.
7. Herster also makes a key error in paragraph 27 when he claims that it would have been impossible for TransAm to have received a Satisfactory Compliance Review if drivers' claimed average hours of uncompensated labor time (26) were true because drivers would have been, on average, out of compliance with Hours of Service (HOS) regulations. Herster's error is to confuse FMCSA HOS regulations and requirements, which allow drivers to log almost all non-driving work time off duty, with DOL requirements to pay workers who are working according to FLSA regulations. It has been quite common for

decades for truck drivers, who have always called logbooks "comic books",<sup>2</sup> to keep multiple logbooks and log unpaid non-driving labor off duty. Whether one goes back to the Labbe survey I have cited elsewhere or the very recent book by Viscelli, who claims to have worked 90-100 hours per week regularly and claims others do the same,<sup>3</sup> this problem is well established in trucking. As long as truck drivers log their non-driving time off duty, it is very possible to appear to stay well under the weekly legal hours limit while actually working 100 hours per week, and these unrecorded non-driving hours will not ordinarily be identified in a Compliance Review.

8. In paragraph 3, at the outset of his report, Crandall claims that "Plaintiffs' experts Drs. Belzer and Albright have reviewed only a small portion" of the evidence in this case because we were unable to recall answers to all the questions directed to us during our depositions. He further claims that I "only skimmed or keyword-searched depositions for select quotes." I actually read 22 of the approximately 52 depositions in this case, in whole or in part, and initially conducted subject matter reviews of all the depositions, as I believed relevant, in addition to reviewing many of the often-repetitive documents provided, such as employee and contractor handbooks, logbooks, settlement sheets, and other documents. I have continued to read through the remaining 30 depositions, in

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<sup>2</sup> Viscelli, Steve. 2016. *The Big Rig: Trucking and the Decline of the American Dream*. Oakland, CA: University of California Press; 62.

<sup>3</sup> Viscelli, Steve. 2016. *The Big Rig: Trucking and the Decline of the American Dream*. Oakland, CA: University of California Press; 64.

whole or in part, as time allows, to familiarize myself with all available perspectives they provide.

9. I was retained in August 2016 to opine on issues of control and hours of work, and I looked at documents with information in them relevant to the area of expertise on which I was asked to opine. This does not mean that I just skimmed them or cherry-picked them to find quotes, but rather that I focused my research and analysis on reviewing the areas of information that I believed were relevant to the subjects I was retained to study in this case. Any social science research, including research in economics, requires limiting the pool of information studied to a manageable and relevant size; that is an important lesson one learns doing a PhD and subsequent scientific research. The methodology I used here was consistent with generally accepted methods of economic and social science research.
10. In testimony given by Crandall in his deposition in response to questioning, however, Crandall reveals that his team, not he, read all these depositions. Crandall says that "we went through them systematically and looked at all of these issues."<sup>4</sup> It appears that he read only two or three of the depositions and he does not appear to have been able to recall very much from any documents in this case. When asked if he had read the depositions, he provided an evasive answer that revealed he had not read the depositions. "Yes, we read -- well, I read excerpts of all of them. My staff read all of them and then flagged all the things for me to look at." When asked to be specific about how many he read, he claimed to have read twenty of them "cover to cover". When asked

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<sup>4</sup> Crandall deposition page 12.

questions about them, he could only remember the names of a few prominent deponents and could not remember what any of them said; he then changed his story saying that he "looked" at them. This interchange goes on at least from page 11 through page 16 without resolution, except that it appears throughout that Crandall personally does not know the material at all and has read very little of the testimony in this case. In sum, this case involves a great number of depositions and other documents. Many of those documents are redundant or not relevant to my opinions in this case, and in marked contrast to Crandall, I read and conducted the analysis for my opinions, relying further on data collected and organized by plaintiff's declared expert Dr. Albright.

11. In paragraph 11 of his rebuttal report, Crandall makes the claim that leased drivers were free to take their trucks elsewhere. The substance of the arrangement is more complicated. Not only did most leased drivers come to TransAm for employment (and were then convinced to lease trucks from TransAm in order to become leased drivers, as discussed in my original Report), most were unsophisticated about trucking (half apparently were fresh out of school and had almost no experience in trucking), and most were unsophisticated about business (most apparently did not read and could not understand the contracts and had little time to consider the financial choices and legal implications, or review the documents with a lawyer). Once they signed the agreements they found themselves trapped within TransAm's system. Leased drivers cannot haul a load from outside TransAm's system (loads that TransAm has not obtained and which TransAm does not control) without TransAm's approval (a trip-lease requires the trip-lessee to guarantee that TransAm will be paid according to the lease operator's contract)

and it requires drivers to bring the loads they obtain on their own into TransAm so that TransAm can add these customers to their business base and then just pay the leased driver the base rate in their contract, regardless of what the load pays. These restrictions imposed by TransAm severely limit and control leased drivers' liberty to expand their work as they could if they were truly independent business operators. Of all the nearly 9,000 drivers employed by TransAm as leased drivers during the case period, very few drivers leased their trucks from TransAm Leasing and took them elsewhere. In paragraph 106, Crandall claims that 9 drivers (out of nearly 9,000) did so, supporting my opinion that the contract TransAm made with these lease-purchase drivers made them especially dependent employees; they essentially are debt peons because unlike regular employees, they are not free to leave the company without paying a high price and foregoing prior earnings.

12. In paragraph 12, Crandall claims that plaintiffs' control survey does not provide a meaningful picture of drivers' perception of control by TransAm. He argues, for example, that if even one respondent does not perceive control on any of the control elements identified in the survey, then the survey must be invalid and thus that the survey does not show control. Crandall claims, for example, that because almost all questions show some variation in perception among drivers, even though it is extremely small, this must mean that TransAm had no or inconsistent control. This betrays a shocking inability to interpret simple data. As indicated in my original report, the control survey shows that TransAm has an overwhelming amount of control over the drivers on a wide range of dimensions, including the fact that they "lease-purchase" their means of production



directly from the very same company that controls their load assignments; load assignments are their lifeblood and TransAm has them both coming and going. TransAm compounds this control by making employee drivers indebted to TransAm, very much like former slave owners effectively re-enslaved the same individuals by making them share croppers. Not only do employee ("leased") truck drivers net little or no earnings for their long work hours away from home, their investment is a rapidly depreciating asset—a truck tractor. They cannot escape the relationship without giving up the little equity they have built. The contract that TransAm induced them to sign allows TransAm to confiscate their escrow (which the company disingenuously calls a "completion bonus").

13. In paragraph 15, Crandall claims that 67% of all stops are drop-and-hook. Crandall's deposition reveals that he has very little understanding about the actual work process and thus does not know what this means. To arrive at this figure he simply looked at codes in TransAm's documents with reference to having dropped or hooked a trailer. He did not measure time between hooks and drops and did not measure time during which truckers were loading or unloading or waiting to load or unload, regardless of whether a drop or a hook or both transpired. The statistics as to the overall percentage of drop and hook loads do not control in any direct way or provide any method of calculating on-duty, non-driving hours of work—merely the immaterial fact that these activities occurred.

14. In paragraphs 15 and 16, Crandall refers to the likelihood that TransAm drivers actually are understating their non-driving working time. TransAm drivers generally do not get

close to FMCSA Hours of Service (HOS) thresholds because they systematically log unpaid loading and unloading labor time, as well as labor time waiting to load or unload, off duty as permitted by FMCSA. As discussed above, just because FMCSA allows companies to give drivers a blanket off-duty authorization in order to extend available weekly work hours does not mean that the Department of Labor (DOL) allows companies to fail to pay employees for time spent working for the employer. The DOL simply gives motor carriers covered by US DOT safety regulations a maximum hours exemption for purposes of overtime compensation, not an exemption from minimum wage requirements for hours of work as defined under the FLSA.

15. Crandall states in paragraph 16 that TransAm does not benefit from under-reported non-driving work time by the leased drivers. In fact, TransAm benefits directly from the extraction of more productivity (miles driven) by drivers; if drivers did not log non-driving service time off duty, they might well run out of hours each week. TransAm took advantage of the FMCSA authorization to log off duty in order to increase driver productivity. Drivers are not near their HOS limits because they log substantial work time off duty and the opportunity cost of that time is substantial.
16. Further, Crandall claims in paragraph 18 that plaintiffs' survey was flawed because "6% of survey respondents reported on-duty not driving time that exceeded the DOT's hours of service maximums for seven consecutive days. In addition, 13% of survey respondents reported on-duty not driving time in excess of 40 hours per week." In fact, substantial data from other detailed industry surveys, such as the survey of the refrigerated sector of the trucking industry conducted by Martin Labbe in 1998, showed that on average

drivers put in about 10 hours of non-driving time per load, and with some loads requiring more than one stop per unload operation, they spent about 40 hours per week in labor other than driving.<sup>5</sup> This helps to explain the discrepancy between the non-driving hours reported by TransAm drivers in the survey we conducted compared with the reports of hours worked reported on TransAm's electronic logs which are almost exclusively driving hours, not other non-driving labor time. The hours of non-driving work reported in our survey in this case are supported by the University of Michigan Trucking Industry Program (UMTIP) driver survey<sup>6</sup> and the National Institute for Occupational Safety and Health (NIOSH) long-haul truck driver survey,<sup>7</sup> both of which include all long-distance truck drivers in the survey and thus do not focus specifically on

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<sup>5</sup> Martin Labbe Associates. 1998. "National Refrigerated Driver Survey". Ormond Beach, Florida. Truckload Carriers Association. June. pp. 42; plus Appendix A (questionnaire) and Appendix B (tabulations).

<sup>6</sup> Belman, Dale L., Kristen A. Monaco, and Taggart J. Brooks. 2005. *Sailors of the concrete sea: A portrait of truck drivers' work and lives*. East Lansing, Mich.: Michigan State University Press.

<sup>7</sup> Birdsey, Jan, William K. Sieber, Guang X. Chen, Edward M. Hitchcock, Jennifer E. Lincoln, Akinori Nakata, Cynthia F. Robinson, and Marie H. Sweeney. 2015. "National Survey of US Long-Haul Truck Driver Health and Injury: health behaviors." *Journal of Occupational and Environmental Medicine* Vol.57, No.2:pp 210-6.

CHEN Guang X., W. Karl Sieber, Jennifer E. Lincoln, Jan Birdsey, Edward M. Hitchcock, Akinori Nakata, Cynthia F. Robinson, James W. Collins, and Marie H. Sweeney. 2015. "NIOSH national survey of long-haul truck drivers: Injury and safety." *Accident Analysis & Prevention* Vol.85:pp 66-72.

refrigerated drivers. They show that on average long-distance drivers in the truckload sector work between 60 and 70 hours per 7-day week.

17. Also in paragraph 18, special survey concerns might be raised if, as Crandall asserts, plaintiffs' survey had not provided the option for respondents to not answer questions with which they are not comfortable or for which they do not know or could not recall the answer. This opt-out feature is a standard requirement in responsible survey design for human subjects. Crandall's assertion in paragraph 19, that plaintiffs failed to inquire about drivers' alleged illegal activity, also raises serious questions involving both the ethics of asking about illegal behavior as well as creating research quality problems. Questions that incorporate language stating that activity respondents report is illegal will likely produce biased underestimated responses. Crandall argues that "the survey does not ask the basic question of whether Owner Operators actually under-reported their on-duty not driving time on their DOT Logs and/or the Hours Worked File"; he claims that we should have "simply ask[ed] whether the Owner Operator falsified his or her DOT Log and/or the Hours Worked File...." Our questions avoided the bias Crandall's suggested method would have introduced. We asked simple yes or no questions about work practices with the specter of possible regulatory violations entirely absent from the questions. The questions, therefore, were appropriately neutral. Asking direct questions about whether a given driver violated the law would likely lead to biased results and, as discussed by Dr. Albright, such survey practices generally are viewed as not scientific and arguably unethical.

18. In paragraph 25, Crandall asserts that drivers can expand their "businesses" by adding trucks and hiring additional drivers. Crandall's argument has a fundamental flaw, however. The only way the leased drivers can get more utilization out of their capital is by running team. Even this is conditional on having a new truck, though, because increased utilization of the truck means more repair and maintenance costs. In addition, TransAm Leasing charges an extra usage charge to drivers who operate their leased trucks more than 3,000 miles per week. The truck is a rapidly depreciating asset and the more miles it runs, the sooner it breaks down or wears out and the less it is worth at the end of the lease.
19. In paragraph 32, Crandall includes a mystifying report on the data that FMCSA's survey showed in 2005. FMCSA reports that on average drivers worked 61.4 hours per week, contrasting that with the UMTIP survey average of 64.3. While these final results show some differences, those differences are almost certainly due to different purposes and methodologies between the two surveys and not a substantive difference. However, these are averages, with significant standard deviations and confidence intervals around the mean (as with all statistics). It is not correct to say, as Crandall has, that "at most one would conclude that these studies suggest potential under-reporting of 2.9 hours per week" (emphasis added). In this conclusion Crandall confuses a point estimate with an average—an elementary statistical error.
20. In paragraph 33, Crandall cites Moses and Savage who say that cheating on paper logs is possible. Indeed, cheating—including the use of multiple logbooks—is a well-established

problem<sup>8</sup> that the electronic logs resolve primarily as to driving hours only; it appears that carriers may be able to set minimum speeds in the Electronic On Board Recorders (EOBRs), which would allow drivers to drive trucks at low speeds around warehouse lots, where they may have logged off duty, without detection.<sup>9</sup> However, plaintiffs are not claiming that driving time is generally underreported in this case, to the extent that driving time data still exists and has been provided in the form of electronic log records. Plaintiffs are claiming in part that non-driving hours are substantially under-reported and not accurately tracked by TransAm, as is required under the FLSA for all employees. The use of EOBRs does not improve accuracy in tracking drivers' work time while the truck is not moving, or when trucks are moving at speeds below which the EOBRs are set to track the trucks' movements.<sup>10</sup>

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<sup>8</sup> Panel on Research Methodologies and Statistical Approaches to Understanding Driver Fatigue Factors in Motor Carrier Safety and Driver Health, Committee on National Statistics, Board on Human-Systems Integration, Division of Behavioral and Social Sciences and Education, Transportation Research Board, and Engineering National Academies of Sciences, and Medicine. 2016. *Commercial Motor Vehicle Driver Fatigue, Long-Term Health, and Highway Safety: Research Needs*. Washington: National Academies of Science. See also: Monaco, Kristen, and Emily Williams. 2000. "Assessing the Determinants of Safety in the Trucking Industry." *Journal of Transportation and Statistics* Vol.3, No.1:pp 69-81.

<sup>9</sup> Viscelli, Steve. 2016. *The Big Rig: Trucking and the Decline of the American Dream*. Oakland, CA: University of California Press, pp. 62-70.

<sup>10</sup> Viscelli, Steve. 2016. *The Big Rig: Trucking and the Decline of the American Dream*. Oakland, CA: University of California Press, pp. 62-65.

21. In Section I through Section U (pages 34 through 54), Crandall makes a series of criticisms of the surveys that plaintiffs' experts conducted in an attempt to assess the drivers' perspective on two issues: control and hours of work. In broad terms, Crandall claims that neither Dr. Albright nor I have used rigorous scientific methods to develop our analyses. Plaintiffs have faced extremely high hurdles because TransAm either did not maintain adequate records, such as hours of work for truck drivers contained in DOT logs, or because TransAm elected to provide data in inaccessible form, such as Portable Document Format (pdf) printouts of data that were printed from databases which they almost certainly have or should have maintained, given the document retention requirements of the legal process. Dr. Albright, in his Report, methodically details his approach to data extraction and analysis with respect to the data TransAm provided and provides evidence that he conducted a scientifically valid analysis of the data.

22. Dr. Albright and I collaborated to undertake two additional analyses based on surveys we administered. One survey was designed to ascertain leased drivers' hours of non-driving labor time performed for TransAm. This survey was necessary because TransAm failed to retain the paper logs that documented drivers' on-duty time and because TransAm failed generally to maintain records of non-driving hours of work performed by their employees. As Dr. Albright notes in his Report, when I was retained in this case and first looked at TransAm's recently produced six-month sample of electronic logs, it became apparent to me that drivers routinely logged labor time off duty and that the documents TransAm produced, claiming to document leased drivers' working time, were

flawed. In the absence of accurate data from TransAm, this survey asked drivers to recall their non-driving work time during their period of employment.

23. The second survey was designed to ascertain the degree of control TransAm exerted on leased drivers by asking drivers simple questions about their experiences with specific control mechanisms used by TransAm. The survey did not ask foolish questions, like "How much control did TransAm exert over you?" but rather asked questions designed to reveal the extent of control. It would have been inappropriate to ask the foregoing question because it would have biased the response. As Dr. Albright discussed in his Report, these surveys were carefully designed and the data from the survey were carefully weighted and analyzed. When we first discussed conducting the survey, we debated about whether it would be better to use the entire opt-in population or a sample of the population. Because technology made it relatively easy and quick to survey everyone, and the population size is tractable, we decided to survey all members of the opt-in class for which plaintiffs' lawyers had e-mail addresses and/or phone numbers. Dr. Albright further weighted the results to ensure that the opt-in respondent population accurately reflected the full driver population of nearly 9,000 drivers. Crandall claims that the mere fact that the survey respondents included only about 20% of class members makes the survey invalid, but actually a weighted sample size of 20% of the population is quite an adequate sample from which conclusions may be drawn. While one might quibble after the fact over small wording differences or methodological choices, in my expert judgment as a developer and user of scientific surveys of truck drivers, these are well-designed scientific surveys that meet generally accepted



principles of scientific survey design and they accurately reflect the experience of leased drivers. Nothing in the criticisms provided by defendant's experts has changed my opinion regarding the validity of the information obtained.

24. Crandall proceeds in Section K to criticize my failure to conduct cognitive pre-testing in the form of focus groups and pilot tests of the survey to determine whether leased drivers will understand the meaning of survey questions uniformly. I have conducted, or consulted in the development of, multiple large-scale surveys (interview-based) of truck drivers and trucking companies over the past several decades. Millions of dollars have been invested in survey research by such respected entities as the Alfred P. Sloan Foundation, the FMCSA, and NIOSH, based on their respect for my knowledge of truck drivers and truck driving. I was a truck driver before I earned my PhD and became a professional researcher and university professor. More than four decades of experience as a driver and as a scholar lie behind my opinion that the questions I designed for these surveys were valid. I believe the results of the surveys conducted in this case demonstrate the quality of the questions used here.

25. Defendant conducted a survey as well, called "Defendant's Questionnaire to Class Members." Defendant did not conduct a cognitive pre-test or a pilot test of this survey<sup>11</sup>. Moreover, the fact that TransAm asked plaintiff truck drivers to sign the survey "under

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<sup>11</sup> Note that from my perspective, the terms "questionnaire" and "survey" mean the same thing. It is possible to imply that a questionnaire is more general or informal and a survey has a more formal definition, they both intend to gather data and thus, for purposes of this case, are one and the same. The same scientific standards must apply to both.

penalty of perjury" means that the drivers may have been intimidated by having to make statements directly to their employer (whether current or former employer, drivers perceive that trucking companies will have influence over their future opportunities). This intimidation would influence respondent's responses and can be expected to bias results.

26. Crandall incorporates exhibits 4 through 34, which report on defendants' questionnaire sent out to opt-in class members. As stated above, there is no evidence in the record that TransAm conducted cognitive pre-testing or pilot-tested their questionnaire, nor do I see evidence that their questionnaire responses were weighted to reflect the population of class members. The graphs on these pages do not indicate the number of leased drivers surveyed nor do they indicate the number of respondents to the questionnaire but the evidence suggests that a small fraction of the class responded. This questionnaire lacks any indication of scientific validity in terms of question design, cognitive pretesting, sampling framework design, or anything showing sound scientific survey methodology. While I rebut elsewhere Crandall's critique of plaintiffs' survey data due to lack of uniformity of responses, it is worth pointing out here that these exhibits show a greater lack of uniformity in responses to defendants' questionnaire. Finally, I find no information relevant to the issues on which I have opined and certainly no information with statistical validity that might alter my opinion.

27. In Section L, Crandall criticizes the wording used by plaintiffs' lawyers in their e-mail message to leased drivers in the class. Crandall is correct that the email invitation to the first survey indicates that the purpose of the survey is to assist the lawyers in their effort

to determine the amount of wages that may be owed. However, the fact that the drivers' responses vary so widely—including a significant number of responses that claim zero or very few hours, as indicated in the results—provides evidence that no such bias was conveyed. Indeed, it is just as probable or even more probable, given truck driver industry compensation practices that usually only pay drivers for miles driven, that leased drivers might well have assumed they were not owed any money for non-driving work time and so leased drivers may have tended to under-state the amount of such time worked rather than inflated it. As I have indicated elsewhere, decades of research and multiple surveys of which I am aware or in which I have participated have produced similar results. After trimming for extreme values (including those impossible zeroes for non-driving labor), the means and medians are quite conservative. I believe the truth may be closer to that found by Labbe's survey of refrigerated drivers<sup>12</sup> (40 hours of non-driving hours per week) or to Viscelli's experience since 2010, working in the long-distance trucking industry as a new driver and discovering that he regularly worked 90 to 100 hours per week, including up to 40 hours per week on-duty not driving (though he logged less than 65% of all work time, he knew it should be classified as such).<sup>13</sup> and the data we are putting forward here for purposes of this claim point to a mean of 26

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<sup>12</sup> Labbe sent out almost 2,700 surveys and received 843 responses (31% response rate).

<sup>13</sup> Viscelli, Steve. 2016. *The Big Rig: Trucking and the Decline of the American Dream*. Oakland, CA: University of California Press: pp. 44, 63, 64.

hours). In sum, defendants have put forward no valid counter analysis, alternative survey, or criticism of our surveys that would change my opinion in this case.

28. In Section M, Crandall claims that neither Dr. Albright nor I have any information on conversations that may have taken place between plaintiffs' lawyers and clients regarding the survey. Indeed, we have no information on such conversations about any topic, because they are privileged. This claim is without foundation and I have no reason to believe that transcripts of such conversations (should they exist and be available, even though they are privileged) would change my opinion. The results are reasonable and, frankly, conservative. And as Dr. Albright reports, only a tiny number of survey respondents provided their responses verbally to plaintiffs' counsel. Even if all such survey responses were discarded altogether, my opinions would not change.

29. Section N of Crandall's report criticizes the questions in the surveys. In paragraph 51, Crandall specifically claims that my questions have unclear meaning. I believe that these questions are quite clear and collect a substantial amount of information parsimoniously (12 questions in the hours survey, one of which required entering only a numerical answer; 27 questions in the control survey, none of which required entering an answer). In good survey work it is important to ask questions specifically enough that clear answers can be given. This clarity was embedded in the questions and in the response options as well. We very carefully kept questions clear and declarative and provided drivers with very specific information describing "non-driving work" that met the FLSA standards for this definition, and in question 12 added specific descriptions of what was not defined as work. In comparison, the questions asked in this survey are far clearer

than the ones asked in TransAm's survey and avoid open-ended responses except question 12, which asked the drivers how many non-driving hours they worked. This required just one number to respond.

30. In contrast, TransAm's survey was six pages long and had at least 23 open-ended questions (questions that either were completely open-ended or required the driver to enter a response, like the one we asked regarding non-driving hours worked) and also required leased drivers to identify to whom and about what, including in social media, they may have spoken about the case "under penalty of perjury". The instructions, with an official-looking header that makes it appear as if the drivers must respond or something unidentified but legal will happen, includes the following language: because you have "consented to become a class member and participate in the lawsuit ... you are required to provide certain information to TransAm." In this communication, "certain information" is not defined. All of this, including the intimidating requirement that drivers identify themselves, broke every rule of survey design on sensitive subjects (like free speech), especially with vulnerable populations.

31. In paragraph 52, Crandall picks at small issues in the wording of the survey questions. These questions were carefully crafted and written, and referred to simple concepts known to the drivers. The fact that there was little variation in the answers to most of the questions (results were highly significant statistically) shows drivers understood the questions well. The reason why drivers were asked about types of work during a typical 7-day week was to get them to think about their usual full-time work schedule and to differentiate their non-driving hours of work from their driving hours during a 7-day

calendar period, which is relevant for determining minimum wage liability under the FLSA. Based on my decades of trucking experience and truck driver industry research, I am confident the survey participants here understood the ordinary meaning of 7-day week to be a complete 7-day calendar week.

32. In paragraph 57, Crandall criticizes the fact that "in asking the final question 'Enter your average weekly Non-Driving Work hours,' Dr. Belzer did not use the industry standard language of 'on-duty not driving,' or even the phrase 'on-duty' at all." This case does not revolve around FMCSA safety regulations but instead it revolves around the FLSA. The FMCSA's "industry standard" language pertains to safety issues only. The FLSA exempts "drivers whose duties affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce"<sup>14</sup> from coverage of the 40-hour weekly overtime working time limit but in every other way that the FLSA defines work it applies to employed truck drivers such as the leased drivers in this case.

33. Crandall argues in paragraph 59 that the survey is without foundation because his interpretation of certain questions suggests they are not internally consistent. Specifically he refers to the following questions: "When you applied for work at TransAm, was it for a regular employee driving job (company driver) rather than as a Leased Driver?" and "During or after your orientation at TransAm, did TransAm state that they didn't have trucks available for employee drivers and that drivers would have to wait before they could start to work if they wanted to be employees (company drivers)?" This argument is without foundation. The two questions refer to two distinct

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<sup>14</sup> <https://www.dol.gov/whd/regs/compliance/whdfs19.htm>

concepts: the lead question asking whether they had intended to become employee drivers, and the alleged lack of availability of trucks for employee drivers (which TransAm claimed were not available, even though depositions of management employees show that a mere keyboard stroke lay between a prospective employee driver and a truck, and that this was done regularly for minor reasons). If plaintiffs had combined these questions, Crandall would have claimed that they were compound questions, as he did elsewhere. While 62% of the drivers who responded said that TransAm claimed it had no trucks available to staff with employees, 72% of the drivers who responded that they came to TransAm to become employees heard this message from TransAm (which could occur before or after they had committed to and participated in the training). This helps to explain TransAm's conversion rate of prospective company drivers to leased drivers, which by the end of the period became 90% or more. This effort to convert prospective company drivers to leased drivers is not an isolated effort just at TransAm, but rather a broad campaign by many similar carriers with a business model designed around recruiting employee drivers and then "converting" them into contractors or leased drivers.<sup>15</sup> In sum, while it is always possible to improve survey wording and delivery, I have seen nothing to make me reconsider my original opinion that the surveys we administered are valid and that the court can rely on the responses to these surveys.

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<sup>15</sup> See Viscelli, Steve. 2016. *The Big Rig: Trucking and the Decline of the American Dream*. Oakland, CA: University of California Press. See chapter 3 and especially pp. 93-95.

34. In paragraph 63, Crandall claims to be incredulous that drivers may claim that they worked more hours in a not-driving status than in a driving status. While Crandall finds this hard to believe, the Labbe 1998 survey of the refrigerated sector specifically found that on average drivers worked about 40 unpaid non-driving hours per week. Currently the refrigerated sector employs the newest and most inexperienced drivers who put in a great deal of unpaid time.<sup>16</sup> This finding is a special and important feature of Labbe's survey precisely because he calls attention to the extraordinarily high number of unproductive hours that drivers in the refrigerated sector are forced to absorb. Naturally, this also explains the turnover in this sector, which is even higher than the terribly high turnover rate (above 100%) typical to the truckload sector generally.
35. In paragraph 64, Crandall attacks the plaintiffs' assertion with respect to non-driving work by attacking the UMTIP survey. The difference is easy to explain because the UMTIP survey included the entire long-haul trucking sector, of which the refrigerated sector is a small part, while the more limited Labbe survey, focused on the refrigerated sector, shows even more extreme hours of unpaid non-driving work than the plaintiffs claim here.
36. In paragraph 68, Crandall asserts that there is no supporting evidence for the statement that refrigerated work is among the lowest paid work. From my years of expertise in trucking, including decades of research and public service work, such as serving on two

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<sup>16</sup> Viscelli, Steve. 2016. *The Big Rig: Trucking and the Decline of the American Dream*. Oakland, CA: University of California Press; pg. 67, 69.



National Academies of Science / National Research Council panels, I know which segments of trucking have the lowest rates of driver compensation: intermodal, refrigerated (not produce), and refrigerated (produce). Data on freight rates and compensation are no longer available to the public but the Labbe study tells us a lot about the problems faced by this sector. The safety records of these three sectors are notably the worst in trucking<sup>17</sup> and low freight rates, as well as extraordinarily long delay times for drivers, play an important part.

37. Crandall claims in paragraph 71 that "if being a TransAm Owner Operator was unprofitable, then there should be zero instances of Owner Operators hiring drivers and/or leasing multiple trucks." In support of this he notes that "Owner Operators" hired 395 drivers to work for them. However, this is a tiny fraction of the nearly 9,000 leased drivers in the case, and does nothing to alter my fundamental analysis that shows that TransAm controls the work performed by the leased drivers such that they are truly employed drivers. Moreover, although Crandall repeatedly correctly refers to these workers as "employees", TransAm in fact forced lease purchase drivers to sign contracts

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<sup>17</sup> Horrace, William C., and Thomas P. Keane. 2004. "Ranking and selection of motor carrier safety performance by commodity." *Accident Analysis & Prevention* Vol.36, No.6:pp 953-60.

Keane, Thomas P., Thomas M. Corsi, and Kristine N. Braaten. 2002. "Motor Carrier Industry Profile Study: Evaluating Safety Performance by Motor Carrier Industry Segment". U.S. DOT - Federal Motor Carrier Safety Administration, University of Maryland - College Park, Econometrica, Inc. May 8. pp. 1-20.

with such drivers specifically declaring that they were subcontractors, and not employees.

38. In paragraph 111, Crandall also admits that the contract required by TransAm when leased drivers hire other drivers, is invalid (and illegal). He calls Davis' driver an "employee driver." According to the contract that TransAm required leased drivers to sign with their employees, the relationship was one of subcontractor. In fact, Davis' employee was not paid as an employee so this makes no sense.
39. Crandall's paragraph 72 discusses my assertion that companies like TransAm frequently hire felons, who have weak bargaining power. Indeed, several of the deposed drivers had felony records. He then fabricates the expectation that such drivers would have low earnings relative to other TransAm drivers. I would have no such expectation. Instead, I said that they had few options and that in general those with felony records would have a hard time finding other work. I did not make any assertion relative to their earnings generally and compared with other TransAm drivers specifically.
40. In paragraph 74, Crandall cites my statement that drivers often terminated leases just to sign new ones for new trucks, or because some other technicality arose with respect to the contract that TransAm wanted to change. If drivers wanted to keep working, they had to sign the contract; there was no negotiation. This misconstrues my statement. I said that they were forced to sign new leases and this shows that 29% did. The others walked away and typically forfeited their escrow funds to the company. They paid a substantial price to walk away and refuse to sign new leases.

### **TransAm's Business Model**

41. In paragraph 102, Crandall refers to the value leased drivers get by having "access to TransAm's customer base". He claims that leased drivers do better than they would otherwise because they have a ready base of customers through TransAm. My OOIDA survey and my experience and past research shows that true owner operators who really know what they are doing have superior outcomes compared with lease operators. Some owner-operators are leased to carriers that take care of them (e.g. Landstar, reputedly) but many carriers abuse them similarly. This tends to be true especially in firms hauling unpredictable or cyclical or low-rate freight. However, it is by no means clear that they make more money than company drivers. My 2003-2004 survey of owner operators, in partnership with OOIDA, showed that owner-drivers who drive their own trucks and have no employees of their own earned an average of \$0.166/mile, which is about half as much as employee drivers earned in the same period but similar to what TransAm pays its own employee drivers.

Summary of Wages Paid to Self per Mile<sup>18</sup>  
Cases selection limited to Owner Drivers with No Employees  
421 total cases of which 196 are missing

Total Cases	421
Count	225
Mean	0.166001
Median	0.0496623
StdDev	0.268602
PopStdv	0.268004
Min	0

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<sup>18</sup> Belzer, Michael H. 2006. "OOIDA 2003-2004 Cost of Operations Survey: Report of Results". Detroit, MI. Wayne State University. April 5, 2006. pp. 50.

Max	2.14286
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42. The foregoing table shows that at the median, drivers paid themselves a wage of \$0.05/mile and the standard deviation was very wide. It therefore is not uncommon, even perhaps more common than not, that they make very little money.<sup>19</sup>
43. The business model requires that leased drivers work only for TransAm. TransAm could allow them to trip lease but their contract is written to prevent this in all but the most rare and unpredictable of circumstances. TransAm does provide drivers with loads that they hope will keep them running, but if the loads don't pay well or they provide the leased drivers inferior outcomes and they refuse to accept them, TransAm also controls the alternative outcome.
44. Crandall indicates in paragraph 68 that there is a 3.7-hour delay, on average, between when a driver reports empty and when TransAm dispatches him or her on another trip. Not only is this an admission of lengthy delays (along the lines of those reported in the Labbe Refrigerated truck driver survey from 1998, providing evidence that the lengthy delays reported then remain today), but it is an admission that the non-driving work hours drivers report must be systematically low. In addition, according to his deposition, Crandall did not measure the time between when the driver gets dispatched and when he actually picks up another load, for which he may have to deadhead hundreds of miles and wait again to get loaded. Crandall's purported analysis is hollow.

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<sup>19</sup> Viscelli, Steve. 2016. *The Big Rig: Trucking and the Decline of the American Dream*. Oakland, CA: University of California Press.

45. Crandall declares in paragraph 105 that "[t]he first criterion of a business is the requirement for capital investment." Our survey shows almost none of the class members invested their own money. Almost none of the lease drivers met that requirement.
46. In paragraph 106, Crandall states that "TransAm Owner Operators utilize capital to invest in their trucks, equipment, and to fund working capital." Evidence I have seen, including our survey, shows that most leased drivers did not have capital to invest and thus were dependent on TransAm for everything.
47. In paragraph 106 Crandall refers to driver Peter Close because Close entered into a lease-purchase agreement with Lone Mountain Trucking and leased that truck to TransAm. The facts are more complicated. Close was a lease driver for TransAm for about five years, 2008-2013; he leased his truck from Lone Mountain Leasing at the end of August 2013. He leased with TransAm initially because he had no resources (even after having leased from TransAm for five years). He leased his Lone Mountain Pete to TransAm because he knew the company and because he thought Jacobson would back him up if he got in trouble. Close did not stay with TransAm very long after that. It seems like a way to transition out. Moreover, drivers who owned their own trucks during some period of time are not a part of this class action, and whatever economic relationships may exist between TransAm and drivers who owned their own tractors are not properly included in analyzing the level of control that TransAm exerted here over the class members who are those drivers who leased their tractors from TransAm Leasing and then entered contracts to drive for TransAm Trucking.

48. Crandall says "that 198 Owner Operators brought a truck with them when contracting with TransAm...." If we include all the second and subsequent leases with TransAm, as well as just new hires, the fraction will turn out to be extremely small. Crandall then says 9 (nine) drivers leased from TransAm Leasing and took the truck elsewhere. This is an even smaller fraction of all lease drivers, and very recent. Here again, those drivers who owned their own truck or who leased their truck to some other company are not part of this class during such periods of time and the economic relationships between TransAm and such drivers do not provide any relevant information here for determining if the class of leased drivers are TransAm employees during the periods of time when they leased trucks from TransAm Leasing and in turn contracted to drive such trucks with TransAm Trucking.

49. In paragraph 107, Crandall mischaracterizes the leased driver's ability to expand. As I have indicated above, there is no practical way to do this except by running team, and this does not increase an individual drivers' wage rate for his or her hours worked. Since the median driver is operating 6 days/week and is not in a regular location, he cannot hire a driver to extend the truck's earnings as Crandall claims.

50. Crandall supports his claim by stating that both Blair and Davis hired drivers (and leased extra trucks) to expand their businesses, but they were not getting more revenue from their existing capital. Rather they were adding a truck, which also added a massive liability.

51. In paragraph 108, Crandall again argues that drivers can expand their business by adding a truck. As I argued above, this is a phony opportunity because they are adding a

very expensive liability: not only do drivers add a risk of breakdowns for expensive equipment, but they become liable for another regular payment for the truck, fuel, insurance, and other expenses, in addition to the cost of paying a driver).

52. In paragraph 109, Crandall cites Blair's effort to expand when he leased more trucks and "hired" drivers. Crandall fails to point out that he lost his shirt trying to do that. He discovered this was not a realistic option and abandoned those leases. Blair expanded only his indebtedness.

53. In paragraph 110, the discussion of Ty Wright is a red herring. Wright states that he figured out that he could not make money doing this and he did not; Crandall disingenuously calls that a choice.

54. Paragraph 111 contains another admission that the contract required by TransAm when leased drivers "hire" other drivers is invalid (and illegal). He calls Davis' driver an "employee driver." According to the required contractor documents, Davis' employee was not paid as an employee so this makes no sense. He then compares apples and oranges because one cannot legitimately compare the net revenue paid to the employee driver with the gross revenue paid to the lease operator, most of which goes to expenses. Moreover, such sub-contracted drivers are not a part of this class and the control or lack of control that TransAm may assert over such drivers is not at issue in this case or my analysis.

55. Paragraph 112 by Crandall discusses alleged profit and loss decisions. The K. Stump deposition shows that TransAm did not allow drivers to split profits between two team members. Regarding the "coach" payment, being a coach pays four more cents per mile.

It does not pay more miles. This is not an expansion of their business; it is just extra compensation for an extra task.

56. In section IX (A) of Crandall's report, he discusses various DOT requirements. Just because some of TransAm's controls over lease drivers are DOT required does not make them irrelevant according to the DOL definitions that define control of employees. This is just another effort by TransAm to hide behind FMCSA, which studiously has avoided interfering with the employment or contractor relationship between trucking companies and drivers and stuck to safety only.

57. In paragraph 114, particularly in the last sentence, Crandall conflates customer and TransAm demands and controls.

58. In paragraphs 116-117, Crandall hides behind the franchise comparison because it is convenient, not because it's the same. TransAm leased drivers are not franchisees. Crandall could just as well call all employees "franchisees"—something the FLSA regulations do not allow.

59. In paragraph 119, Crandall's reference to "bottom up" implies a degree of control that is not realistic. Technically an employee takes his assignments "top down" but with representation (like a union) there are limits to this top-down control. Likewise, the leased drivers realistically have very little control because of the debt peonage relationship. Their economic survival rests entirely on the company's top-down provision of loads and the economic pressure on the contractors is enormous (greater than for employees) because they have to pay for the truck lease, insurance, and other



fixed expenses. If it were just fuel it would be much easier, but those fixed costs force drivers to run against their preferences.<sup>20</sup>

60. In paragraph 122, Crandall's emphasis on driver "decisions" is a red herring. Employees decide whether to stay or quit their jobs every day. This is a nonsensical argument.

61. In paragraph 124, Crandall's reference to drivers' supposed independence is frivolous. Of course like anyone who pays for fuel and understands the physics, driving slowly saves fuel and as long as you can make the run on time, makes sense. Drivers report, though, that they are under pressure to follow the company's fuel "recommendations" and regardless, the decision to drive slowly or more rapidly on a given route does not reflect the type of control over business decisions that separates employees from true owner-operators. Employee drivers who earn a fuel-savings bonus do not automatically become independent businesspersons.

62. In paragraphs 127-128, Crandall discusses his "Exhibit 39 [which] presents data for the Transportation and Warehousing industry nationwide. As shown on Exhibit 39, over 86% of the firms in this industry are non-employer firms." Crandall uses endogeneity, created intentionally, to assert that there is no reason to consider that owner operators in trucking are reflective of the small business population in the entire economy. First Crandall refers to general comparisons with businesses that have no employees. He then proves this by showing this percentage in the Transportation and Warehousing industry; most of the "companies" in the Transportation and Warehousing industry probably are

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<sup>20</sup> See from NY Times: <https://nyti.ms/2nPvprZ>  
"How Uber Uses Psychological Tricks to Push Its Drivers' Buttons"

tiny trucking companies. This is circular reasoning and again has no relevance to show that the leased drivers in this case are independent of TransAm.

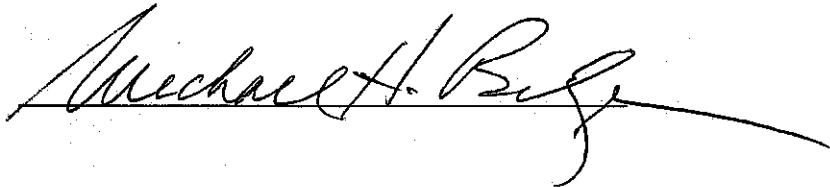
63. In paragraph 129, Crandall refers to gross revenue numbers. However, gross revenue is a meaningless comparison across businesses because some have high expenses (e.g. grocery and trucking), some have high capital requirements (e.g. manufacturing), and others have extremely ROE because they need no physical capital or cash reserves to do the work. This is just a red herring and has no relevance here.

64. Finally, Crandall claims I did not look systematically at several data sources that he says he has studied: home time reports, movement reports, drop and hook data, and GPS data, for example. These reports, as I understand them, cannot tell us anything about actual non-driving hours. The problem with all such data is that we never know for sure what truck drivers are doing when their trucks are stopped. The only way to know what drivers are doing at these times is if the driver reports his or her activities in the "Remarks" section of the driver logs. Since FMCSA regulations do not require such comments (such as "loading" or "unloading") and TransAm does not require such entries, we cannot tell anything at all about non-driving hours worked; it depends entirely on self-report. For this reason, the data sources to which Crandall refers could not change my opinions.

65. In sum, having carefully reviewed and considered Defendant's expert reports, attachments and their depositions, I am confident that the statements made in my Report are true and entirely defensible to a reasonable degree of economic and scientific certainty, and that my opinions are based on generally accepted, relevant scientific methods. I have more than four decades of experience in trucking and three decades of scholarly and professional experience at the national and international level and I understand what I am looking at when reviewing the facts concerning TransAm's leased drivers. The critiques made by defendant's rebuttal experts Crandall, Dominitz, and Herster do not substantively change my opinions and nothing in their criticisms has caused me to change my testimony in a material way.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

EXECUTED this 3rd day of May 2017 at Ann Arbor, MI.

A handwritten signature in black ink, appearing to read "Michael H. Belzer", with a long horizontal flourish extending to the right.

DECLARATION OF MICHAEL H. BELZER Ph.D,

Exhibit A to Rebuttal Report of Michael Belzer, Ph.D.:

I have reviewed the following additional documents in writing my Rebuttal to the Defendants' Expert reports:

Expert reports, including attachments of:

Robert Crandall

William Herster

Jeff Dominitz

Depositions and exhibits of:

Robert Crandall

William Herster

Jeff Dominitz

DOT Logs

Production 014

Production 108

By reference, I hereby incorporate the documents consulted in preparation for my Report dated 5 December, 2016.