EXPERT REPORT ON THE SIMILARITIES OF LEASE-OPERATORS OF CELADON AND THEIR RELATIONSHIP TO CELADON

BY:

Dr. Steve Viscelli, Ph.D. 113 McNeil Hall 3817 Locust Walk Philadelphia, PA 19104

Dated:

<u>1. Purpose of the Report</u>

I was asked by counsel for the named plaintiffs to review documents associated with this case and publicly available information on the business of Celadon Trucking Services, Inc. (hereafter "Celadon") and use my expertise as an economic sociologist who has extensively studied the trucking industry to offer my opinion as to:

- whether the opportunities and constraints experienced by the named plaintiffs and those who entered similar contractual agreements with Celadon are typical of alleged independent contractors working for companies in long-haul trucking;

- whether the working relationship of the Celadon lease-operators differs from that of the Celadon acknowledged employee-drivers;

- the type and extent of control exercised over the Celadon lease-operators by Celadon;

- whether the Celadon lease-operators had the ability to run their own business, making business-like decisions from which they would suffer or benefit;

- the degree to which workplace experiences and outcomes for the Celadon-lease operators are outcomes of the policies, practices and organization of Celadon's primary business and the likelihood that those experiences and outcomes are shared by the Celadon acknowledged employee-drivers.

2. Relevant Expertise of the Author

I am an economic sociologist with 12 years of experience researching the trucking industry, specifically the over-the-road truckload industry and its labor and employment practices. I have extensive training in both qualitative and quantitative methods and use both in my research. I received training in qualitative methods of ethnographic observation and interviewing at Syracuse University (M.A. 2002). I received further extensive training in both qualitative methods at Indiana University (Ph.D. 2010).

At Indiana University I spent 5 years researching and writing my dissertation on work and employment relations in the long-haul trucking industry. My dissertation used a wide range of quantitative and qualitative data analysis. I began the research in 2005 by taking a job as a long-haul truck driver with a major truckload motor carrier. I spent approximately 6 months applying for, training and working as a long-haul driver for this company. In the years that followed this fieldwork I conducted in-depth interviews with randomly selected over-the-road truckers about their work routines and employment decisions. I also interviewed owners, managers and non-driving employees at a range of different long-haul trucking companies. In total I conducted more than 130 interviews (100 of which were with drivers) about the work and employment decisions of long-haul truck drivers.

After completing my dissertation in 2010 I was awarded a two-year National Science Foundation post-doctoral Fellowship to study the effects of the Great Recession on the work and employment opportunities of long-haul truckers. During my post-doctoral fellowship I was housed jointly by the University of Wisconsin's Department of Sociology and the Center on Wisconsin Strategy (COWS), a think-tank and policy research center. During that time I began serving as a Senior Associate at COWS. In that capacity over roughly 6 years I worked with and advised a range of stakeholders in the trucking industry and government on issues of regulation and efficiency in the industry. In particular I have served as an expert for the State Smart Transportation Initiative (a group of state DOT Secretaries interested in "best practices" for state transportation agencies) on issues related to the work of truckers and trucking operations.

In the course of my work with COWS I developed a policy proposal to improve the efficiency of freight movements in urban areas to meet the interests of a range of stakeholders. This policy proposal aims at public investments to facilitate more efficient use of the labor and time of truckers. Over the past 5 years I have been invited to present this policy proposal to industry and government groups, including the North American Council on Freight Efficiency and more than one dozen State Transportation Secretaries. Recently a group of four policy centers at the University of Wisconsin has received funding to explore this idea for the movement of food freight in the Upper Midwest from the US Department of Agriculture. I serve as an adviser to that group. I have also provided advice on trucking in a number stakeholder processes to private firms and public agencies, including the Chicago Metropolitan Agency for Planning.

Currently I work full time at the University of Pennsylvania in several positions. I am Lecturer in the Department of Sociology. I am also a Robert and Penny Fox Family Pavilion Scholar and a Senior Fellow at the Kleinman Center for Energy Policy. In the latter position I serve as an expert on the trucking industry for the Center in its work on energy efficiency. Finally, I am also currently working for Penn's Wharton School of Business to develop a truck innovation research consortium across the university and housed by Wharton.

In terms of the specific task at hand of assessing the use of independent contractors by firms relative to the questions outlined above, I am uniquely qualified. In April of 2016, I published a book, entitled "The Big Rig: Trucking and the Decline of the American Dream" with the University of California Press, which is the only in-depth study of independent contractors in long-haul trucking since deregulation of the industry in the late 1970s and the development of the current labor practices of the industry. To my knowledge I have reviewed the methodologies and results of every major academic work and every important public or publicly available industry report on the work lives of long-haul truck drivers published since the mid-1970s.

I have attached to this report a synopsis of my qualifications, which includes my educational background, all my publications in the last 10 years, expert testimony I have provided in the last 4 years, and my compensation paid for this report.

3. Documents Reviewed for this Report

Case specific documents I have reviewed include:

Deposition of Matthew T. Douglass Deposition of David J. Chesterman Deposition of Helen Blakley Deposition of William Blakley Deposition of Kimberly Smith CLD00001-3361 P000026-57 P000449-51 P000453-6 P000058-73 - First Amended Individual, Collective, and Class Action Civil Complaint - Answer, Affirmative Defenses, And Counterclaim to Plaintiffs' First Amended Complaint and Demand for Jury Trial - Defendants' Response to Plaintiff's Requests for Admission to Celadon Group Inc. and Celadon Trucking Service, Inc. - Defendant's Answers to Plaintiffs' First Set of Interrogatories to Celadon Group, Inc. and Celadon Trucking Services, Inc. - Defendants' Answers to Plaintiffs First Set of Interrogatories to Quality Companies, LLC and Quality Equipment Leasing, LLC.

- Plaintiff Helen Blakley's Responses to Defendant's First Interrogatories

- Plaintiff William Blakley's Responses to Defendant's First Interrogatories

- Plaintiff Kimberly Smith's Responses to Defendant's First Interrogatories

4. Overview of the Findings

With regard to the purpose of the report as outlined above, I will show that:

- While Celadon lease-operators may have some nominal abilities to make decisions regarding the work they do, all indications in the available data clearly suggest Celadon utilizes the typical lease-operator labor management model for over-the-road truckload carriers. That labor management model is fundamentally incompatible with the exercise of meaningful control by independent contractors in choosing the work they do. As I will explain below, meaningful control by Celadon lease-operators in making decisions relating to their work would have substantial negative impacts on the operational goals and the profitability of Celadon. As a result, like similar carriers and as indicated by the depositions of Celadon's managers, Celadon clearly retains and exercises the ability to control work performed by its lease-operators.
- Celadon staff actively manage Celadon lease-operators as if they were employees, regularly monitoring their activity in real time. There are also clear indications that Celadon coordinates the labor of the "independent contractors" with other workers in order to achieve its goals, most importantly, ensuring on-time deliveries of loads. From an economic perspective, the use and management of Celadon lease-operators is a central part of Celadon's core business and thoroughly integrated in the most critical processes of that business (e.g. training, load assignment, dispatching) with the labor of employees. Therefore, Celadon's use of its employees and leaseoperators in daily operations is virtually indistinguishable as they carry out the core business of Celadon. This is clearly, *from an economic perspective*, a case of "making" and not "buying" a particular service.
- Celadon lease-operators do not and cannot independently perform many of the essential tasks required to provide trucking services to customers. In other words, they simply could not move freight without Celadon. They do not find loads, engage with customers to negotiate prices for their services, provide meaningful capital investments or do a wide range of other kinds of work that is required for participation in the business of trucking, including the most fundamental requirement of obtaining the legal authority to provide freight services.
- Within the type of operation Celadon operates, the decisions of leaseoperators, other than the decision about how many days to stay on the road at a time, will have only marginal impact on their earnings. And almost none of the decisions they make differ in any meaningful way from the decisions available to employees. Again, this is not surprising given the business of Celadon, as I will explain below.

From the perspective of economics or organizational theory, the facts in any one of the areas above shows that Celadon lease-operators are not running a small business. When taken together and put into the proper context, it is clear that the best way to think about

the similarities and differences (or lack thereof) between Celadon lease-operators and Celadon employees is as two sets of employees performing the same work but under different compensation schemes – essentially lease-operators are subject to having their pay reduced by the fixed and variable costs of the equipment they operate and employees are not. Importantly, while lease-operators are subject to having their pay reduced by such amounts, they have little to no control in reducing such costs. Despite the terms applied by Celadon to their situation and behavior, Celadon lease-operators clearly behave and are treated like employee truck drivers.

5. Glossary of Terms As Used in this Report¹

Brokerage – A business that arranges freight transportation by motor carriers but does not transport freight itself or take legal possession of freight.

Dedicated – Freight service organized to serve the regular shipping needs of a particular, usually high-volume customer. Dedicated service can entail meeting special requirements of shippers but almost always involves significant numbers of loads moving from particular origins and destinations. Dedicated service is typically a long-term (multi-year) relationship and motor carriers often differentiate within their own fleet drivers assigned to service a dedicated account.

Drop and Hook – A load assignment to pick up and drop off a pre-loaded trailer (i.e. the driver does not have to wait while the freight is loaded into a trailer, known as "live-loading" or "live-unloading")

Dry Van – A standard non-refrigerated "box" trailer. The most common trailer in the industry used to carry a majority of freight. Freight in a dry van is usually on pallets or in boxes.

Dry or Dry Van Freight – Anything that can be hauled in a dry van, but is often hauled in refrigerated trailers.

Federal Motor Carrier Safety Administration (FMCSA) – The federal agency responsible for most motor carrier regulation.

For-Hire Motor Carrier (For-hire Carrier) – An individual or firm with an operating authority to offer freight transportation services to the public for a fee.

Hours of Service (HOS) – The federally mandated rules set by the Federal Motor Carrier Safety Administration (FMCSA) that regulate, among other things, how many hours drivers may drive and work over certain periods of time.

Independent Owner-Operator – The owner of a for-hire motor carrier who also works driving equipment they control. Independent owner-operators are responsible for all of the fixed and variable expenses of their operation and operate under their own legal authority to provide freight services to customers (which could include shippers, freight brokers or other motor carriers).

Lease-operator – A driver who is responsible for a large portion of the fixed and operating expenses of their tractor and works under contract for a motor carrier. Lease-operators may own trailers, but typically do not. Lease-operators operate under the

¹ The meaning and usage of many common terms varies significantly across the industry. The definitions given here are intended only to help the reader understand how I will use these terms in this report, which may differ from specific legal or regulatory definitions and/or informal usage within particular firms or industry segments.

authority of a motor carrier which typically finds and prices all of the loads hauled by the lease-operator.

Less-than-truckload (LTL) – Freight service moving shipments generally less than 10,000 pounds. These services often consolidate multiple shipments into a single truckload size shipment for long-distance transport and then break consolidated shipments down again for final delivery. Consolidating and breaking down of LTL shipments often happens at motor carrier-controlled terminals.

Less-than-truckload Carrier (LTL Carrier) – A for-hire motor carrier providing LTL service.

Live Load/Live Unload – When a driver must wait while freight is loaded into or unloaded from the trailer attached to their tractor.

Local – Freight services less than 150 miles from origin to destination.

Motor Carrier – Generally refers to a commercial vehicle transporting freight or passengers. For the purposes of this report I will use the term in the common usage meaning a motor carrier with an operating authority or motor carrier (MC) # issued by the FMCSA.

Operating Authority – The federally-mandated license required for a motor carrier to provide for-hire interstate freight services.

Parcel Service – Freight services that move packages or individual shipments of freight weighing roughly 150 pounds or less (e.g. UPS or Fed-Ex).

Private Carrier – A trucking fleet that hauls goods that it produces or sells. A private carrier provides "in-house" services and does not require an operating authority.

Over-the-road (OTR) or Long-haul – Any freight services that transport freight more than 150 miles from origin to destination.

Refrigerated (also Reefer or Temperature-Controlled) – Used to refer to freight that must be transported at a particular temperature. It can also refer to van trailers used to haul that freight or firms that haul it (Refrigerated Carriers). Refrigerated vans (a.k.a. reefers) are often used to carry dry freight.

Segment (or Industry Segment) – A portion of the trucking industry distinguished by freight or service type. There are numerous recognized segments based on whether carriers are private or for-hire, size of shipments, distance goods are moved, the type of trailer required, etc. The most common segment distinctions would include, among others: private/for-hire, truckload/less-than-truckload, OTR/local. Within the OTR for-hire truckload segment are segments defined by the type of trailer used to haul freight (e.g. dry van, refrigerated, flatbed, tanker, etc.). Segments sometimes have relatively

distinct business models for firms and different labor market and operational characteristics relative to drivers.

Truckload (TL) – For-hire freight service that moves shipments larger than 10,000 pounds, generally large enough to fill a truck to capacity either based on legal allowable weight or trailer volume. Truckload freight generally moves "point-to-point" from shipper to consignee (receiver) without passing through a motor carrier facility.

Truckload Carrier (TL Carrier) – A for-hire motor carrier providing truckload service.

6. Important Notes on the Nature of the Analysis

A. This Report is Not Intended as Legal Analysis

The similarities and differences among truck drivers working under different employment arrangements and why workers choose those different employment arrangements or start their own firms have been my primary research topics for the last 12 years. Over that time, I have performed extensive comparisons between employee truck drivers, leaseoperators and independent owner-operators on all aspects of their work and compensation using data ranging from in-depth interviews to surveys to industry-level statistics. Whether workers are treated or classified by employers as employees or independent contractors has important legal and regulatory influences and consequences. These influences and consequences have necessarily been fundamental considerations in my research. However, no statement in this report should be understood as intended to make any assertion about the proper or improper legal or regulatory classification of workers. I have no formal training in the law and the analysis contained in this report is intended only to assist the reader in understanding the economics and organization of work and labor market behavior of truck drivers under various employment arrangements and management systems, not to assert how those workers should be understood relative to the requirements of any particular law or regulation.

B. Distinguishing between Possible and Likely Outcomes of Employment and Work Arrangements

At several points in his deposition Matthew Douglass makes a number of claims about behaviors or possible circumstances such as lease-operators soliciting freight (Douglass 87:8-9), leasing multiple trucks (Douglass 85:24-86:2; 86:11-3), hiring other drivers (Douglass 85:3-7; 86:11-3) or operating paid off trucks (Douglass 104:11-15). It is important in any social scientific analysis of work and employment to recognize that work activities and relationships are heavily structured by workplace rules, contracts, regulations, patterns of market interactions, etc. This creates relatively stable and predictable outcomes. Indeed, the goal of extensive day-to-day private and public efforts is to make certain outcomes in workplaces (e.g. profit or safe work environments) as close to a certainty as possible. However, as in virtually any economic behavior, there will be a norm and variation - to a small or large degree - from that norm. Often times in the presentation of lease-operator arrangements, such as presented in Mr. Douglass' deposition, there is a strong focus on the *possibility*, either hypothetical or illustrated by anecdote, of certain behaviors relative to questions at hand. For example, it may be that a Celadon driver is not prohibited by contract from leasing multiple trucks and that several drivers have in the last decade or so actually done so and hired other drivers.² While such behaviors may be *possible* at a firm like Celadon, they are also *extremely unlikely*.

² Celadon further does not provide a meaningful platform to enable drivers to hire and lease other trucks, as even in such a hypothetical, each truck would be managed by a Celadon driver manager with loads assigned to the driver exclusively by Celadon.

From a social scientific perspective, taking into account likelihood - or how common a behavior and outcome is - is critically important when examining the economics of work and employment for two main reasons: 1) we are generally concerned with what the typical worker (e.g. average, median) in a particular circumstance experiences because this tends to be, by design, what the vast majority of workers in that circumstance experience. In most cases employers and regulators deliberately try to create recurring norms of behavior rather than to prevent or encourage extremely unlikely behavior work systems are generally oriented toward shaping the most prevalent behaviors toward greater productivity or away from common problematic behaviors (e.g. product theft), thus resulting in relatively uniform outcomes (i.e. employers try to "standardize"); 2) nearly all common analytical and methodological tools available to social scientists become unreliable or simply useless when applied to statistical outliers - meaning that we generally have much greater confidence in explaining why 900 out of 1000 workers do x while 99 out of the 1000 do y. We almost never have enough or good enough data to offer analysis of the 1 worker out of 1000 doing z (e.g. a lease-operator owning multiple trucks and employing other drivers).

For these reasons this report focuses on explaining the experiences and outcomes of workers relevant to the issues at hand, while noting exceptions as they are indicated by case-related documents and my expertise on these topics.

C. Understanding the Situation of Lease-Operators as a Relationship

It is critical to recognize from the perspective of economics and organizational theory the relationship at issue here. Celadon structures the economics of its lease-operators. While Mr. Douglass states in his deposition that lease-operators are "running" their own businesses (Douglass 76:22-77:1), nowhere is it claimed that lease-operators are creating their own businesses according to their own plans and then negotiating with Celadon to sell the firm services. Celadon sets all of the important terms of the relationship: the pay rates per mile or percentage per load (CLD000341; Douglass 87:19-88:7), what fuel surcharges will be based on (CLD00341), pay for unloading trailers (CLD000192), etc. For lease-operators, Celadon provides the leasing company for them to obtain trucks, which provides relatively uniform lease agreements. These agreements effectively restrict drivers while working for Celadon to hauling freight only for Celadon. (See, e.g., CLD002468, 002486, 002505, 002523, 002541, 002559). The processes for drivers getting trained to work for Celadon and leasing trucks are intertwined and drivers get their truck and get hired by Celadon within the span of a few days (Smith 118:12-25). These processes are structured by Celadon with no meaningful input from drivers as to how, or the terms under which, they will unfold. Celadon also ultimately controls interactions to solicit freight and price services with customers (Douglass 89:4-23). Within the resulting arrangements lease-operators then carry out their work in Celadon's name. Therefore, understanding what Celadon needs and wants out of lease-operators is critical - one cannot understand the nature of the lease-operator/Celadon relationship by only looking at one side of it. It is necessary to understand how the labor of leaseoperators fits into Celadon's business model and how the interests and behavior of leaseoperators might affect the business of Celadon and vice versa.

7. Overview of the Lease-operator Labor Management Model

Lease-operators at truckload companies are frequently portrayed by motor carriers as running their own trucking businesses (*See, e.g.* Douglass 76; 77; 78; 79; 86). In fact, these workers do little more than pick up freight with a truck at a particular location and deliver it to another location within a specified period of time, at a motor carrier's direction. This does not constitute a trucking business, but rather the work of a truck driver. If there is a general model of a trucking business, it certainly also involves - at the very least - finding loads, negotiating prices with customers and having the legal authority to operate as a for-hire motor carrier. Profitably engaging in these activities requires substantial knowledge and assets. In particular, meeting customer demands for on-time delivery, pricing services, tracking market rates, tracking costs, sourcing equipment, fuel and maintenance services, dealing with training, safety, insurance, and regulatory requirements of all sorts, are all essential tasks for any trucking business. In the largest segments of the industry these tasks are so extensive they preclude independent owner-operator firms almost entirely.

In order to understand how lease-operators differ from for-hire motor carriers, it is important that we understand the work that lease-operators do relative to the business activities of for-hire motor carriers. The lease-operator model employed by Celadon is one of the most common labor management systems used by for-hire motor carriers in the truckload industry. Estimates of the number of long-haul truck drivers working as lease-operators vary and the actual number varies significantly in response to economic conditions, but estimates tend to suggest that in recent years there have been between 150,000-250,000 truckers working in this arrangement. Drivers in this arrangement likely compose somewhere around one-third of the total labor supply in the long-haul truckload segment. While these arrangements are often portrayed as a continuation of the long-standing tradition of independent owner-operators in the trucking industry, there are fundamental differences between independent owner-operators and lease-operators. In fact, the lease-operator model as it is employed by carriers today is a labor management strategy of relatively recent origin and is the result of a combination of the market conditions for motor carriers produced after deregulation and a remarkable transformation of the trucking industry's labor markets.³

To understand the lease-operator labor management model, we must take into account the markets for trucking services and how those affect what forms of organizing those services are profitable. In order to understand that relative to labor management models it is necessary to outline a brief history of the trucking industry, which will explain where firms like Celadon came from and the way lease-operators fit into their overall business.

A. Deregulation of the Industry and Labor

The trucking industry used to be subject to extensive economic regulation that limited both price competition and market entry by new firms. Prior to deregulation of the

³ Viscelli, Steve. 2016. *The Big Rig: Trucking and the Decline of the American Dream*. Berkeley: University of California Press.

industry beginning in the late 1970s, large trucking firms were very profitable and truck drivers, most of whom were members of the International Brotherhood of Teamsters, were among the nation's highest paid blue-collar workers. During regulation, nationwide collective bargaining developed and for several decades wages were taken out of competition and working conditions standardized across the nation. In short, trucking firms in most segments of the industry did not compete based on how much they paid workers or basic working conditions (e.g. how often drivers slept in their trucks).⁴

Regulation was enacted in 1935 in order to combat the industry's central tendency toward excessive competition. In terms of economic theory several factors cause this tendency. First, trucking lacks asset specificity: the capital investments required for trucking are not generally tailored to narrow or specific product markets, and trucks are, for the most part, interchangeable and readily available. This means that the barriers to entry into the industry are low, so when trucking is profitable new firms are able to enter a market and existing firms can increase capacity quickly.

Second, trucking is a derived-demand industry. That is, what trucking produces is entirely dependent on the immediate demand for its services from customers. Trucking firms cannot store what they produce for later sale. When demand slackens, some portion of equipment, facilities, and labor will be immediately underutilized. When that happens firms may have strong incentives to "keep the wheels rolling" by cutting the rate they charge customers, even taking a loss on individual loads to maintain market share or generate revenue to cover fixed expenses and survive down periods.

What these characteristics of the industry mean is that trucking markets can be very volatile and over the long-term there is significant risk but very little, *if any*, profit to be made by simply owning trucks as an asset – that's why most truckload firms today want to shift the costs and liability of owning trucks to workers.

Deregulation at the end of the 1970s plunged the industry into chaos as excessive competition immediately became the norm. Over several decades the vast majority of the leading less-than-truckload firms in the industry were driven out of business. Intense competition through cost cutting brought lower wages, greater amounts of unpaid work, and less desirable working conditions for truckers. Total employee compensation per mile, including benefits, fell by 44 percent in long-haul trucking from 1977 to 1987.⁵ Within two decades of deregulation conditions had deteriorated so much that Dr. Michael Belzer, a leading economist of the industry, characterized long-haul trucks as "sweatshops on wheels."⁶ These conditions upended labor-capital relations in the industry.

B. Owner-Operators in Long-Haul Trucking

⁴ Ibid.

⁵ Corsi, Thomas M., and Joseph R. Stowers. 1991. "Effects of a Deregulated Environment on Motor Carriers: A Systematic Multi-Segment Analysis." *Transportation Journal* 30: 4-28.

⁶ Belzer, Michael. 2000. *Sweatshops on Wheels: Winners and Losers in Trucking Deregulation*. New York: Oxford University Press.

Immediately after deregulation, trucking firms needed less expensive labor and turned to existing independent owner-operators, who worked primarily in agricultural hauling, which was never regulated, in order to shed the costs of expensive, inflexible unionized labor. Firms also began using owner-operators within their own fleet as a way to avoid the risk of owning trucks under chaotic and hyper-competitive market conditions. In the first years after deregulation using owner-operators was a survival strategy for many carriers.⁷

But the shift to owner-operator labor was short-lived. Despite carrier interest, by the mid-1980s, this labor supply was declining rapidly as intense competition and plummeting freight rates bankrupted many of them. Soon the most profitable for-hire motor carriers were truckload firms making their profits through more efficient use of non-union employee drivers and sending these drivers point-to-point across large geographical areas. Owner-operators were being squeezed by declining rates and were not investing in their equipment, which caused them to have poor customer service and a loss of productivity. In contrast the high asset utilization rates achieved by profitable truckload companies that emerged after deregulation required that trucks be dependable and that drivers accept nearly every load that was assigned to them by the increasingly sophisticated load planning systems that were being developed. Owner-operators, while appealing in terms of low pay and reducing capital costs and the likelihood of unionization, were seen as unwilling or unable to submit to the dispatching requirements and achieve the equipment reliability required by the new breed of truckload firms - like Celadon - that came to dominate long-haul trucking. Within just a few years, the number of loads hauled by owner-operators dropped dramatically.⁸

From the late-1980's to the mid-1990s, the leading truckload carriers generally favored non-union employee labor. But continually deteriorating pay and working conditions were causing increasingly high levels of employee turnover and associated costs. In an attempt to retain drivers longer and gain the cost advantages of independent owneroperators, carriers began adopting a new model in the mid-1990s. Independent owneroperators clearly did not fit with the organizational need carriers had for control and reliability. So firms began consciously transforming the labor market institutions around contracting, to create a new kind of owner-operator that would fit their needs: the leaseoperator.⁹

Choosing when to work and what loads to haul, let alone choosing loads based on how much they pay - a regular practice of owner-operators historically - is fundamentally at odds with the way the dominant truckload firms, such as Celadon, have sought efficiency gains and profit since deregulation. Carriers need owner-operators that see taking

⁷ See Viscelli, 2016 and Nickerson, Jack A., and Brian B. Silverman. "Why Firms Want to Organize Efficiently and What Keeps Them from Doing So: Inappropriate Governance, Performance, and Adaptation in a Deregulated Industry." Administrative Science Quarterly 48 (2003):433-65.

⁸ Corsi, Thomas M., and Joseph R. Stowers. 1991. "Effects of a Deregulated Environment on Motor Carriers: A Systematic Multi-Segment Analysis." *Transportation Journal* 30: 4-28. ⁹ Viscelli, 2016.

whatever load is offered to them not as companies telling them what to do, but as doing what it takes to meet the needs of their customers and a smart way to "run their own small business."

Through various individual and industry-wide recruitment and informational efforts (e.g. trucking newspapers), truckload firms created a large pool of lease-operators very different from previous owner-operators.¹⁰ In the mid-70's a majority of all owner-operators were union members in many segments; virtually none are today.¹¹ Just before deregulation 33% of all owner-operators owned more than one truck and 16% of all owner-operators owned more than 5 trucks.¹² By 1997 less than 14% of all owner-operators owned more than 5 trucks.¹³ There have not been representative surveys done since that time that could accurately estimate the number of lease-operators that own more than one truck, but I suspect it is likely to be less than 1%. Perhaps most importantly, by 1997 90% of lease-operators received their payments through a permanent lease to haul freight exclusively for a single company.¹⁴ In contrast, only 50% of all owner-operators were under leases of 30 days or more in the mid-1970's and most of these drivers retained the right to haul for other carriers.¹⁵

Today, there are very few independent owner-operators in long-haul trucking, those truckers we might consider as owning and operating their own trucking business. These truckers are distinguished on numerous dimensions from lease-operators but primarily by the fact that they:

- must operate under their own hauling authorities (they are in fact single truck or very small *for-hire motor carriers*, with the legal authority to haul freight);

deal directly with customers in finding and pricing loads;

- set the rates they charge to customers based on market conditions both relative to their costs and competition;

- choose the freight they haul based on what it pays;

- tend to serve predominately small shippers or concentrate on highly specialized freight that requires specialized knowledge or equipment (e.g. hauling heavy equipment) that does not provide a return to the economies of scale crucial to large truckload firms.

While independent owner-operators are scarce today, lease-operators are the preferred labor for truckload carriers. Nearly all large truckload firms today use lease-operators to

¹⁰ In this paragraph the term owner-operator is used because due to different survey methodologies and the changing nature of owner-operator/motor carrier relationships after the mid-70s, independent owner-operators and lease-operators were not always clearly distinguished in research.

¹¹ Wyckoff, Daryl D. 1979. *Truck Drivers in America*. Lexington, MA: Lexington Books.

¹² Agar, Michael. 1986. *Independents Declared: The Dilemmas of Independent Trucking*. Washington, DC: Smithsonian Institution Press.

 ¹³ Belman, Dale L., Kristen A. Monaco, and Taggert J. Brooks. 2005. Sailors on the Concrete Sea: A Protrait of Truck Drivers' Work and Lives. East Lansing, MI: Michigan State University Press.
 ¹⁴ H. J.

¹⁴₁₅ Ibid.

¹⁵ Wyckoff, 1979; Agar, 1986.

haul a significant amount of their freight. Quite simply, lease-operators are a critical source of cheap and flexible labor.

Companies gain essential advantages by using lease-operators and how well firms execute the lease-operator labor strategy has a significant role in determining their profitability. This is suggested by Celadon's corporate filings, which indicate intent to increase the use of lease-operators.¹⁶ Because lease-operators own or lease a truck and pay for fuel, maintenance, and insurance, firms can potentially shift a significant amount of capital and operating costs to them, translating into much lower overall costs per unit of work. And, though lease-operators are often nominally free to choose what loads they haul, they are generally under *much greater* pressure than employees to accept whatever work is offered to them and to spend more days working because they need to work many more hours per day and days per year to meet fixed expenses and then earn take-home pay at levels even close to what they would earn as employees.¹⁷

C. The Lease-Operator Model as one Component of a Coordinated Labor Supply and Management System

The lease-operator model is one component of the overall labor recruitment and management strategy of Celadon. It is important to understand how it fits with the other components.

Long-haul truckload firms offer relatively low wages and poor working conditions relative to other segments where drivers could work. As indicated by its internal reports Celadon has difficulty recruiting or retaining sufficient numbers of experienced truck drivers. Overall turnover at Celadon can be well over 100% annually and has been a "chronic" problem among lease-operators (*See, e.g.* CLD003338). As a result, Celadon relies heavily on inexperienced labor (CLD003308). Celadon operates its own trucking school and hires drivers with no previous experience (CLD003247).¹⁸ Celadon's school charges workers for their training if they do not work for the company for a year. In Celadon's Quarterly report, the company noted that its "Quality Driving Training" Program would reduce turnover by ensuring that new drivers "are bound by contract for approximately 1 year" (CLD003247; CLD003278).

While small- and medium-sized firms are unlikely to hire drivers with less than 1 year of experience due to the cost of training and insuring them and their lower productivity, the largest firms, like Celadon, have established CDL schools and training programs that allow them to hire drivers with no experience at all. Operating a training program is a major undertaking. For the cost of recruiting inexperienced drivers, firms get what is can essentially a captive labor supply. It is very difficult for new drivers to switch jobs in their first year – the companies that hire drivers with less than a year experience almost

¹⁶ Celadon Group Inc. 2016. Form 10-Q. retrieved at:

http://hsprod.investis.com/shared/v2/irwizard/sec_item_new.jsp?epic=celadon&ipage=11222793&DSEQ= &SEQ=&SQDESC=. Accessed 12/14/2016.

¹⁷ See Viscelli, 2016.

¹⁸ <u>http://www.celadondrivingacademy.com/</u>. Accessed 1/18/2017.

all offer similar work and pay. Further, the use of contracts that require workers to pay back training costs effectively discourage workers from quitting. Firms typically employ training contracts that charge students anywhere from \$3,000-4,500 at high interest if those students do not work for the company for a year. Economists Hoffman and Burks concluded that such contracts reduced quitting significantly and that without these contracts employing inexperienced drivers can be unprofitable.¹⁹

Recruiting and training lease-operators is also a significant expense. Celadon spends considerable amounts on recruitment, as its internal reports state:

"Increased volumes of hires resulted in significantly higher travel and hotel costs. An additional factor driving this increase is a delay in obtaining lease equipment due to Quality's customer base expansion. Per driver recruiting cost exceeded \$2835 for the quarter (excluding administrative wages)" (CLD003310; *also see* CLD003330).

Some truckload firms pay higher rates, have more experienced drivers and save on training, recruitment, insurance and other costs. Instead of paying high wages, firms like Celadon employ a number of coordinated strategies to delay worker exit without raising wages. Once workers can leave without penalty resulting from training contracts and gain more experience options at other truckload, local, niche, or private carriers with better work routines and pay begin to open up. To retain these more experienced drivers, low-pay carriers, trucking media, and third-party "business consultants" convince workers to become lease-operators, promising that lease-operating will be financially rewarding and give workers additional control over working conditions. But leaseoperating ends up being much worse for most truckers than being an employee. Because lease-operating is a way to convince more experienced drivers to stay at lower-paying companies – temporarily at least – it can come at a significant cost to those drivers. Exact estimates are difficult to calculate without specific data, but, on average, it is likely that lease-operators at truckload firms like Celadon earn somewhere between 15 and 25% less per unit of work than they could at comparable firms as employees and more than 50% less per unit of work than they could at private firms. Simply put, the lease-operator labor management model allows carriers to pay the most productive drivers far less than they are worth for their labor while exercising the same, sometimes more, control over them than employee drivers.²⁰

 ¹⁹ Hoffman, Mitchell and Burks, Stephen V. 2013. Training Contracts, Worker Overconfidence, and the Provision of Firm-Sponsored General Training. Available at: http://dx.doi.org/10.2139/ssrn.2220043.
 ²⁰ See Viscelli, 2016.

8. The Lease-operator Labor Management Model at Celadon

The documents and depositions in this case and publicly available information on Celadon all evidence that Celadon operates a typical lease-operator labor management system as outlined above. Again, it is critical to understand this system as one component in the overall operations of the firm.

While the firm has several dedicated fleets and smaller operations it has acquired over time, the core business of Celadon is hauling truckload freight. In simple terms, Celadon's profitability rests on two core activities: 1) sales activities to find the highest revenue freight possible to haul; 2) operations oriented to deliver that freight at the lowest possible cost while fulfilling contracts and satisfying customers.

As the depositions and the public corporate filings make clear, the process of finding freight is a sophisticated one requiring substantial staffing. Celadon staff uses the existing information of the firm and relationships with customers to find the highest revenue freight that it can, concentrating on particular "lanes" and freight types.²¹ Sales and operations work hand in glove to produce the best overall outcome they can in terms of profit for Celadon. In particular, sales needs to help "balance" Celadon's operations. It does this by looking for the most profitable freight based on predictions of where Celadon trucks – company and lease-operator – will be. The sales staff then makes commitments to Celadon's customers based on predictions of the operational needs and capacity of the company (Douglass 9:10-13:4). In other words, the norm is for sales to make contracts to haul freight at a particular price with a given set of characteristics and requirements without any input from or agreement with the drivers - company or leaseoperators – that will haul it. Celadon, in conducting the sales side of its business, does not distinguish between the freight that will be hauled by lease-operators and employee drivers (Douglass 10:12-23). This is a future concern dealt with by the planning and dispatching staff in operations. What this means is that Celadon conducts all of this important work with an eye toward its own interests. It is then the operations side of the business that is charged with producing the outcomes promised – the delivering of freight from and to particular locations at or within specified times - to Celadon's customers as efficiently and profitably as possible. That work will be done by Celadon's drivers, whether lease-operators or company.

A. Truck Drivers' Work at Celadon

Long-haul truckload firms require generally very long periods spent away from home on the road, where drivers are required to sleep in the truck, and typically provide well below average pay compared with other segments of the trucking industry with which they must compete. In terms of these key issues, however, Celadon is noticeably worse than the typical firm in the dry van segment.

²¹ Celadon Group Inc. 2016. *Annual Report*. Pg. 4. Retrieved: <u>http://quote.morningstar.com/stock-filing/Annual-Report/2016/6/30/t.aspx?t=:CGI&ft=10-K&d=274f467d4434686857ec32e325a7d57e</u>. Accessed 12/14/2016.

Long periods away from home have clearly been established as one of the most important factors in high turnover rates.²² Celadon has a less generous hometime policy for employee drivers, giving 2 days of home after 14 days on the road.²³ The norm in the truckload industry for large firms is 1 day at home for every 6 on the road. The most common scheduling of this is for drivers to work roughly 12 days and then have 2 days at home.²⁴

Celadon also compares poorly when it comes to pay. On its website Celadon reports driver starting pay at 33¢ per mile for drivers with less than 3 years and 34¢ per mile for drivers with more than 3 years experience. Drivers apparently get 1 additional cent per mile after every 120,000 miles driven for the company, likely a little more than one year of driving.²⁵ Given its turnover rates, it is highly likely that the typical employee driver at Celadon has less than a year of experience and less than a year of tenure with the company, which means the typical driver likely earns 33¢. Base mileage pay typically works out to more than 90% of all pay at companies like Celadon. The rest of a driver's pay comes from a mix of bonuses and accessory pay, which can be for things like extra stops, unloading trailers, etc.²⁶ Celadon appears to have had several bonus programs in recent years (CLD003287; CLD003308; CLD003338)

Celadon's pay rates are well below average for the dry van segment. Not long after the recovery from the Great Recession, dry van driver pay rates began to increase. In 2011, average pay in the segment, according to the best industry benchmarking, was 36¢ per mile and there has been strong upward pressure on wages over the last 5 years. By 2013 dry van driver pay rates averaged over 37¢ per mile.²⁷ Celadon's current pay offerings per mile are 15% or more below average for other firms in the dry van segment. At the same time, despite keeping its drivers out on the road for longer periods of time, Celadon has for several years typically averaged less than 2200 miles per week per seated company tractor, sometimes significantly less. (CLD003360) While exact estimates of annual salaries are not possible with the mileage and pay data produced thus far in the case, it is unlikely with these mileages and pay rates that the typical Celadon employee driver earns more than \$40,000 a year. To put that in perspective, the average dry van driver earned over \$47,500 in 2013. And employee truck drivers for private carriers earned more than \$73,500 in 2013.²⁸

²² See Haskel D. Harrison and Julianne Pierce. 2009. "Examining Driver Turnover and Retention in the Trucking Industry." Center for Intermodal Freight Transportation Studies: Memphis and Nashville, Tennessee.

²³ As reported on Celadon's website: <u>http://www.driveceladon.com/companydriver/</u>. Accessed 12/7/2016.

²⁴ See ATA. 2012. Benchmarking Guide for Driver Recruitment & Retention. American Trucking Associations: Arlington, VA.

²⁵ See <u>http://www.driveceladon.com/companydriver/</u>. Accessed 11/24/2016.

²⁶ See <u>http://www.driveceladon.com/companydriver/</u>. Accessed 1/20/2017.

²⁷ These data come from the National Transportation Institute (NTI). NTI is the leading industry benchmarking firm and conducts quarterly benchmarking of wages at more than 300 medium and large trucking firms. NTI regularly presents its benchmarking data at industry roundtables and conferences. See Klemp, Gordon. 2014. "2013 – The Year That Changed Driver Compensation Forever." Presented at Recruitment and Retention Conference, 2014. Accessed 9/15/2015 at: www.truckload.org.
²⁸ Ibid.

As a result of its poor pay and home time, Celadon cannot attract sufficient numbers of experienced drivers as employees. Unfortunately, workers new to the industry have incredibly high turnover rates and are typically not that profitable to employ.²⁹ There are costs associated with recruitment and training as well as the time company trucks (a substantial capital investment) sit idle without drivers. Inexperienced drivers are also less safe, leading to high insurance, accident, damage and maintenance costs (See e.g. CLD003309). Beyond this is the effect of driver experience on productivity, which is probably the largest single cost of inexperienced drivers. Inexperienced drivers simply drive a lot less than experienced drivers, whether or not those experienced drivers are lease-operators or employees drivers (though experienced lease-operators typically drive significantly more miles than experienced employees). At truckload firms drivers increase the number of paid miles they average per week significantly over the first 6 months of driving as they learn how to efficiently plan their time, manage hours of service, and develop the physical and mental stamina to work long hours. After that point drivers typically continue to increase their productivity modestly until, usually after a year or two of total driving experience, they reach maximum productivity.³⁰

It is critical for a carrier like Celadon to retain for as long as possible more experienced, and thus productive, drivers in order to be profitable. One of the most important ways for low-paying firms to do this is to convince drivers to work as lease-operators.³¹ Celadon uses the same basic arguments as other firms in the truckload segment to get workers to work as lease-operators. They promise them that they will be their own boss and make more money than employee drivers.³² As is the case across the truckload industry, neither of these promises are likely to be realized by lease-operators at Celadon. Giving drivers meaningful control over the things that really matter (i.e. load selection, negotiation of load prices) is simply not feasible given the way that firms like Celadon do business. And lease-operators almost always make significantly less than they would as employees for the same work.³³ From the records produced by Celadon, it is not uncommon for Celadon lease operators to end the week in *debt* to Celadon (meaning their net pay was negative) (See, e.g. CLD000301; 000304; 000305; 000307).

B. How Truck Drivers are Managed at Celadon

Truck drivers, whether employees or lease-operators, at a firm like Celadon make decisions about when and how to do their work. And those decisions impact how much money they make. But that, in and of itself, is not unique. Virtually all employees of all

Economics Experiments at a Large Motor Carrier: The Context and Design of the Truckers and Turnover Project." IZA Discussion Paper No. 2789 (May). Bonn, Germany: IZA, 2007. Also see Viscelli, 2016. ³¹ Viscelli, 2016.

³² See https://truckdriverjobsinamerica.com/trucking-companies/celadon-leasepurchase/jobs/CeladonTruckingServiceshasleasepurchasepositionsavailablenowforqualifieddriversintheMo untPleasantMIarea+58335cb6cffe9cf931c51515/#tab-basicInfo. Accessed 12/14/2016. ³³ Viscelli, 2016.

²⁹ Hoffman, Mitchell and Burks, Stephen V. 2013. Training Contracts, Worker Overconfidence, and the Provision of Firm-Sponsored General Training. Available at: http://dx.doi.org/10.2139/ssrn.2220043 ³⁰ See Burks, S.V., J. Carpenter, L. Gotte, K. Monaco, K. Porter, and A. Rustichini. "Using Behavioral

types in all industries are given authority to make decisions at work and often times those decisions have direct economic consequences for those workers. Research has demonstrated for decades that even the most unskilled workers, such as those at fast food restaurants, are constantly making meaningful decisions at work about what to do, when and how – decisions that affect profitability. Of course, it is in the interest of employers (and properly incentivized managers) to get workers to make decisions that produce more profit. Across different kinds of work and businesses there is a range of different management approaches to this problem. Economists, sociologists and management scholars all generally understand the key dimension of variation to be the degree to which workers decisions need to be immediately constrained and monitored by machine and/or a manager (we could also describe this as the degree to which a worker is "self-directed" in their immediate work activity). On one side of this range are coercive management systems, on the other are consensual management systems. In general, less skilled or educated workers are more likely to be subjected to generally coercive systems and more skilled or educated workers are subject to more consensual management systems. However, there are many exceptions to this rule largely determined by the nature of the work being performed. Trucking is one of the exceptions.

The classic example of a coercive management system would be the assembly line. An assembly line is a method of "machine-pacing" workers - workers are assigned one or a few tasks and the speed of the line determines how often they perform that task or tasks. Similarly fry cooks at a fast food restaurant may have computer screens telling them when to drop or lift fry baskets. Even management systems where machine-pacing is central still most often require human monitoring by supervisors on a regular basis to ensure that workers are ultimately performing the tasks when and as required (e.g. even though most things are machine-paced and standardized at McDonald's, there is still a shift supervisor immediately present). On the other end of the spectrum are consensual systems (often referred to as "hegemonic" management systems), in which workers are deliberately given significantly more autonomy to make decisions. In many kinds of workplaces consensual systems result in far higher productivity than coercive systems. The key for consensual systems' higher productivity is to get workers to understand working harder as *in their own interest*. Coercive systems often make workers feel dominated and exploited which can lead to resentment and resistance and thus lower productivity.

Consensual systems, on the other hand, are consciously designed to align the interests of workers with that of their employer. Consensual systems can employ all kinds of particular incentives to achieve this, but the most important features generally involve compensation. Consensual management systems frequently use compensation systems intended to incentivize higher productivity by rewarding it directly or indirectly (e.g. commissions, profit-sharing, employee ownership, bonuses). One of the most common practices for aligning worker and employer interests in blue-collar jobs is piecework, which is when workers are paid based on the number of units or "pieces" they produce. Piecework is often found when individual productivity can be assessed easily but direct supervision or management of workers is difficult or expensive. Nearly all truck drivers working in the over-the-road truckload industry are paid by the piece.

of these piecework drivers are paid by the mile or by the load but since the Great Recession the number of companies offering workers, primarily lease-operators, the chance to get paid a the percentage of the load revenue ("pay by the load") has been growing. Celadon appears to be one of those firms that traditionally paid primarily by the mile, but now has a percentage of workers paid based on percentage (CLD003354) – regardless, both groups are still piece workers paid based on per unit productivity. Celadon offers several different pay packages among which workers are allowed to choose, potentially fostering a sense of autonomy. It is clear that Celadon believes perceptions of them by drivers are important to worker retention (CLD003287; CLD003289; CLD003283).

Like other pieceworkers, truckers try to find the most efficient ways to organize their work tasks in order to increase their pay. Especially in industries like trucking where direct human supervision over workers is difficult, expensive, or impossible, welldesigned piecework systems that allow workers limited autonomy to plan and carry out their work result in significantly higher productivity. The most widely accepted explanation for this outcome was put forth by Michael Burawoy (1979), who argued that in successful piecework systems, managers purposefully design the labor process to allow pieceworkers autonomy within a narrow range of options that ensure profitability. In response, pieceworkers treat management's demands as rules to a kind of game in which they work hardest on what returns them the greatest compensation. In well-designed systems this is also where worker effort results in the highest profit for employers. By playing the game, workers consent to management's rules and end up working smarter or harder (i.e. producing more profit) than they would under more coercive and costly methods of control while still experiencing a greater sense of autonomy. A successfully designed labor game thus shapes both what workers do and how they experience what they do. Burawoy's concept of the game perfectly captures the way the pay-per-mile or pay-per-percentage system shapes the experience of truckers – *regardless of whether they* are considered employees or lease-operators.³⁴

In short, lease-operators and company employees will make essentially the same kinds of decisions. All drivers, whether employees or contractors, want to drive as many miles as possible. All of the decisions they make will be made with an eye toward that goal. Though there is sometimes lots of rhetoric from companies like Celadon about the differences between lease-operators and employees there are no meaningful differences in how they go about doing their work.

Employee drivers are sent load information and they plan their routes and work on their own, even if they are provided with a set of driving directions, fuel stops etc. Lease-operators get the same information and behave in exactly the same way. Unless they are already thoroughly familiar with a customer and route, all truckers are trained to plan how they will perform their work ahead of time. However, there is virtually always one best route to travel in long-haul trucking (*See, e.g.* Helen Blakley 76). When and where to fuel is generally determined by the best timing of stops relative to trip planning of the driver (e.g. making an extra stop to take advantage of lower fuel prices would cost far

³⁴ Burawoy, Michael. 1979. *Manufacturing Consent*. Chicago: University of Chicago Press.

more in time than a lease-operator could possibly save.) And, in general, the places where lease-operators get a discount from purchasing plans are the same stops that company drivers are authorized to stop. Celadon, like most similar firms, tries to "optimize" employee drivers' stops because it is paying for the fuel. But employee drivers don't actually fuel exactly where the company's fuel optimization program suggests they should. So firms like Celadon monitor the "compliance rate" of drivers in this regard (this is discussed below with regard to Celadon's Driver Scorecard). And, as the Blakley's depositions suggest, lease-operators are often dependent on payment cards issued by firms in order to pay for fuel and these cards may only allow use at certain filling stations and may result in additional charges if used at other stations. (Helen Blakley 144:25-145:23).

Once a driver has developed basic planning skills, load characteristics determine how hard they work and how much they earn. All drivers recognize better and worse loads. Essentially good loads involve more driving time and less unpaid work and loading times. Generally there are just a few load characteristics that determine this. The first is how soon a driver can start hauling it, and whether it needs to be live-loaded or is preloaded. The second consideration is how many miles the load is to be hauled. All else being equal, long loads simply mean a greater amount of driving relative to unpaid work, especially waiting. The third major consideration is the geographic area the load requires a driver to go through and whether it is mountainous, urbanized, etc., which determines among other things the speed they can drive, how long it might take to find parking and, of course, how far they are from home. Many drivers are also reluctant to drive into very congested areas, such as New York City.³⁵

Load quality determines most aspects of the job from how many hours they work and when, to how much waiting and other unpaid work they do, to what kind of traffic conditions they encounter, to when they will be able to return home, and ultimately the size of their paychecks. Unfortunately, neither employees nor lease-operators have meaningful control over load selection. Again, as explained above, the sales department has already agreed to haul the loads assigned to employee drivers and "offered" to lease-operators and the planning department has already figured out or "modeled" the optimal way – and most efficient and thus profitable way for Celadon – to assign those loads to available trucks (Douglass 29-32).

C. The Ability to Refuse Loads

If truck drivers had their way, most would choose loads with the most miles, or the longest length of haul (LOH). Celadon is clearly aware that LOH affects turnover of drivers, under the heading "Concerns" internal reports note: "Shorter LOH – Length of haul has been decreasing over the last few quarters and our drivers are starting to notice this in their loads. Our Pricing and sales team is working very hard to remedy this situation and get us more longer loads in our network" (CLD003252; *also see* CLD003268; CLD003295; CLD003278). Internal reports also note that at times turnover

³⁵ Viscelli, 2016.

is exacerbated by the fact that, "drivers did not get the miles they needed" (CLD003258; *also see* CLD003263).

For lots of reasons long hauls may not be the most profitable loads for either firms or lease-operators per mile, but at a firm like Celadon, length of haul is, from a driver's perspective, both employee and lease-operator, the key metric in load quality. When drivers get a bad load at a company like Celadon, there is little they can do about it except complain to their driver manager, ask to be reassigned or refuse the load; even if they are a lease-operator – they cannot get themselves a different load (Chesterman 14:21-16:4).

Given the importance of load assignments to all aspects of the job and their income, controlling them is the key thing that drivers want out of being a lease-operator. And firms promise and argue that lease-operators have this right, as the deponents for the respondents repeatedly suggest. For instance, on page 9 of Mr. Chesterman's deposition:

7 Q How were load assignments treated differently
8 between company drivers and contractors?
9 A A company driver is a -- they're a forced dispatch,
10 so they -- what load we assign them, they had to
11 take that. With a lease-purchase or independent
12 contractor, they are non-forced dispatch, so they
13 could turn down a load offer without any penalty
14 towards them.

It should be noted that, despite the fact that company drivers are supposed to accept every load assigned to them, they *do* refuse loads. This is clearly indicated by the fact that Celadon's Driver Scorecard calculates load acceptance rates for drivers. It is also indicated by Mr. Chesterman and Mr. Douglass' depositions (*e.g.* Chesterman 9:19; Douglass 91:25; 30:17-31:13). In fact, Mr. Douglass suggests that occasional load refusals (less than 3 in 30 days is suggested) from company drivers do not result in disciplinary action (Douglass 32:6-16).

In my research I have found that driver managers will typically only request a change in a driver's work assignment from load planners when they cannot convince the driver to take a bad load in exchange for things like a small payment for multiple stops or excessive waiting, an extra day off, or, most commonly, the vague promise of better assignments soon. Furthermore, before asking for a reassignment, the driver manager can simply tell the driver that no better load is available and present him with the option of waiting, which drivers rarely accept. This process is referred to by Mr. Douglass during his deposition (Douglass 55:6-12; *also see* Douglass 119:18-120:3). As a result, lacking information and fearing that they could be informally punished in future load assignments, drivers learn to accept nearly all assigned loads, as the Named Plaintiffs did. (Helen Blakley 63-64; William Blakley 109:1-11; Smith 138:9-139:6). It is better to drive a bad load and get paid poorly than to complain and possibly sit unpaid for extended periods of time. It is clear from the depositions that drivers have no real options

other than to sit and wait for Celadon to assign them different work if they refuse a load (*See, e.g.* Smith 183; Chesterman 14:10-15:1).

One of the key statistics for system performance measures the percentage of recommended pairings of drivers and loads that are actually achieved. This statistic does not distinguish between lease-operators and employees, meaning that Celadon's expectations for its driver managers are that load acceptance rates for company drivers and lease operators should be similar (Douglass 27:1-29:25). Driver managers have plenty of leverage over lease-operators to ensure that they take the loads assigned to them. And it is in the driver manager's own interest to exercise their power to get driver's to accept the loads assigned to them because ultimately it affects the utilization metrics driver managers are evaluated on (CLD003311; CLD003268).

One of a driver manager's primary responsibilities is to make drivers feel better about taking the load assigned to them. In general driver managers tell drivers they have to take the good with the bad and that every driver gets their share of bad loads. Celadon, according to the depositions, has a practice of informing its lease-operators why they can't get better loads by showing them the kind of freight moving into and out of particular areas (Douglass 51:8-52:7; 121:1-122:5). This is a common strategy of firms to deflect responsibility away from their own control over load assignment and to suggest that the outcomes workers are experiencing are unavoidable and the result of market demand.

In my own research I have found that while inexperienced employee drivers may initially feel lots of pressure to accept all loads, employee drivers quickly become comfortable refusing what they consider to be problematic loads. It is still relatively infrequent behavior for all drivers because it always means waiting unpaid until a new load is assigned, but employees do feel empowered to do it when they feel it is needed. In contrast, while lease-operators sometimes initially refuse more often (maybe once or twice a month or even more), they very quickly learn that refusing loads comes at great personal cost and often results in dispatchers or load planners informally punishing them and not assigning them loads for a period of time. In the end, I have found that experienced employees express feeling significantly more comfortable refusing a load than lease-operators – understandably so given the potentially severe economic consequences for lease-operators.³⁶

When drivers turn down a load, it can cause a major headache for load planners, who must often rework other drivers' assignments in order to compensate. As Mr. Douglass' deposition makes clear, the load planning process is done with the aim of assigning loads in a way that is most efficient overall (Douglass 28:3-29:19). First there is a computer derived set of suggestions and then load planners manually review and make final assignments (Douglass 38:11-19). Once the load assignments go out to trucks and drivers start to accept them and act on their assignments, if a driver refuses their load, the whole set of assignments and the efficiency of that set of assignments can get upset, potentially requiring planners and dispatchers to rework numerous assignments to

³⁶ See Viscelli, 2016.

compensate and, in general, making a lot of extra work, possibly upsetting drivers who had already accepted their assigned loads, reducing profit for Celadon, etc.

D. Control Over Lease-Operator Load Assignments

At a firm like Celadon, what a driver hauls has a much larger effect on their earnings than anything in their control other than how many days off they take at home. And Celadon clearly controls the loads that drivers get, which gives Celadon control over drivers' behavior in all important areas and leaves drivers entirely dependent on Celadon to provide them with work to do. In fact, Celadon can finely tune the process of determining which loads drivers get based on the characteristics of those loads – exactly the kind of control lease-operators are seeking, but do not get. Celadon's load assignment software, which I believe is Manhattan Associates' Driver & Load (which I believe was transcribed incorrectly as "Driver Unload" in: Douglass 35:24), allows Celadon to weight certain factors in assigning loads to lease-operators. Mr. Douglass claims this is done with an eye toward getting higher acceptance rates:

O So Celadon decides -- has decided that it will 16 weight the contractor's freight differently, that 17 it will try to give higher revenue, lower weight 18 loads to the contractors? 19 A Correct. 20 Q And is that a decision Celadon made? 21 A Yes. 22 Q And do you know why Celadon made that decision? 23 A We want to cater our load assignments to our 24 contractors. 25 O You want to make the loads available to contractors 1 better loads? 2 A I would not classify it as better but more in line 3 with what our contractors are looking for. 4 Q Is that designed to make the contractor package 5 more attractive? 6 MR. ECKHART: Objection. Vague and 7 ambiguous. 8 A No. It's designed to provide our contractors with 9 freight that we feel they'll accept so we have less 10 driver refusals -- load refusals. I apologize (Douglass 37-38)

It appears that such weighting is effective at increasing acceptance rates. Internal reports suggest Celadon's Freight Analyst team is using a Manhattan Associates' companion program to Driver & Load, called Load Analyzer, "showing positive results in our load acceptance rates" (CLD003267). It is unclear from the depositions exactly what factors are weighted and what the consequences of Celadon's weighting of loads are for lease-operators. The important point is that Celadon can and does exercise control to systematically shift certain kinds of loads toward lease-operators. However, as Mr. Douglass' responses suggest, it is highly unlikely that this weighting gives contractors

"better" loads. The exact weighting Celadon uses is not as important as the fact that they have and exercise that kind of control over the work available to lease-operators and, without doubt, this affects lease-operator earnings. Again, such control over load assignments is the most important kind of control lease-operators want, but are not given, from firms like Celadon.

Interestingly, it appears that Celadon has explored or may employ a weight in its models to assign loads to lease-operators based on the revenue of that freight, something that would give Celadon the ability to systematically reduce any benefit lease-operators might seek from working on a percentage basis – a pay option Celadon developed to improve retention and recruitment (CLD003287; CLD003289). A truckload operations report, dated September 30th 2015, stated as a projection: "Launch of percentage pay optimization in November, which will model lease-purchase drivers based on freight rates (CLD003311). Presumably Celadon would use such modeling to increase its own take of better pay freight and assign lower revenue loads to lease-operators paid by percentage. Again, regardless whether this has been implemented yet, it illustrates the ability of Celadon to assign loads or not to lease-operators systematically to its own advantage on the key metrics that determine profitability.

Recently Celadon has launched a new application called FreightRover that Mr. Douglass claims will give lease-operators the ability to choose among multiple loads (Douglass 53:6-54:10). While this may increase the sense of autonomy that drivers feel, giving drivers such choice will not affect the primary issues of Celadon ultimately controlling what freight is made available, pricing of that freight, etc. Essentially what FreightRover does is allow lease-operators to choose from multiple optimized "solutions" produced by Celadon's load planning system (CLD003331). And, even if they are selecting their loads from among several choices, they will still be subject to the management discussed below.

E. Celadon's Driver Scorecard

Getting drivers lots of miles to drive and increasing overall utilization rates of Celadon's system requires regular, on-going communication and other behaviors by drivers. Toward this end, Celadon has used a driver bonus program called the Driver Scorecard. Like piecework, this bonus program is meant to align driver interests and firm interests by paying drivers for behaviors important for overall efficiency of Celadon's operations.

On Celadon's website, a blog post entitled "Innovative Driver Scorecard," which the page suggested was written by Mike Griffin, who is identified as the Operations Manager, on August 10, 2015, stated the following:

"On June 1, 2015 Celadon rolled out its innovative driver scorecard after nearly two years in programming. The driver scorecard is a way for Celadon to incentivize our partners on the road who go above and beyond for the company. Our partners are currently measured on compliance and availability.

The compliance component measures our partners on their idling percentage and fuel stop compliance. The availability component measures partners on the time it takes them to respond to a load assignment, load refusals, and lost hours of availability... Our partners have become very engaged in the program and are constantly talking about how their performance will affect their scorecard. The driver scorecard will improve driver performance, in-turn greatly impacting the customers we service." ³⁷

Though it is unclear from the depositions exactly for how long the Driver Scorecard was used, information on Celadon's website suggests that the Driver Scorecard was used as a means for assigning a performance bonus to both employee drivers and lease-operators for work performed as of June 1st, 2015.³⁸ Exactly when the bonus system was used and for what purpose and for what drivers is actually not important to the points made here. What matters is that it clearly demonstrates that the performance of employee drivers and lease-operators relative to the goals of Celadon can be assessed using the exact same metrics.

Celadon's website had a Frequently Asked Questions page with this Q&A:

Q. What am I being evaluated on?

A. Your performance is based on your AVAILABILITY to run loads and communicating in a timely manner regarding the loads you are assigned, as well as your COMPLIANCE in controlling engine idle time and following fuel routings.

Q. I am a Lease Purchase/Owner Operator; Will I be dinged for refusing a load? A. Yes, but please keep in mind this is not forced dispatch. This is simply to reward those contractors who accept loads as assigned.³⁹

Apparently qualifying for the performance bonus was based in part on whether drivers followed the prescribed fuel routing set by Celadon as well.⁴⁰ This indicates, first off, that employee drivers do not always follow the prescribed fueling, as their bonus is also based on their compliance in this regard. This bonus system, like many others, also took into account how much drivers idled. It did so for lease-operators as well.

Overall the Driver Scorecard is clear evidence that employees and lease-operators have the ability to make the same kinds of decisions. The difference is, as suggested above, that they are working under different compensation schemes, lease-operators have to pay for some fixed and variable costs while employees do not. The treatment of the fuel compliance and idling is a good example of this. In its FAQ for the Driver Scorecard it says:

³⁷ <u>https://drive-celadon.squarespace.com/blog/2015/8/10/innovative-driver-scorecard</u>. Accessed

^{11/24/2016.} Sometime between 11/24/2016 and 1/16/2017 this page was removed from Celadon's website. ³⁸ See http://www.driveceladon.com/blog/driverbonus. Accessed 12/13/2016.

³⁹ Driver Scorecard FAQ, accessed on 11/24/2016 from <u>www.driveceladon.com/blog/2015/7/22/driver-scorecard-faq</u>. Sometime between 11/24/2016 and 12/13/2016 this page was removed from Celadon's website.

⁴⁰ Ibid.

Q. I'm a Lease Purchase/Owner Operator; Why am I measured on my idling? I pay for the fuel so I shouldn't be counted against for something I pay for. A. Please keep in mind that the scorecard is to identify drivers who exceed our expectations. Though you may be responsible for fuel, we still want to recognize and reward drivers who are able to operate efficiently. It is also a way for Celadon to help drivers identify areas they can improve upon to ultimately be a more profitable business owner.⁴¹

While Celadon again suggests here that idling less can be a source of "profit"⁴² and the decisions of a business owner, what this shows is that the exact same metrics that determine whether employees get a bonus are the ones that supposedly constitute efficient business management on the part of lease-operators. The depositions of Mr. Douglass (Douglass 90) and Mr. Chesterman (Chesterman 31; 11-14), also suggest that managing fuel costs are among or are the most important area for lease-operator "profitability." Other than fuel it is clear that the things that matter for lease-operator success are the same things that matter for employee driver's pay and bonuses, whether they refuse loads and how many hours they work while on the road.

Overall, Celadon appears to have found the Driver Scorecard an effective tool in altering driver behavior, internal reports state: "Saw major success in positively influencing driver behavior through the launch of the scorecard" (CLD003307).

F. Management of Lease-Operators

All truck drivers at a firm like Celadon will be monitored on a regular basis via satellite linked computers, commonly referred to as "Qualcomms" – the name of the most common systems manufacturer. (Helen Blakley 97:21-101:5). Qualcomm units were required for lease-purchase operators by Celadon's contracts (CLD000193). The use of such system is required by all company drivers and lease-operators (Douglass 40:3-5). Contractors were charged \$14.00 per week for the Qualcomm equipment (CLD000193). Celadon runs Otracs software (CLD000193). These Qualcomm units and the Qtracs software are extensively used in the industry and can be configured to collect a range of information depending on the settings of the basic software and various add-on software packages available from Qualcomm. This system can also tell managers whether the truck is running, the vehicle's speed, how much fuel it has used, its odometer reading,

⁴¹ Ibid.

⁴² I put the word profit in quotes to indicate common use by firms to refer to the earnings of leaseoperators. Mr. Eckhart tries to define profit in this way in Kimberly Smith's deposition, asking: 21 O. Yeah. And to earn a profit is generating more

²² revenue than the costs that you have to pay out to run the

²³ truck. That's all I'm asking.

²⁴ Do you agree with that? (Smith 164).

In fact, I believe this kind of rhetoric is highly misleading. At the very least, any definition of profit for these workers must recognize the ability of these workers to be able to potentially earn some return above and beyond the value of their labor. And it is highly unlikely any lease-operator at Celadon earns any profit in this sense.

and a whole range of potential other information.⁴³ The most central features of the basic software allow for regular updates of vehicle location and speed. This information is sent at regular intervals that can be specified by the firm. Authorized software users, typically including driver managers, can also "ping" trucks, requesting this information from the truck.⁴⁴ Drivers themselves are typically not aware of exactly what information is being collected or when their truck is pinged.⁴⁵ Both lease-operators and company drivers are tracked using Qualcomms.

The depositions in the case indicate that employees and lease-operators receive the same training on operations (Chesterman 54:5-55-7) and are subject to the same kind of disciplinary procedures for the same kinds of violations of company policy (Chesterman 67:12-76:8). Often times in the documents, Celadon uses the term employee to refer to lease-operators (Douglass 83).

As the depositions make clear, once a driver accepts a load, there is no difference between a lease-operator and an employee.

Q When you say dispatch, what do you mean?
8 A If a driver accepted the load that was assigned to
9 them, then I would dispatch them at that point, get
10 the information, all the pertinent information to
11 them that they didn't already have when they
12 accepted it.
13 Q So how is that duty different for contractors and
14 company drivers?
15 A That piece of it, if the load has been accepted by
16 the driver, whether company or independent
17 contractor, the actual dispatch is no different. (Chesterman 11)

Celadon clearly monitors employees and lease-operators similarly.

Q And did Celadon monitor the progress of its

6 contractors as well as its company drivers?

7 A We monitored all trucks while they were under

8 freight to ensure on-time deliveries.

9 Q Did the monitoring allow you to see when a truck is

10 idling?

11 A Yes.

12 Q What types of issues did you discipline contractors

13 for as an operations manager?

14 A Conduct, log violations, on-time deliveries. (Chesterman 20)

This becomes particularly important because of the "domino effect" that missing a delivery or pick up time. Celadon "stacks" it drivers, scheduling multiple loads for them at one time based on location and timing and hopes to model drivers up to four loads out

⁴⁴ See Omnitracs, LLC. 2011-2016. "Qtracs Help System". Dallas, TX: Omnitracs. Available at:

⁴³ For a description of these various software products, see <u>http://www.omnitracs.com/products</u>.

https://customer.uat.omnitracs.com/help/qtracsWeb/help/en_US/procedural/qtracs-help-guide.pdf⁴⁵ See Viscelli, 2016.

(CLD003317). If a driver does not achieve the result modeled early in this sequence, it will not only decrease their utilization, but potentially affect a number of other drivers whose modeling may now need to be adjusted to compensate. Toward this end Celadon was planning a software upgrade that will, "help with forecasting to us those loads that are losing time and allow for programming to be created notifying the drivers to get up and run" (CLD003290).

The other primary goal, related to on-time service and modeling, is to get workers to work as many hours as possible and reduce what it terms, "waste hours" (CLD003317). Celadon internal report from June of 2013 highlights what getting a few extra hours per week out of drivers would mean for Celadon's bottom line under the heading of "Future Goals":

· The Two Hour "Squeeze"

a. If every one of our trucks produced 100 more miles per truck per week, Celadon will make an additional \$10,000,000 dollars in net operating income. All we need to do is "squeeze" two additional hours from our drivers to get 100 miles per truck. We are pushing this mindset onto the floor DMs to push an overall better financial thought process throughout floor employees

b. i.e. if a driver goes on a 10 hour break at 2000 on Tuesday, his PTA should be for 0600 on Wednesday. We are pushing for shortest possible breaks and punctuality. (CLD003296)

It is important to be clear what driver managers are being asked to do here. Celadon drivers are asked to provide a "PTA" or projected time of availability, using a macro form message. This time of availability is necessary for planners to assign loads and to check the viability of existing modeling. These PTAs will often be for the following morning. In the example provided above, the driver may have sent in the macro marking the start of his "off duty" period at 8 pm. Celadon is suggesting here that the driver manager push for the driver to start driving again at 6:00am. This entails driver managers monitoring the on-going behavior of drivers via their computer terminal.⁴⁶ The Blaklevs described regular communications from their dispatcher inquiring about their arrival time and progress. (Helen Blakley 96-100). The information sent to Celadon from the onboard computer of the truck allows the dispatchers to track exactly where workers are, whether they are moving, etc. And Celadon encourages its driver managers to use this information to increase the number of hours drivers drive (CLD003296). All of this is ultimately to eliminate service failures and improve utilization rates, a metric driver managers are evaluated on, giving them incentive to actively manage drivers to increase it. In fact, it appears that driver managers could lose their jobs for not achieving their goal on this metric. One internal report reads:

⁴⁶ A video published by a Celadon Driver entitled "Celadon Trucking An Inside Look Talking With Driver Managers" and apparently made during Celadon's Driver Appreciation day shows clearly how Celadon dispatchers monitor drivers and track their progress on loads to ensure efficiency. https://www.youtube.com/watch?v=1pqJ4Z9AP40. Accessed 1/14/2017.

o Achieved a 97% completion rate among longhaul irregular route Driver Managers in achieving a fleet average of 2200 miles or better within an 8-week period during Q3. Achieving the metric was required for job retention (CLD003338).

Driver managers are also evaluated on other metrics directly related to driver behaviors:

o Designed a Driver Manager "pay for performance" plan based on the weekly Rack & Stack. The plan will launch the week of April 11 and run throughout Q4. The weekly Rack & Stack assesses Driver Managers in achieving the following metrics with their fleet:

o Average Utilization (Goal = 2100 miles solo and 4000 team)

o Driver Turnover (Goal <75%)

o Service Failures (Goal = 0)

o Revenue per truck (Goal = \$3850 solo and \$7000 team)

o Weekly scorecard grade (Goal <2) (CLD003338)

What all of this means, not surprisingly given their job title, is that Driver Managers really are just that: managers. Their job is supervise lease-operators and employee drivers and increase productivity and thus profitability for Celadon.

9. Are Lease-Operators at Celadon Operating a Small Business?

When we take all of the facts stated above into account relative to the needs and goals of Celadon, the "business model" of Celadon lease-operators is not part of a business-tobusiness relationship but a labor management strategy.

From an economics perspective the issue of whether or not there is an employment relationship or separate business is a question of whether a particular business is "making" or "buying" a service or product. In a "buying" situation, a business contracts with another business for some outcome. In a "making" situation, a business uses the labor of an employee to produce an outcome. In a making situation a business has the *incentive and ability to monitor and manage* the labor activity a worker is doing in order to ensure the outcome they are trying to achieve (e.g. getting a load there on time). What a firm "makes" is what it "does" and what is often referred to as its "core" business. What Celadon does is make trucking services and sell them to customers. From an economic perspective, the workers Celadon uses to make trucking services are its employees.

Celadon *must manage* lease-operators like employees in order to realize its own interests. From an economic perspective Celadon does not buy discrete units of service from leaseoperators as one business would from another (using a contract that specifies a particular *outcome*). Instead, Celadon utilizes lease-operator labor to make trucking services. Celadon manages the labor activity of lease-operators as they go about doing their work to ensure that they meet customer demands, increase asset utilization, etc. Celadon monitors the labor activity of lease-operators and, when Celadon management perceives that the firm's goals are in jeopardy (e.g. that a delivery to a customer might be late), it intervenes by directing the lease-operator's labor activity or by coordinating the labor activity of the lease-operator with that of other workers (e.g. it swaps trailers between tractors to ensure on-time delivery). From an economic perspective, monitoring, directing and/or coordinating the labor activity of workers in order to realize one's own economic interests of making a profit is the very essence of what it means to *employ*.

Driver managers also do extensive monitoring and direction of workers, something wholly incompatible with the operation of a distinct business. And they do this for both employees and lease-operators. They do this because ultimately Celadon is responsible for making on-time trucking service and Celadon can and does retain the authority to manage workers to avoid what it calls a "service failure," which it hopes to eliminate entirely from its operations (CLD003328; CLD003258).

Perhaps the clearest indication that lease-operators are treated like employees is that their labor activity is coordinated with that of other workers by Celadon. Celadon uses another Manhattan Associates program called Drop & Swap. On its website, Celadon advertises the benefits this program provides to its customers: "If truck is delayed, our system automatically arranges for another truck to meet it and exchange the trailer, maintaining the delivery schedule."⁴⁷ In the industry this is commonly called a "repower." When one truck is hauling a load and a driver manager realizes it is not going to make it on time, the load is reassigned to another driver to ensure on-time delivery. This kind of management is entirely inconsistent with the idea that Celadon's buying or contracting the services from a separate, distinct transportation company or business. This would be like you or I contracting with a parcel service like FedEx to transport a parcel for us and as we are tracking the progress of the parcel online we realize it will not arrive when we want it to. We would then call a UPS driver and arrange for him to meet the late FedEx driver and hand off the package for final delivery. What Celadon is doing when it repowers loads is clearly directing workers in the making of trucking services. Celadon's lease-operators are clearly part of an integrated process of providing trucking services. Celadon appears to perform this kind of tractor to tractor transfer of loads frequently (CLD003360).

10. Could Celadon Lease-operators Operate Their Own Trucking Business?

It typically takes drivers around a year or more to reach full productivity. Even after several years, very few, if any drivers, at a firm like Celadon have developed business skills and knowledge that would allow them to effectively run their own trucking businesses. And if they have done so, they have managed to do it outside of the performance of their work as lease-operators. Employees and lease-operators at a firm like Celadon have little, if any, exposure to many of the most important activities that make a trucking firm work. They do not know where loads are found, how they are contracted, who to contact to find freight, how to price loads, what loads are profitable, how to obtain the needed licenses and permits, how to find insurance, get maintenance done at the best price, etc.. Independent operating in the long-haul general freight segment takes very detailed knowledge of the demand for freight services, which

⁴⁷ https://www2.celadontrucking.com/default2.aspx?id=2254. Accessed 12/14/2016.

fluctuate seasonally by geographic region. The typical lease-operator at Celadon or other large firms in the segment is woefully under-prepared to be successful as an independent. Celadon is clearly aware that its lease-operators do not understand key aspects of the business, this is why they planned to at "business analysts" to their "lease-purchase management team" who would be "responsible for helping drivers understand rates, profitability, and debt management" (CLD003311). Celadon also planned to provide "personal coaching" to help lease-operators understand "utilization" (CLD003340).

The chances the typical lease-operators at a firm like Celadon will get the legal authority, capital to buy trailers, and the experience required to operate independently of a larger motor carrier and provide services directly to customers are extremely low. Unless they have some additional experience in sales or management in the trucking industry, which almost no lease-operators at a firm like Celadon do, lease-operators know how to drive efficiently, like experienced drivers do, they do not know how to manage the various administrative and sales tasks required to provide trucking services to customers.

A truck driver picks up freight at one location and delivers it to another location in a specified amount of time. A successful trucking company – as any experienced manager or owner in trucking will tell you - does far more than this. Among the keys to profit in truckload trucking is managing market interactions (e.g. sales, customer service), benefitting from economies of scale in purchasing and maintenance and properly pricing freight services relative to supply and costs to find a "sweet spot" where there is profit to be made. Labor management strategies that keep labor costs at or below market rates and asset utilization high are also critical. All of these tasks require skills and knowledge that lease-operators do not have and will not gain as a result of their work as lease-operators.

11. Differences between Lease-Operators and Employees

The number one thing that lease-operators can do to increase revenue is to work more. Unfortunately, lease-operators need to work a lot just to overcome fixed expenses and then earn an income. In the end, both productive truckload employees and leaseoperators typically work 6 out of every 7 days in this segment of the industry. Employees are often required to work a certain number of days, but they often decide how long beyond a certain minimum they go out for and sometimes they stay home longer than then should. As a result, employee drivers, like lease-operators, can make the same kind of decision to increase their earnings by working more days and driving more miles. The big difference is that employee drivers can work less than lease-operators without as great a penalty. Lease-operators could choose to work less days, but they could not do that for long because compensation packages are generally structured to ensure that doing so will result in them earning little or no income.

The actual work behavior of lease-operators like those at Celadon is effectively indistinguishable from that of employee drivers on a day-to-day basis. In terms of what work they perform and how they perform that work, lease-operators typically exercise no more and sometimes significantly less control (e.g. being less able to afford to take hometime) than employee drivers.

12. Conclusion

Utilizing lease-operators is a means to get relatively more experienced workers to work for less money than they could earn elsewhere. The obvious question is then: what's in it for workers? The answer at Celadon, like at similar firms, is that there is no meaningful benefit to workers, they become lease-operators because they don't (and can't) fully understand the consequences of lease-operating until they have done it. This is why, at a firm like Celadon, as Matthew Douglass estimates, only a small fraction of drivers successfully complete a lease-purchase (Mr. Douglass estimates that perhaps 5-10% of drivers succeed, Douglas 76). Yet even Douglass's estimate may be high given the company's internal reports demonstrating a truly remarkable rate of turnover. For instance, in the 3rd Ouarter of 2016, the firm experienced a 328% turnover rate in leaseoperators, losing 916 drivers or an average of 76 per week (CLD0003346). Clearly an incredible number of drivers cycle through Celadon's lease-purchase program each year. If success means paying off a truck, which will take 5 years under the terms of the contracts provided to the Named Plaintiffs (CLD000257; CLD000272), the success rate is probably less than 1%. Even when drivers "succeed" at a lease-purchase at a firm like Celadon, they will still end up working for far less than they could have earned if they had elected a company driver compensation arrangement.

Celadon's lease-purchase drivers are ultimately an integral component of Celadon's trucking services, and their integral nature requires Celadon to monitor and control the lease-operators as if they were company drivers. Celadon needs drivers to perform trucking services for their customers, and in an effort to decrease wage expenses, is utilizing the Lease-Operator Labor Management Model. As described in this report, such a labor management model is incompatible with the notion that lease-operators are small business owners who are economically independent of Celadon. The reality is that lease-operators have little autonomy in their work, and are not in a position to utilize business ability to increase profitability. Rather, these drivers are subject to a labor management model which is designed to incentivize the drivers to perform the work assigned to them by Celadon. From an economic perspective, it is clear that lease-operators are entirely dependent upon Celadon to assign them sufficient work, both in terms of quantity and compensation, to succeed. Consequently, such drivers do not operate independently from Celadon, but instead operate in a subservient economic relationship to Celadon, similar to company drivers and employees.