

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

EXPERT REPORT OF MICHAEL H. BELZER, Ph.D.

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

1. Qualifications summary. I am President of Sound Science, Inc., a consulting firm specializing in sound scientific research related to my areas of expertise. I currently am Associate Professor of Economics at Wayne State University and I teach in the areas of macroeconomic principles, industrial organization, and transportation economics. I have taught extensively in the labor relations area as well and specialize in trucking and transportation economics and industrial relations issues.

2. Evidence of my specific expertise includes numerous publications (books, book chapters, monographs, scholarly papers, conference and meeting presentations, and research reports) in areas of industrial relations, industrial organization (specifically, the organization of product, service, and labor markets associated with the trucking industry specifically and the freight and passenger transportation industry generally) and the economics of truck and bus driver safety and health. I have testified in numerous cases, and U.S. and foreign government agencies, including the U.S. Congress, have asked me to provide expert evidence on these issues. I have conducted numerous sponsored and independent research projects involving trucking industry and other transportation issues, and given hundreds of interviews on these subjects to various media outlets.
3. I founded and chaired the Task Force and later the Committee on Trucking Industry Research of the Transportation Research Board (TRB) of the National Academies (of which I am now Emeritus Member in recognition of 45 years of cumulative lifetime service to the TRB) and I also have served on the Freight Systems Executive Board of the Technical Activities Council. I currently serve on one additional TRB committee, the Freight Economics and Regulation Committee, and after having completed the maximum allowable nine years of service on the Truck and Bus Safety Committee, continue as a Friend of the Committee.
4. I served on the Transportation Research Board of the National Academies' Committee for Review of the Federal Motor Carrier Safety Administration's Large Truck Crash Causation Study. I currently serve on The National Academies of Sciences, Engineering, and

Medicine Committee on National Statistics (CNSTAT) Expert Panel on the Review of the Compliance, Safety, and Accountability (CSA) Program of the Federal Motor Carrier Safety Administration. This expert panel consensus study responds to Section 5221 of the Fixing America's Transportation (FAST) Act of 2015.

5. I have served for ten years on the National Institute for Occupational Safety and Health / National Occupational Research Agenda (NORA 2) Transportation, Warehouse, and Utilities (TWU) Sector Council. I have been reappointed to serve another ten years on the TWU Sector Council for the third decade of NORA.
6. I have been asked to give opinions regarding economic control issues and non-driving hours of work associated with truck drivers and purported independent contractors ("Leased Drivers") employed by TransAm Trucking, Inc. My qualifications including my publications authored in the previous ten years are further detailed in my curriculum vitae, which is attached as **Exhibit A**. A list of all cases in which I have testified or been deposed in the last four years as an expert is attached as **Exhibit B**. A list of materials containing the facts and data I have considered in preparing this report and forming my opinions is attached as **Exhibit C**. A current invoice as of close of business on 5 December, 2016, is attached to this document as **Exhibit D**.
7. I am being paid my customary rate for work on this matter at \$325 per hour and \$325 per hour for deposition or trial testimony.

A. Economic Control: The TransAm Lease-Purchase Plan as Debt Peonage

You load sixteen tons, and what do you get?
Another day older and deeper in debt
St. Peter, don't you call me, 'cause I can't go
I owe my soul to the company store.¹

8. TransAm is a trucking company specializing in refrigerated loads. This freight is its primary source of business but it also hauls other dry freight on a secondary basis to keep the trucks loaded. It is the kind of company that used to dominate the "exempt" sector of trucking (called "exempt" because agricultural products were exempt from standard motor carrier regulation by the Interstate Commerce Commission), precisely because it handles perishable agricultural products, such as meat and produce, which cannot be moved until shipments are ready because they are susceptible to vicissitudes of fresh food production. These loads also are among the lowest paying freight because the market is extremely competitive. A long-standing culture in this industry treats drivers poorly and is not averse to making them wait for long periods—often for days—to get a load or to unload their freight. This is an example of the economic principle of "moral hazard" in action: cargo owners and carriers do not pay drivers for the opportunity cost of their time, so they are willing to waste it.
9. TransAm's leases for Leased Drivers are based on a very low mileage rate of \$0.84 (the rate remains remarkably constant over the entire period covered by this case) that is so

¹ Merle Travis, 1946. Recorded by Tennessee Ernie Ford, 1955.
<http://www.ernieford.com/SIXTEENTONS.html>

low that experienced truck owners know they cannot make money. The American Transportation Research Institute has estimated cost of operations for trucking companies since 2008. They estimate that the average marginal cost per mile for trucking has ranged from \$1.653 in 2008 to \$1.703 in 2014. Fuel costs alone have ranged from \$0.633 to \$0.583 per mile and the cost of driver compensation ranged from \$0.579 in 2008 to \$0.591 per mile in 2014. Adding the cost of truck/trailer lease or purchase payments, repair & maintenance, truck insurance premiums, permits and licenses, and tires brings the full cost to approximately double the rate that TransAm pays lease operators. In sum, it is almost impossible for TransAm Leased Drivers to break even, let alone earn a wage or a profit.²

10. Companies hauling these products often attract persons with felony records because it is one of the few employment options for them.³ TransAm can recruit in this labor market because most potential drivers for TransAm are inexperienced in trucking but really need a job badly;⁴ most of TransAm's new hires indeed have virtually no experience and come straight out of truck driving school.⁵ Indeed, TransAm considered someone with one month of experience sufficiently experienced to become a lease driver⁶ and a driver with

² W. Ford Torrey IV and Daniel C. Murray. 2015. "An Analysis of the Operational Costs of Trucking: 2015 Update". Arlington, VA. American Transportation Research Institute. September.

³ Examples of deposed drivers with felony criminal records include Nabors, Moreno, Bowers, Zorilla, and Yarber.

⁴ See Nabors deposition: 24; "I needed a job, and so I signed the lease."

⁵ McFarland 2013 deposition: 52.

⁶ McFarland deposition: 53-55.

three months experience qualified to be a "coach".⁷ In my own information and experience, as a former commercial truck driver and as a scholar and as someone active in policy and labor market policies in trucking, someone is not considered to be even minimally experienced until he or she has driven for a year. Three months is an extraordinarily limited amount of experience for someone to become a driver trainer or advisor of any kind. A purported owner-operator or contractor needs much more experience than that because he or she needs a substantial understanding about how this complex industry works.

11. Depositions, as well as data collected in a survey of class members, show that most drivers come to TransAm seeking employment as company drivers. However, having committed their time and opportunity cost to travel to TransAm's facilities—often from great distances and by bus,⁸ on a one-way ticket⁹—they find that TransAm does not have jobs for them except if they agree to sign a two-inch stack of legal documents¹⁰ with a short time to evaluate and sign, during lunch, with pressure from multiple sources,¹¹ and which they are ill equipped to understand or evaluate, and become "Leased Drivers" for TransAm.¹² "According to driver Paul Caraglio, "when I asked to have a copy to have my

⁷ McFarland deposition: 79.

⁸ Roetzel deposition: 21-28.

⁹ Nabors deposition: 27; see also Falkner deposition, in which she says that drivers who don't sign leases have to return home "on their own dime: 137. For TransAm, the beauty of this scheme stemmed from the fact that many (perhaps most) drivers they recruited did not have a dime. In her experience, perhaps 5% of the drivers chose not to sign.

¹⁰ Hensley deposition: around 217 minutes.

¹¹ Nabors deposition: 27.

¹² Close deposition; Roetzel deposition; Davis deposition: 118.

attorney look at it, I was told that there -- there -- due to time constraints that they really didn't want to hand me a copy of it until after I signed it."¹³

12. Company officials tell them that no company trucks are available and they will not be available for up to four weeks, during which time they have to pay for their own lodging and food. Most of the driver candidates who respond to TransAm have no resources and cannot afford to return home on their own. They also have no resources with which to support themselves while they wait, which pressures them to sign the contracts.¹⁴

Drivers appear to have the impression that they will have to wait from one to four weeks to get a company truck, and were told so by TransAm personnel.¹⁵ For example, Leased Driver Eddie Hensley testified "they told you point blank, it could be one to three weeks before you could get a truck...."¹⁶ TransAm even intimated that they would never get a truck: "no guarantee"..." that they would have a truck...."¹⁷ TransAm told him "point blank" that he had to lease a tractor if he wanted to work. "If you want to work today, you'll take a lease. If you want to wait on a truck, you can do that, but you won't be getting paid. You're going to have to find you a place to stay at your [expense], because TransAm is not going to pay for it while you're waiting on a truck."¹⁸ Finally, they come to TransAm because they are desperate for work due to either their lack of skills or their

¹³ Caraglio deposition: 56.

¹⁴ Nabors deposition: 27.

¹⁵ Nabors deposition: 24.

¹⁶ Hensley deposition: 218.

¹⁷ Hensley deposition: 219.

¹⁸ Hensley deposition: 219.

personal problems, including for many criminal records that makes it hard to get work¹⁹

and this makes them willing to accept constraints that other people might not accept.

They were desperate to make money and desperate for a job, even if they effectively had to buy one by leasing a truck.²⁰

13. TransAm takes advantage of this weak bargaining power to employ bait-and-switch tactics. Most drivers report, both in depositions and in survey responses, that they came to TransAm for a job and were forced to lease a truck in order to obtain a job. Paul Caraglio testified:

"When I first applied to TransAm they -- I was signed on as a company driver. At that point they pressured us so greatly that it would be more advantageous to us to become lease purchase or lease operators, depending on if you wanted to purchase the truck at the end or not. However, that was one of the worse mistakes I've ever made in the trucking industry. It turned out to be a -- a -- such a one-sided situation that only a brave man and somebody with more tenacity than most would ever be able to even making a reasonable existence at what was left over after TransAm did their accounting practices."²¹

I see no evidence from depositions that most of these individuals are knowledgeable enough about trucking to build successful businesses. In fact, substantial evidence in the

¹⁹ For example, Nabors, Moreno, Bowers, Zorilla, and Yarber had felonies in their record.

²⁰ It was the only option for me to get on the road and make money." Wright deposition: 156.

²¹ Caraglio deposition: 13.

record suggests that they are going to fail without earning the money they expected to earn working as an over-the-road truck driver.

14. Consistent with the Merle Travis / Tennessee Ernie Ford song, TransAm traps these drivers in a form of debt peonage. Their fatalistic responses, like failing to read the documents they are signing²² or failing to consult proper legal counsel²³ stems in part from TransAm's effort to prevent them from consulting with counsel²⁴, the pressure they are under during the brief time they have to sign all the documents (including pressure from other TransAm staff to get them back into class²⁵),²⁶ their inability to remove documents from the room,²⁷ and their overall power asymmetry. They need to get jobs and they expect people having power over them to control their options to the company's advantage.

²² For example, see Close deposition: 23. Referring to the stack of contracts he signed, Close said "I don't believe I read any of them." "I just recently bought a home. I didn't read that contract, either. Those contracts are so written that it's hard for a common man to understand them, so that I either sign the contract or I don't get the house. I sign the contract or I don't get a truck that I just purchased."

²³ Hensley deposition: 217; K. Stump deposition: 31; Goodspeed deposition: 295; when Nabors asked if he could send the contract to his brother, who is a lawyer, TransAm told him "absolutely not." Nabors deposition: 24.

²⁴ TransAm gave them no time to read the contract and did not allow them to take the contract out of the room or consult a lawyer. Goodspeed deposition: 25-29.

²⁵ Caraglio deposition: 13.

²⁶ The drivers had an hour, during lunch (net 30-45 minutes), toward the end of their orientation, to read and sign documents for trucks and employment with TransAm, with trainers pushing them to hurry so they could get back to orientation. Falkner deposition: 142.

²⁷ Goodspeed deposition: 295.

15. TransAm Leased Drivers sign leases under both financial and time duress, as stated above. Depositions of drivers and some depositions of employer representatives suggest that TransAm employees begin to sell the prospective drivers on the purported advantages of leasing instead of being employee drivers. Falkner specifically reported being told by management to overstate the money the drivers would make and the miles they would drive. She was told to tell people they would bring home \$600-\$1,000 per week and run 2,800-3,100 miles. She never saw people make \$1,000/week. She saw they were running 1,800-2,200 miles per week. She also was told to say that 70% of all loads were drop-and-hook but saw no evidence to support this.²⁸ They incessantly present purported facts and figures, as well as promises, "browbeating" the drivers²⁹, that sound like a get-rich-quick scheme, and many deponents became aware that TransAm representatives appear to be more interested in making lease-purchase "sales" than in training them as drivers, since TransAm could turn the truck over 10 or 12 times while no Leased Driver actually ended up owning the truck.³⁰
16. Once they sign the lease agreements, these drivers are in thrall to TransAm and can only extricate themselves at considerable cost, including a loss of their entire investment.

²⁸ Falkner deposition: 151-157; see also testimony from Latisha "Rocky" Raine, a former Fleet Manager or Driver Manager for TransAm for approximately 4-5 years, who stated that TransAm gave its managers incentives to convince company drivers to convert to become Leased Drivers, paying \$100 for each driver she convinced to switch from being company drivers to Leased Drivers. "I made very good money" and "most" drivers switched over, leaving only around "2 percent" as company drivers. Raine deposition: 17-18, 29-32.

²⁹ Caraglio deposition: 46-49.

³⁰ Hoyt deposition: 62-63.

Their investment, in this case, is the escrow fund that TransAm holds. Escrows or deposits are held for mechanical and other expenses as well as parts, and if the driver does not complete the lease, TransAm keeps all their funds.³¹ Goodspeed testified that the "lease completion bonus" that he received after completing the lease was actually his own money. That is, TransAm deducted money from his settlements to put into an escrow-like account that they would pay him after he completed his lease. As Goodspeed says, that's not a bonus but actually his own money.

Q. · And not only that, but you got what's known as a lease completion bonus; correct?

A. · Correct.

Q. · Didn't that --

A. · But that wasn't -- that wasn't really a bonus. · That was my own money being set aside to pay something, so it's not really a bonus. A bonus is something that you're given by somebody for doing a good job.

A lease completion bonus is 3 cents -- well, as a solo driver, it's 3 cents a mile coming out of your check, of my own money. And then as a team I believe it was 6 cents or 7 cents.

So I would say my own money was in an escrow account set aside for me to put towards the truck, but I -- I wouldn't call it a bonus.

Q. · So it's your testimony here, as you sit here today, that the lease

³¹ Hensley deposition: 224.

completion bonus was really just your own money that had been set aside?

A. That's what it says in the contract.³²

Leased Drivers discovered that their earnings were often negative. Goodspeed was "negative" for five to seven months because TransAm controlled his load assignments and they made him sit for from two to four days.³³ He was even forced to borrow from TransAm to pay a ticket because he had not received a paycheck for months.³⁴ Close also had negative paychecks perhaps 10% of the time because he wasn't getting enough miles.³⁵ When Roetzel was asked why he kept driving for TransAm, he testified that he continually owed TransAm money and could not afford to quit.

A. I had no money.

Q. What do you mean?

A. I owed them money. They hardly paid me enough to stop to take a bus back anywhere. Half my checks were negative, and I constantly drove for them.

Ty Wright, for example, explained that his earnings were consistently negative; for at least the first six months he never earned a paycheck. In fact, he actually made

³² Goodspeed deposition: 23; 779-180. Note that throughout the deposition, the defendant's attorney continues to use the term "completion bonus" but I interpret this to be his re-statement of Goodspeed's claim that this is an escrow of his money that they company holds, not a bonus.

³³ Goodspeed deposition: 227-228.

³⁴ Goodspeed deposition: 249.

³⁵ Close deposition: 116, 121, 131.

\$15,000-\$20,000 a year, net. He apparently made \$27,000 one year (the deposition is unclear)³⁶, working for TransAm six or seven days a week with very little home time.

17. TransAm controls the entire recording and reporting of Leased Drivers' expenses. They deduct for PrePass, Fuel Optimizer, PL&PD insurance, bobtail insurance, workers' compensation insurance, fuel, maintenance and repair, accounting (bookkeeping and taxes), and the lease note that requires payments in the range of \$2,000 per month (lease payments vary).³⁷ They also pass along a fuel surcharge paid on loaded miles, which may make the difference between breaking even and going "in the negative", and purported discounts on volume prices of fuel. TransAm changed the fuel surcharge from a regional basis to a national basis.³⁸ TransAm marks up the cost of parts and labor³⁹ and dictates the frequency of service, including, for example, excessively frequent APU servicing, which far exceeded the manufacturer's requirements.⁴⁰
18. To summarize the foregoing, while TransAm did not pay drivers in scrip, the fact that they controlled all facets of their operation meant that they might as well have paid in scrip. TransAm set a low, non-negotiable mileage rate for all freight.⁴¹ They paid "book" miles rather than hub miles, further reducing the drivers' revenue.⁴² They controlled the

³⁶ Wright deposition: 46, 173, 174, 175.

³⁷ Deductions for a wide range of Leased Driver expenses can be found in any of the settlement statements and supporting signed agreements. See Exhibits 27, 55, as examples.

³⁸ Nabors deposition: 30-32.

³⁹ Hensley deposition: 210.

⁴⁰ Goodspeed deposition: 112-113.

⁴¹ Hensley deposition: 205; 208-209.

⁴² Roetzel deposition: 30-33, 52-53

dispatching tightly like they did for employee drivers, and controlled the number of miles drivers could run and amount of money drivers could earn. "I am not in control -- I was not in control of how many miles we drove, how many loads we was able to take, how many days we sat, you know. I was not in control of that. TransAm was in control of that."⁴³ Both lease-drivers and management personnel (either in direct testimony or reported by drivers in depositions) confirm that they retaliated against drivers who refused loads and otherwise tried to take some measure of load-decision control from TransAm.⁴⁴ Punishment was regular and sometimes several times a week, as TransAm would turn off their fuel card to get them to sign a paper, punish them for going off the route demanded by the Fuel Optimizer, or even failing to return a phone call immediately.⁴⁵ They pulled drivers out from under their previously dispatched loads for the company's advantage, when they needed drivers for certain loads for the company's benefit. They directed them to use a purported fuel optimizer system that tracked their every move and routed them without discretion, including even telling them where to buy fuel and how much to buy at each location. They deducted money from their settlements for a "bonus" that was really a bond against the possibility that they would quit before they paid off the leases. They forced drivers to terminate leases and sign new leases that extended their period of servitude. If drivers terminated their leases before the term of the lease (including the additional forced leases), the company seized their

⁴³ Blair deposition: 201; K. Stump deposition: 6-14

⁴⁴ K. Stump deposition: 16.

⁴⁵ Roetzel deposition: 21-29.

escrow payments. Many drivers report that their dispatched miles declined as they got closer to the end of their lease, making it much harder for them to make their final payments. TransAm was the sole judge, at the end of a lease, of wear and tear on trucks and tires, enabling them to tip the scale in their favor, much like the old sharecroppers' masters could tip the scales for cotton. They decided the prices for mechanical services and parts, marking prices up at the "company store" to which lease drivers owed their souls.⁴⁶ They even charged the drivers for excess mileage if they ran more than 3,000 miles a week (which the company controls).⁴⁷ Finally, when drivers finished paying off their leases and got their escrows back, there wasn't enough residual to buy their truck off lease and they found themselves paying off the residual with yet another purchase contract and payments to TransAm Leasing, in order to keep working. The cycle of debt peonage was complete, so it is no wonder that TransAm could take advantage of these relatively unsophisticated workers, most of whom were not ready for the rigors of trucking business ownership.

19. In my judgement, TransAm's lease purchase plan provided a level of control over Leased Drivers that equals or exceeds the level of control that it has over employee truck drivers. While employee drivers get a low mileage wage and have no control over the miles they can run, they actually get paid for their work; they get a positive paycheck. Leased Drivers, on the other hand, may work for months without seeing a paycheck because

⁴⁶ Hensley deposition: 215-215.

⁴⁷ Roetzel deposition: 74; Wright deposition: 24-25.

while they too don't control their miles, they have very high fixed expenses that can swamp their gross earnings, causing them to have negative net earnings. Adding to TransAm's control, only TransAm can decide how many trucks and vehicles to place in service in the fleet. If they make money on leasing, they may make money by leasing more trucks to drivers than they have business. They essentially control TransAm's response to the external freight market and control the internal market they create, so that placing more trucks in the fleet will leave less work for the existing lease operators. While employee drivers who drive TransAm's trucks can just quit, Lease Drivers pay a substantial cost to quit. Also, if business is slow, employee drivers get fewer miles and earn less money. In contrast, when business is slow or for some other reason TransAm fails to provide them with sufficient miles, Lease Drivers do not earn enough to pay the lease and run the risk of losing the truck for which they have been paying for months or years.

B. Elements of Economic Control

20. TransAm controlled Leased Drivers equal to or greater than if they were employees.

TransAm did not allow them to pick loads off a load board, or take brokered loads.⁴⁸

President Russ McElliott states that drivers can take any load they want but they just cannot haul them with trucks leased from TransAm Leasing. McElliott describes the process drivers can use, in theory, to get such loads. He says that drivers can find loads on

⁴⁸ Caraglio deposition: 133-135; Bourgeois deposition: 100-101; Blair deposition: 133-139, 143.

load boards and submit them to TransAm which will run them through their planning system and then, if they decide to take them, pay the drivers the 84-cent rate and pocket the rest.⁴⁹ While the drivers' contract says they are free to haul other freight or haul freight for other carriers, fine print in the contract says that any carrier that engages a TransAm truck has to guarantee to pay the TransAm Leasing lease,⁵⁰ which no carrier will do.

Addressing Leased Drivers' alleged opportunity to haul for anyone they choose, Kristin Stump responded:

Q. Now, you agree that at any time during these two stints, you or your husband individually could have gone and driven another load for someone else; right?

A. Without that piece of equipment.

Q. Without the truck; right? Right?

A. It's rather difficult to pull a 53-foot trailer with no truck.

Q. You agree that at any point in the two stints or any time that you wanted to, the two of you could have gone and individually driven for another carrier; right?

A. It's called quitting.⁵¹

21. TransAm dispatchers assigned Leased Drivers their loads without providing information about what other loads might be available that would allow a driver to make more

⁴⁹ McElliott deposition: 217-220.

⁵⁰ Hoyt deposition: 210-211, 218.

⁵¹ K. Stump deposition: 93.

money. The other side of this load-assignment is that Leased Drivers could not refuse a load without paying a steep price. If Leased Drivers refused loads, TransAm usually punished them by making the driver sit and wait for hours or days before they get another load,⁵² yelling at the driver or otherwise verbally or physically coercing them to take the load,⁵³ threatening the driver that he or she may not get another load for an indefinite time, or giving the driver a bad load (short miles, live load or unload, which often means waiting to load or unload, and other similar punishments.) Far from being treated as independent contractors, TransAm Leased Drivers essentially experienced "forced dispatch", which motor carriers can do with employee drivers.⁵⁴ For example, when Hensley refused a dispatch to downtown New York City because he could not make any money doing it and could not afford the risk to his license and equipment, the dispatcher battled him for an hour (probably twenty phone calls) and he was not provided with a load for three or four days⁵⁵ (likely putting him in the "negative" for the week and probably much longer). In sum, Mary Hoyt, former vice president and director of planning said that one of Russ McElliott's favorite comments was, "They can refuse a load, but we can refuse to plan them." He told managers to move Leased Drivers to the bottom of the list if they refuse a load.⁵⁶

⁵² Davis deposition: 61-62.

⁵³ Blair deposition: 212.

⁵⁴ Nabors deposition: 16-26.

⁵⁵ Hensley deposition: 24-28.

⁵⁶ Hoyt deposition: 68-98, 166-177

22. TransAm controlled the parameters of all loads, including the number of paid miles, the time of pickup and delivery, the speeds of delivery, whether the load would be a drop-and-hook (a driver's preferred money-making trip) or a live load (a costly and time-consuming exercise) and even the speed of driving.⁵⁷
23. TransAm specified minimum times that Leased Drivers needed to log for On-Duty Not-Driving labor: dropping and hooking trailers, loading and unloading, fueling, and pre- and post-trip inspections. Leased Drivers' logbooks were subject to regular inspection by Driver Managers. TransAm managers also instructed drivers on how to "make more money" by falsifying their logbooks: logging only fifteen minutes on-duty when arriving at a shipper or consignee in order to conserve daily and weekly on-duty time.⁵⁸ TransAm is well aware that Leased Drivers are under-reporting their On Duty, Not Driving time. Russ McElliott testified that before electronic logbooks TransAm used a three-hour per day rule of thumb (three hours of Line 4 On Duty Not Driving time) for a base reasonable estimate of On Duty, Not Driving time per day, per driver.⁵⁹ However, calculations made by Jeremy Albright on six months of recent daily logs show that drivers are logging only about 3.6 On Duty Not Driving hours per week now and driving an average of six days per week.

⁵⁷ Roetzel deposition: 34-36. TransAm manager asked him to speed and assigned loads to him because his truck was 10 mph faster than other trucks. See also Hoyt deposition: 190.

⁵⁸ Falkner deposition: 134-136.

⁵⁹ McElliott deposition: 52-57.

24. As discussed above with reference to the debt peonage problem, TransAm coerced Leased Drivers to sign the truck leasing agreements and independent contractor agreements. This coercion had many levers. When training was nearly over, TransAm told them that no company trucks were available and that they would have to wait an indeterminate amount of time if they insist on becoming a company driver. They were told they would have to go home and wait for a possible call back, even though they had no way to get home because they haven't the funds for a bus ticket home, or to return to Kansas. TransAm told them that they could wait in Kansas for an indeterminate number of weeks and pay for their own lodging and meals while waiting for a company truck. TransAm brought the trainees into a small room with a stack of contracts with sticky notes saying "sign here". The scene is well described by driver Dewey Nabors:

"Well, they had Diane and another couple of young girls there, and that would be the day they would wear the push-up bras and dress attractively, I guess you'd say. And most of the people that were in these classes were not educated people, and they would sit there and be looking at the staff instead of paying attention to what they were saying, and the pitch was, you know, you will make more money if you will sign a lease with us."⁶⁰

TransAm did not allow the drivers to read or take the documents out of the room to review or seek legal advice, interrupted them and hurried them to sign, wrote the

⁶⁰ Nabors deposition: 23-24.

documents with complicated wording and jargon that most drivers would not understand, and recruited almost exclusively straight out of trucking school. Based on my decades of experience with the trucking industry, including having been a truck driving instructor at a private training school in the mid-1970s, truck driver training schools can at best provide a cursory training on the regulations and the hours-of-service record of duty status logs, and a rudimentary introduction on how to drive and to maneuver this large vehicle, forward and backward. In the late 1990s, when giant truckload carrier JB Hunt moved to reduce turnover and crashes by raising compensation, closing their truck driver training school, and hiring experienced drivers only, they did so to get away from the risk and low productivity associated with such barely trained and inexperienced drivers.

25. The terms of the truck leases or independent contractor documents were not negotiable by the Leased Drivers. They were "take it or leave it" offers⁶¹.
26. TransAm limited the total earnings of Leased Drivers by limiting the available loads and miles so that many times, as soon as Leased Drivers had earned enough in a week to make their truck payment, drivers' miles would dry up, resulting in very low settlements even though the drivers wanted to drive more miles. Drivers complained in most depositions about the lack of miles and sufficient revenue to both pay the lease and the other fixed expenses owed to TransAm because of the one-sided lease that favored TransAm, and pay themselves. As stated by Hoyt, TransAm appeared satisfied to turn a

⁶¹ Hensley deposition: 205.

truck over ten or twelve times over the course of its use by taking the truck back over and over again and re-leasing it to another unsuspecting driver who, with his or her labor, essentially buys the truck for TransAm's business. TransAm's President Russ McElliott was not concerned about the high turnover.⁶²

27. TransAm's business model structured the relationship between TransAm trucking and TransAm Leasing so tightly that no daylight appears between the two enterprises. Murray Driescher, an official corporate representative deposed in this case, is the CFO of both TransAm Trucking and TransAm Leasing, which is a wholly owned subsidiary of TransAm Trucking⁶³ He also is CFO of TAFS, Inc., the financing company that finances drivers who want to purchase their trucks at the end of their leases. TAFS is a factoring company that purchases "receivables at a discount to provide financing and cash flow for a business."⁶⁴

28. TransAm leasing unilaterally decides on the price at which to sell the used truck based on its "experience".⁶⁵ The profits from leasing flow up to the parent trucking company. Title to the trucks, leased by TransAm Leasing to the Leased Drivers, actually are owned by TransAm Trucking and leased back to TransAm Leasing to lease to drivers⁶⁶ This allows TransAm, with a keystroke, to reassign a truck from a Leased Driver back to TransAm's company-owned fleet (so that it can be driven by an employee driver) and back again to a

⁶² Hoyt deposition: 60-67, 95, 162.

⁶³ Driescher deposition: 15-16.

⁶⁴ Driescher deposition: 44.

⁶⁵ Driescher deposition: 38-44.

⁶⁶ Driescher deposition: 36

Lease Driver.⁶⁷ Office employees were treated similarly, moving seamlessly between TransAm Trucking and TransAm leasing. Hoyt's paycheck, as Vice President of TransAm Leasing, for example, came from TransAm Trucking⁶⁸.

29. TransAm typically did not allow Leased Drivers to take their trucks leased from TransAm Leasing to drive for other companies. The stipulations and requirements they put in the fine print of the lease meant that no other trucking company would allow a driver with a TransAm lease to pull freight for them. Specifically, the lease required other trucking companies to "guarantee" that they would make the weekly truck lease payment directly to Transam even if the driver did not have any earnings and even if the Leased Driver proposed to haul a single load for that carrier. Because TransAm did not allow drivers to take their trucks elsewhere,⁶⁹ they effectively were employees.

30. TransAm had far more knowledge and power about the business and trucking industry than the Leased Drivers, most of whom were brand new to trucking. TransAm had far greater investment in this business. Because TransAm's primary business is hauling freight (its secondary business is leasing trucks to their drivers), they cannot claim that only independent contractors carry out its core business. At the beginning of the period covered by this lawsuit, TransAm had about an equal number of Leased Drivers and

⁶⁷ Hoyt deposition: 224-225.

⁶⁸ Hoyt deposition: 237.

⁶⁹ Hoyt deposition: 210-211, 218

employee drivers; at the end of the period TransAm had a much higher proportion of Leased Drivers.⁷⁰

31. Most Leased Drivers did not have the resources or credit history to actually be able to lease or purchase a tractor costing more than \$100,000 (new) without TransAm providing the tractors. They also do not have the resources to buy their own tractor (the one they have paid for on lengthy leases) at its residual value, and regularly turn to TAFS for financing. This traps them in a payment cycle. TransAm's power over the relationship stems from their unilateral evaluations and unilateral control over finance. One driver described a process in which TransAm would not allow him to buy his own tractor at its residual value because of alleged maintenance issues. He just had replaced both his tires and his transmission (both very expensive items) so these costs ate into his lease completion escrow. Johnny Jacobson, the company owner, said he would help him out by talking this out with his managers but instead came out with the keys to a new truck, and large financing costs to go with it, wiping out the driver's residual. The driver felt he had no choice but to accept this state of affairs and go back into debt.⁷¹
32. Most Leased Drivers had no prior trucking industry knowledge before they came to work for TransAm and most of them had no business training.⁷²

⁷⁰ See for example Deposition exhibit 36 and deposition of Latisha Raines explaining very few drivers remained as Leased Drivers after TransAm provided incentives to its managers to encourage drivers to convert from company drivers to Leased Drivers. Raines deposition: 29-32.

⁷¹ Davis deposition: 150-156.

⁷² See Driver Control Survey, described below in detail.

33. Most Leased Drivers did not do anything to set up a separate business entity, a corporation or LLC or the like. They just signed the leases as a condition of getting a job, as if they were buying a job.⁷³
34. Most Leased Drivers relied totally on TransAm to provide their insurances for the trucks.⁷⁴
35. Although TransAm claimed drivers could purchase some of their insurance elsewhere, in fact TransAm coerced drivers to buy the TransAm insurance by refusing to approve insurance policies from outside agencies and by not allowing Leased Drivers any time to obtain such insurance before they had to sign the lease documents. The mechanism was clever, however. Blair pointed out that although the contract said it was optional to buy insurance from TransAm, the boss said it was mandatory.⁷⁵ Blair went to the Owner Operator Independent Drivers Association (OOIDA, based in Grain Valley, MO) to buy his insurance, but TransAm rejected it.⁷⁶ Stump and her husband attempted to buy their own insurance, but were prevented from doing so. They were told that only "real" owner operators could get their own insurance. In practice, the company appeared to construct the contract signing process so that they were required to sign a paper agreeing to take TransAm insurance before TransAm assigned the truck, so that they would not have a VIN

⁷³ See, for example, Driver Questionnaires.

⁷⁴ See Driver Control Survey, described below in detail.

⁷⁵ Blair deposition: 126.

⁷⁶ Blair deposition: 236.

to insure and thus not be able to get insurance in hand.⁷⁷ Hensley did not even try to get insurance elsewhere because he was afraid of retaliation.⁷⁸ In practice, all insurance, including PL and PD (including truck collision) insurance had to be bought from TransAm.⁷⁹

36. Drivers who started as company drivers were coerced or mislead to switch to being Leased Drivers by promises of greater earnings and miles that were not true, and then after company drivers switched to become Leased Drivers, they were not allowed to return to company driver status.⁸⁰
37. TransAm controlled the physical aspects of the how the truck was operated, including placing DriveCam cameras in the trucks to monitor Leased Drivers, monitoring truck location and speed via GPS, limiting drivers or pets in the truck without permission, requiring maintenance be performed, limiting the use of the tractors for personal use or matters, limiting where tractors could be parked, and virtually every other operational choice. Their control was as complete as is control for an employee driver, except that the debt peonage relationship meant that the economic risk was greater for Leased Drivers.⁸¹

⁷⁷ K. Stump deposition: 33-36.

⁷⁸ Hensley deposition: 85-86.

⁷⁹ Falkner deposition: 145-147.

⁸⁰ See Driver Control Survey, Falkner deposition and Raines deposition: 29-32.

⁸¹ See Driver Control Survey.

38. TransAm prohibited modifying the tractors by Leased Drivers, such as any mechanical modification to alter or improve performance or change appearance substantially to their preference. One driver who completed his truck lease and bought the used truck attempted to place the words "Leased to" on his truck, signifying that he was now the owner and was leasing it to TransAm, as is the conventional owner-operator relationship (TransAm no longer owned his truck). TransAm made him remove that.⁸²
39. TransAm required Leased Drivers to submit their trucks for regular inspections in order to identify any alleged violations or maintenance needs.⁸³
40. If a Leased Driver encountered a problem with a timely load delivery due to accident, injury or maintenance needs, or because another driver either lacked hours or the Leased Driver's truck could go faster (as noted above), TransAm reserved the right to intervene and take over the load by sending another Leased Driver or company driver to take the trailer from the Leased Driver so that the load would be delivered on time. Refusal to give up a load, once under load, invited severe retaliation.⁸⁴
41. TransAm required Leased Drivers trucks to have the speed governed at a speed of its choosing during substantial parts of the relevant class period.⁸⁵
42. TransAm coerced Leased Drivers to accept a package of expensive add-ons including APUs, Fuel Optimizer service, and PrePass services. Some of these services were useful

⁸² Bourgeois deposition: 98-99.

⁸³ See Driver Control Survey.

⁸⁴ See Driver Control Survey.

⁸⁵ See Driver Control Survey.

and some of them the drivers considered useless. One of them, PrePass, acted as a signal to FMCSA enforcement officers at an open scale to pull the truck around back for a time-consuming high-level inspection. This is because TransAm had been identified as a chronic violator.⁸⁶ In my expert judgement, I know that this is how FMCSA and the Commercial Vehicle Safety Alliance (CVSA) carry out their legal responsibility to keep the nation's highways safe: they target carriers with unsafe or non-compliant records for special attention.

43. TransAm coerced drivers to follow the routes it selected by the routing service and fuel optimizer services. Many drivers believe that these routes are not optimal from a fuel perspective or from a driving time perspective, but may be optimal because they route trucks to TransAm's preferred fuel stations; this may be best for TransAm but not for the drivers.
44. TransAm controlled where maintenance on the trucks should occur and coerced drivers not to have maintenance done at any place that was not approved by TransAm.⁸⁷ Most of this maintenance and most of the parts not only were purchased from the company store, but they were purchased at a substantial markup, as indicated elsewhere.
45. TransAm limited Leased Drivers' ability to control their own schedule and choose their home time by requiring requests for home time to be made 7-8 days in advance and by

⁸⁶ Roetzel deposition: 59, 61, and 63.

⁸⁷ See Driver Control Survey.

not providing Leased Drivers sufficient miles to allow them to earn enough money to make their leased payments and take any time off.

46. Very few Leased Drivers were ever allowed to purchase their tractor at the end of the lease, because TransAm would load up the charges for maintenance or repairs or limit miles such that the Leased Driver had a very large payment due at the end of the lease and then TransAm would not finance that payment but would coerce the driver to quit or to simply sign another lease. This is analogous to the way plantation owners could tip the scales in their favor in the debt peonage relationship with their sharecroppers, because they controlled both the costs and the benefits associated with the production process. It kept sharecroppers in thrall to plantation owners.
47. TransAm required Leased Drivers to sign and follow policies similar to those applicable to employees, including those Leased Drivers who served as training coaches. The "Owner-Operator Handbook" and the employee handbook were virtually identical.
48. As discussed above, TransAm controlled on both sides of the production equation the internal market in which Leased Drivers function. They controlled the customer base for the Leased Drivers and all recruitment and marketing of new customers as well as the decision as to how many trucks to enter into the fleet. Leased Drivers were not allowed to build any "book of business" among any of the freight customers or establish their own relationships to obtain loads; neither were they able to secure their own loads.
49. TransAm controlled all advertising and marketing and did not allow Leased Drivers to advertise their services with signage on the tractor.

50. TransAm controlled the rate of pay for shipments and for miles driven; Leased Drivers typically had no ability to negotiate different rates. Even in the rare cases in which Lease Drivers obtained business of their own, they had to run it through TransAm's planners and TransAm took control of the shipment and only paid them their contracted low rate.⁸⁸
51. TransAm controlled the billing and payment to and from shippers and Leased Drivers had no role in the flow of funds other than the monies paid to them by TransAm.
52. TransAm controlled what loads it would agree to ship or haul including all loads carried by Leased Drivers as well as those hauled by company drivers with company trucks.
53. TransAm controlled all the dispatch of loads, essentially a "forced dispatch" similar to company drivers.⁸⁹
54. Very few Leased Drivers were allowed to hire other drivers to work with them, and in those cases, TransAm exercised control over whether it would allow any Leased Driver to bring on another driver to help him or her, and controlled and determined if that Driver would be hired. It further demanded that Leased Drivers sign on these extra drivers as contract drivers, not as employees, even though they filled out employee applications for TransAm, and even though they drove Leased Drivers' trucks leased through TransAm.⁹⁰
- Ms. Stump, who worked for TransAm as part of a husband and wife team, actually tried to get herself on the lease and TransAm refused it because they considered the man to

⁸⁸ McElliott deposition: 217-220.

⁸⁹ Nabors deposition: 16-26.

⁹⁰ Blair deposition: 166-188; Exhibits 17, 23, 24, 25, 26.

be the responsible party in the team, by definition, and even if Ms. Stump was effectively the dominant partner in the team, they would not recognize her as a contractor but rather as a contract employee of her husband.⁹¹

55. TransAm retained a unilateral right to withhold load assignments and to terminate a Leased Driver's contract for violation of any company policy or for no reason at all on a limited notice. If the independent contract for the driver was terminated then the Leased Drivers would be in default on the truck lease and TransAm would not allow the driver to take the truck elsewhere, thus giving TransAm great leverage and control over the conduct of Leased Drivers⁹².

56. Leased Drivers' schedules were controlled by TransAm by requiring them to check in with Driver Managers on a regular basis, except on scheduled home time, which had to be approved in advance.

C. Control: Survey Results

57. In order to further verify that the testimony reported in depositions by Leased Drivers and TransAm representatives was accurate regarding TransAm's economic control of Leased Drivers, I developed and supervised a control survey that was executed by statistical and survey expert Dr. Jeremy Albright. The survey asked 27 questions to ascertain the degree of economic control exercised over Leased Drivers by TransAm. Dr.

⁹¹ K. Stump deposition: 60-69; 80-85.

⁹² Driescher deposition.

Albright administered this survey to all available opt-in class members as indicated in his report. In **Exhibit E** I report the results of this survey.

58. From 2004 until the present, TransAm Trucking has employed truck drivers as purported independent contractors based primarily on a lease-purchase program. The number of Leased Drivers has increased from a small number in 2004 to the substantial majority of all drivers hired in recent years.⁹³ Under the terms of this program, TransAm advertised and recruited to hire truck drivers both as employees and as Leased Drivers. According to the survey of TransAm drivers who have opted in to this class-action lawsuit, which I directed, two thirds of all drivers who applied to TransAm were attracted to the company's employee driving jobs. However, once they completed training, most all of this group of drivers (nearly 63% of drivers surveyed) were told by TransAm Trucking's representatives that they did not have any trucks available for drivers to drive as employees (see results of survey of TransAm drivers, **Exhibit E**), and that they would have to wait for a truck to be available for them to drive. Indeed, the survey shows that 91% of all drivers report having been encouraged by TransAm to become leased drivers; 84% reported being pressured by TransAm to become lease drivers, and 96% report that TransAm promised greater earnings as leased drivers, suggesting that TransAm engaged in a bait-and-switch exercise in recruiting prospective truck drivers.

⁹³ See for example Deposition exhibit 36, and Raines deposition: 29-32.

59. The foregoing suggests that TransAm pressured newly hired “leased drivers” in many respects. More than 99% of all lease drivers report that they were given non-negotiable lease contracts to sign that were fully constructed by TransAm and nearly 98% state that they were not given time to consider the documents and an opportunity to show them to their own lawyers before they signed. More than 90% of all drivers assert that the language was lengthy and complicated and that they did not understand what they were signing. Indeed, more than 41% of all lease drivers were dissatisfied enough with their predicament to ask to switch back to become employee drivers, which TransAm refused to allow.
60. The driver control survey showed that zero percent report that they put any money down on the truck (thus all were required to finance with TransAm for 100% of the cost of their truck) and less than 0.5% of all drivers reported that they could negotiate some unspecified element of the terms of their contracts. TransAm claimed that leased drivers could buy insurance from any legitimate insurance carrier, but over 94% reported they relied on TransAm to provide the insurance for truck. Larry Blair, for example, in his deposition, swears that he obtained an insurance policy from the Owner Operator Independent Drivers Association (OOIDA), which sells policies like this to owner-operators across the country, but that TransAm rejected this policy.⁹⁴.

⁹⁴ As described above, TransAm's process was circular. They would not provide a VIN until the driver had insurance, and thus could not provide an insurance carrier (including OOIDA) with a VIN. Without a VIN, the Leased Driver cannot get a binder for insurance from the insurance company. This way, the only company from which the Lease Driver can obtain insurance is TransAm.

61. Ninety-nine percent of drivers who leased trucks from TransAm found themselves prevented from hauling loads for any other customers for any reason. Only one driver respondent out of all survey respondents reported that he was able to negotiate a different rate than the rate TransAm quoted for delivery of freight. Further, of all the surveyed drivers, 98% say they had no information regarding the availability of better loads and felt compelled to take what they were offered by TransAm management. More than 85% of all drivers report that if they refused a load, TransAm managers threatened them with retaliation or actually retaliated, for example by making them wait an extended period for another load. Less than 2% of all surveyed drivers report that TransAm would allow them to market their services independently to any other potential customer.
62. Were the drivers TransAm hired and trained prepared for the rigors of being business owners in a business with which they were fully familiar? Of the surveyed respondent drivers who were asked about their trucking experience, more than 50% had less than two months of experience in trucking and more than 47% were completely new to trucking, reporting less than one month experience in trucking. Less than 22% of all drivers with whom TransAm contracted had more than one year of experience in trucking. Multiple drivers, including Peter Close, reported in his deposition that he did not read any of the documents and simply accepted the terms and conditions provided by TransAm. While he had substantial experience as a truck driver, he did not have sufficient education or expertise or experience as a business owner to succeed in such a difficult

task. He appeared to be unable to understand or deal with the rigors of business ownership.

63. Succeeding financially as TransAm Leased Drivers would have been an almost impossible task. As cited elsewhere, the American Transportation Research Institute (ATRI) regularly surveys the trucking industry and makes a public report on cost of operations. TransAm's per-mile rate for contractors is specified in the driver handbook at approximately \$0.84/mile during the relevant time period, plus a varying fuel surcharge applicable only to loaded miles. Data collected by ATRI shows that the cost of operations per mile in 2008 was \$1.73, of which \$0.603 was driver pay. This means TransAm was paying \$0.25/mile less than the cost of operating the truck, and almost \$0.90 less than the cost of operation over all.⁹⁵

64. Further, the deposition of Larry Blair shows that some of the newly trained drivers, who wanted to become employee drivers, were referred to existing lease drivers who agreed to hire them, not as employee drivers but as independent contractors. More than 66% of all lease drivers who did hire drivers (less than 9 percent of total survey respondents) report that TransAm exercised control and required its approval before hiring them. Leased drivers who agreed to take on such drivers may have chosen to train them as co-drivers but eventually leased additional trucks from TransAm. TransAm required lease drivers who employed these newly trained drivers to sign a TransAm document that

⁹⁵ Trego, T. (2008). An Analysis of the Operational Costs of Trucking. Atlanta, GA, The American Transportation Research Institute: 20

declared these drivers to be independent subcontractors, contracted with the lease drivers, even though these subcontractors drove equipment provided by the TransAm lease drivers who, in turn, leased their trucks from TransAm. Since TransAm provided management of the drivers and since the purported lease drivers, through a lease from TransAm Leasing, provided the truck, TransAm required its own leased drivers to misclassify these drivers as contractors (Exhibits 17, 23, 24, 25, 26). These misclassified employees of misclassified employees do not meet the basic U.S. Department of Labor test as employees. (<https://www.dol.gov/whd/regs/compliance/whdfs13.htm>). The acknowledgement the purported TransAm contractor was required to sign, along with the acknowledgement the purported TransAm contractor's purported contractor also was required to sign, demonstrates that TransAm was fully aware of this arrangement.

65. Not only did TransAm control the Leased Drivers' contracts, send almost all lease operators to a closely related truck dealership, control the drivers' insurance and financing, and control the drivers' loads, more than 95% of all drivers report that TransAm tracked their movement via GPS satellite. More than 84% report that TransAm prohibited them from making any performance or even cosmetic changes to their trucks. Almost 79% reported TransAm would intervene due to a delivery problem and take their load away by sending another driver and truck. Such delivery problems would include those due to breakdowns, traffic, available hours, accidents, weather, or delays in the loading or unloading process, or other similar reasons.

66. In summary, TransAm controlled almost every economic aspect of the leased drivers' operations and finances, including the capital that these purported Lease Drivers used to operate their purported businesses. Leased Drivers, and the subcontractors some of them hired to work for them, were all misclassified employees of TransAm. TransAm's economic control of the Leased Drivers, in my professional economic judgment, to a reasonable degree of economic and scientific certainty, is at least as complete as TransAm's economic control over its employee drivers or of employed drivers generally in the trucking industry. Indeed, considering the economic dependency of these Lease Drivers, I believe that TransAm had equal or greater economic control over its Leased Drivers than most trucking companies have over their employed drivers.

D. Survey: Non-Driving Hours Worked by Leased Drivers

67. I supervised the administration of a survey by Jeremy Albright of opt-in class members regarding their non-driving hours worked. This survey was called for by the fact that (1) TransAm destroyed daily logs applicable to most of the period covered by this lawsuit; (2) the logs that TransAm provided for a recent six month period were electronic logs that showed that drivers' non-driving, on duty hours were too low to be plausible, given both my expert judgement and years of research experience, including experience with driver surveys, and also given that TransAm President, Russ McElliot, testified that before the advent of electronic logs, TransAm used a three-hour rule of thumb for daily on duty, non-driving labor based on their years of industry experience. This survey also was called for because depositions in this case have indicated that drivers were encouraged to

under-report their non-driving hours in order to conserve hours available to drive. In subsequent paragraphs I review the logging requirements and the evidence from depositions and logs regarding driver practices, and then turn to a report of driver survey data.

68. The Federal Motor Carrier Safety Administration (FMCSA) requires drivers to log all their time for all days in the employ of a motor carrier. Driver log categories are Off Duty, Sleeper Berth (generally time spent in a sleeper berth, also off duty, between shifts or tours of duty; solo drivers use the sleeper berth instead of a motel and may choose to log their off duty time between shifts in the sleeper); On Duty Driving; and On-Duty Not Driving. Drivers should note, in the Remarks section of their log, what they are doing at each change of duty status. If the Remarks section does not say what drivers are doing, a full audit requires an inspector to correspond all log times with freight bills to determine what drivers are or are not doing.

69. According to driver Kristen Stump in her deposition, for example, TransAm orientation trainers suggested that drivers could maximize their "profitability" by logging only 15 minutes whenever they had to wait at a dock and go off duty the rest of the time. Ms. Stump's testimony indicates that TransAm's trainers trained drivers to falsify their logs (log on-duty not-driving labor time off duty) on a systematic basis. Ms. Stump testified that TransAm managers told her, whenever her team was short of hours, that they were logging wrong because they did not falsify their logs. She said she would not do it

"because it is illegal".⁹⁶ My examination of samples of driver's daily logs shows that drivers rarely fill in the Remarks section, and logs regularly suggest that the under-reporting of on duty, non-driving hours practice is widespread at TransAm..

70. For example, if a driver arrives in Kansas City to load, he or she should enter "Loading" (or the equivalent) in the remarks section. While he is responsible for the truck, either directly loading or observing loading and performing a freight count, or waiting to load, he must continue logging On Duty Not Driving. He may not log off duty unless he is truly on a break and free of work duties for a fixed period of time (he may not log Off Duty while loading as long as he is responsible for the truck or the freight).⁹⁷ After he is loaded he begins to drive. He must log both the location and the activity performed in his next stop. If his next stop is St. Louis for fuel, for example, he must enter the location of his duty status (St. Louis, in this case) in the "Location" section of the log. At that time he should also enter "Fueling" (or the equivalent) in the Remarks section. When he completes fueling he may choose to have a meal or restroom break. If so, he must change his duty status from On Duty Not Driving to Off Duty and should enter, in the Remarks section, that he is having a meal or taking a rest break. When he leaves St. Louis to drive, he changes his Duty Status to "Driving" and continues to his next stop. If his next stop happens to be Indianapolis to unload, he must change his duty status from Driving (Line 3) to On Duty Not Driving (Line 4). He must enter "Indianapolis" in the Location

⁹⁶ K. Stump deposition: 98-100.

⁹⁷ McElliott, in his deposition, confirms this interpretation for TransAm: 22.

section of the log and enter, in the Remarks section, he should indicate that he is unloading. The log must also contain the shipping document number for the load he picked up in Kansas City and delivered in Indianapolis, as well as the truck and trailer number or numbers.

71. TransAm destroyed drivers' logs from the start of the period covered by this lawsuit until very recently. For this reason, it is impossible to examine the driver logs for virtually all of the class period.

72. TransAm provided logs for only a six-month period for the Leased Drivers in the class.

These logs have been used to estimate a number of things, including the number of days on which drivers typically worked (days with non-zero hours of work logged) per week, the number of hours driven, the number of miles driven, and the number of hours logged in the other categories. Jeremy Albright has calculated the following hours as reported in the sample of logs.⁹⁸

The mean weekly hours by category from the log sample are:

Driving: 38.17

On-Duty: 3.57

Off-Duty: 54.61

Sleeper: 35.28

The median weekly hours by category are:

⁹⁸ See Albright Expert Report for details.

Driving: 41.62

On-Duty: 3.13

Off-Duty: 48.18

Sleeper: 33.61

I believe that the log data sample substantially underestimates driver On Duty Non-Driving hours. Research (including surveys) performed by or supervised me and by other colleagues, as well as research performed by others and my expert knowledge, has led me to expect that the average truck driver across the industry works twenty to thirty hours of On Duty Non-Driving time per week. TransAm's CEO Russ McElliott, in his deposition, indicates that for much of the class period TransAm flagged driver logs that showed less than three hours of On Duty Non-Driving time per day because their experience in trucking makes them believe that three hours per day is typical. Since the mean weekly driver's log in the sample shows 3.57 hours per week (median 3.18), on average drivers in the sample of daily logs actually logged only 0.6 hours non-driving time per day (based on a median six-day week), which is far less than surveys or TransAm's rule of thumb show is reasonable to expect were actually worked. My expertise in trucking and years of experience and research, as well as an examination of driver logs provided for this 2015 period, suggest to me that these low non-driving hours reported by TransAm drivers comes from the fact that that they systematically under-report the

non-driving time on their logs, as TransAm's testimony and the testimony of drivers indicates.

73. In addition to research findings, decades of experience and interaction with truck drivers, motor carriers, regulators, and others leads me to believe that on-duty non driving time in the meat hauling industry in which TransAm competes is especially long. I believe that average on-duty not driving time in this sector is closer to thirty hours per week and in many cases would far exceed this. My expectation for average weekly on duty, not driving time, is an order of magnitude greater than the On-Duty time reported in the sample of TransAm driver logs.

74. This expectation led me to direct and supervise a survey of opt-in truck drivers in the TransAm class (results contained in **Exhibit F** attached to this report). Details on the methodology used are reported in the expert report of Dr. Jeremy Albright.

75. The survey asked whether, "in an average 7-day week", drivers "engage[d] in [specific] Non-Driving Work". A total of 652 drivers responded.

76. The results of this survey are striking. Leased Drivers performed a substantial amount of weekly on-duty not driving work. Indeed, TransAm President Russ McElliott acknowledged the definition of "work" in his deposition to be consistent with the activities set out in the survey questions, and also acknowledged TransAm's responsibility to provide log book supervision of drivers. My examination of the Electronic Log Book documents provided by TransAm shows that drivers very rarely enter their activity in the Remarks section of the log. This would be easy for TransAm to spot and correct if they

had been fulfilling this supervisory responsibility, but the logs remain quite consistently flawed across all periods of time for which logs were provided. The evidence suggests that this flaw is no accident.

77. The non-driving hours worked survey asked drivers if they engaged in non-driving work of the following types:

=> Participating in pre and/or post trip inspections

=> Completing trip or other job-related paperwork

=> Speaking with, meeting with, or otherwise corresponding with dispatch, [their] Driver Manager, or other TransAm managers about issues related to [their] work as a driver

=> Waiting for [their] trailer to be loaded or unloaded at a dock or lot

=> Waiting for, or overseeing, someone else loading or unloading [their] trailer

=> Re-fueling

=> Performing maintenance or repairs on [their] truck, or waiting while others performed maintenance or repairs on [their] truck

78. For all of the foregoing labor, drivers' responses range from approximately 94% to 99% affirmative. Approximately 61% of drivers reported "loading, stacking, or re-stacking freight or otherwise assisting a customer". About 75% of drivers reported "waiting on roadside inspections" in a typical week. Drivers have testified in depositions that they were pulled around to undergo a full inspection most of the times the scales were open. Two non-driving activities appear to be relatively uncommon, but they are covered by special compensation provisions in the driver handbook: About 18% of drivers report

acting as coaches or trainers for new drivers and approximately 23% report formally recruiting drivers for TransAm.

79. Recall from above that an analysis of a sample of drivers' logs from 2015 reveals that drivers reported a mean of 3.57 weekly hours (median 3.13) of non-driving time on their logs. The survey, in contrast, showed that drivers in the class were working 7 to 8 times as many non-driving hours as the log samples report. The raw data from the driver survey collected by Dr. Jeremy Albright suggests that drivers worked many times more weekly on duty, non-driving hours. For 652 cases:

Unweighted Mean: 28.657; Weighted Mean: 28.982

Unweighted Median: 21; Weighted Median: 21

80. To review, according to Russ McElliott, TransAm admits the typical driver works at least three hours per day of non-driving labor. According to a calculation of days worked per week performed by Dr. Jeremy Albright, using Electronic Log Book data provided for six months, the median TransAm Leased Driver works six days per week (Mean: 5.818; Standard Deviation: 1.531). From the raw survey data information it is safe to exclude the extremely high total non-driving work hours reported by a few drivers (two entries of 300; one of 150; one of 140), because such reports are either actually or virtually impossible. To further be conservative, in my evaluation of on duty, non-driving hours worked as reported in **Exhibit F**, I have excluded from my analysis any survey values

higher than 100 and all reported zero values (it is impossible to have zero hours of non-driving work in any weeks where driving occurred). These data adjustments change the summary statistics modestly. Non-driving, on-duty hours per week are as follows:

Unweighted Mean: 25.65; Weighted Mean: 26

Unweighted Median: 21; Weighted Median: 21

Truck drivers have been acculturated to think that because they are paid by the load and by the mile that they should only log their driving time (the time for which they are paid). They also have become acculturated to understate their non-driving, on-duty labor. As driver Ty Wright says in his deposition, "The truck only makes money when the wheels turn. It doesn't make any money just sitting there".⁹⁹ TransAm drivers were told by their supervisors to just log 15 minutes for each stop and to log the rest off duty. In fact, if drivers ran out of hours before dispatch thought was appropriate, management explained to them this fact of life and urged them to change their logging practices, logging almost all possible non-driving labor time as Off Duty.¹⁰⁰

81. I conclude, based on all the available evidence as well as based on my experience with trucking surveys, to a reasonable degree of economic and scientific certainty, that the weighted mean value of 26 hours per week of On Duty Not Driving labor is the

⁹⁹ Wright deposition: 45

¹⁰⁰ K. Stump deposition: 98-100.

appropriate value to use to estimate total weekly hours of work performed by Leased Drivers.

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

EXECUTED this 5th day of December 2016 at Ann Arbor, MI.
