Expert Opinion
on the
Work of TransAm Truck Drivers

Submitted by

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July 22th, 2022

Relevant Expertise of the Author

1) I am an economic sociologist who has spent approximately 17 years studying the trucking industry. I received my doctorate from Indiana University in 2010. My dissertation was on work and employment relations in the long-haul trucking industry. It used quantitative and qualitative data analysis. As part of that research, I trained and worked as a long-haul truck driver for six months. 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. I have interviewed hundreds of truck drivers and surveyed thousands more on their work. 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 explains the changing patterns of work since the industry was deregulated, specifically the evolution of independent contracting. My current research projects look at the impacts of automation and last-mile delivery on truckers' work. I am currently conducting a study for the State of California on the pay and work of long-haul refrigerated truck drivers, like those at TransAm.

2) I am employed by the University of Pennsylvania as an Associate Professor of Practice and as Faculty Fellow at the Kleinman Center for Energy Policy. In my work for the Kleinman Center, I serve as an expert on the trucking industry and energy efficiency.

3) I serve as a consultant to investors, motor carriers, and technology firms on self-driving trucks, including Aurora Innovation.

4) I have worked with numerous private organizations that need to better understand the work of truck drivers, including: the World Economic Forum, the Blue-Green Alliance, the Environmental Defense Fund, UC Labor Center, Working Partnerships USA, and the International Brotherhood of Teamsters.

5) I have served as a consultant for media outlets and my research has been covered and used by journalists from dozens of industry, national and international media outlets including: the Wall Street Journal, the Economist, the Washington Post, Forbes, Money, Time, BusinessWeek, the Atlantic, the New York Times, Planet Money, PBS NewsHour, Frontline, and 60 Minutes.

6) My research and policy work on trucking have been funded by a number of foundations, including: the National Science Foundation, the Heinz Foundation, the Kellogg Foundation, the Ford Foundation and the Alfred P. Sloan Foundation.

7) In recent years I have served as an adviser to various state and federal elected officials and agencies. Among others, in recent years I have advised:

- California Department of Labor on the impact of climate policy on trucking
- California's Future of Work Commission on the impact of automation on truckers
- California Departments of Labor, Transportation, and Agriculture and the Governor's Business Development office on the trucker shortage
- US Dept. of Agriculture on climate issues to agricultural trucking
- US Senators (Rubio, R-FL; Schumer, D-NY) on trucking workforce issues
- USDOT on scenarios for adoption of self-driving trucks (Trump Administration)
- Chicago Metropolitan Agency for Planning on truck related congestion
- National Science Foundation on research questions related to trucking workforce impacts related to automation
- US Government Accountability Office on labor impacts of self-driving trucks (Trump Administration)
- Pennsylvania Department of Transportation on the impacts of COVID-19 on freight transportation
- New York State Attorney General's office on workforce issues in trucking
- Federal Motor Carrier Safety Administration on technology, hours of service and supply chain crisis (Biden Administration)
- US DOL on wage and hour issues in trucking (Biden Administration)
- US DOT on the supply chain crisis and the Biden Trucking Action Plan
- US Consumer Financial Protection Bureau on truck leasing

8) My relevant publications are:

The Big Rig: Trucking and the Decline of the American Dream. Berkeley: UC Press, 2016.

"Assessing the Impacts of Self-Driving Trucks on Truckers." *Industrial and Labor Relations Review*. May, 2022.

"Policy, Worker Power and the Future of the American Trucker." *American Behavioral Scientist*. November, 2021.

"Will Robotic Trucks be 'Sweatshops on Wheels.'" *Issues in Science and Technology*. Fall 2020.

"The Trouble with Trucking." In *Shifting to the High Road: Improving Job Quality in Low-wage Industries.* Edited by Paul Osterman. Cambridge, MA: MIT Press. 2019.

“Truck Stop: How One of America’s Steadiest Jobs Turned into One of Its Most Grueling.” *The Atlantic*. May, 2016.

Sustainable Transportation in Putting California on the High Road: A Jobs and Climate Action Plan for 2030. UC Berkeley. With Richard France and Carol Zabin. September, 2020.

Comment to the Federal Motor Carrier Safety Administration on Suggested Changes to Hours-of-Service Regulations. October 9th, 2018.

Brief of Amicus Curiae in New Prime v Oliveira, submitted to the Supreme Court of the United States, Steve Viscelli, et. al. 2018.

Driverless? Autonomous Trucks and the Future of the American Trucker. Labor Center, UC Berkeley and Working Partnerships USA. 2018.

Effect of Automated Trucks on the Truck Driver Workforce. National Science Foundation. Authors: Jeffery Hickman; Levy, Frank; Burks, Stephen; Viscelli, Steve; Lee, John. 2018.

Mobility 21: Strategic Investments for Transportation Infrastructure and Technology. Computing Community Consortium. Contributing Author. 2017.

Stalled: Make Big Trucks More Fuel Efficient with Smarter Infrastructure Investments. Kleinman Center for Energy Policy. 2017.

A Road Map to Wisconsin’s Climate and Energy Future. Wisconsin Academy of Sciences, Arts and, and Letters. Contributing Author. 2014.

Getting It from Here to There: Urban Truck Ports and the Coming Freight Crisis. Center on Wisconsin Strategy. 2012.

9) I have provided expert testimony or amicus briefs in the following cases:

Blakley v. Celadon Group, Inc., 1:16-cv-00351-LJM-TAB

Blodgett v. FAF, Inc., 2:18-cv-00015-DCLC-DCP

Browne v P.A.M. Transport, Inc. 5:16-cv-5366

CTA v. Becerra, 3:18-cv-02458-BEN-BLM

Ayala v. U.S. Xpress Inc., 5:16-cv-00137

Cilluffo v. Central Refrigerated Services Inc., 5:12-cv-00886

New Prime v. Oliveira, 17–340

Canava v. Rail Delivery Services Inc., 5:19-cv-00401-SB (KKx)

Swales vs KLLM Transport Services, LLC, 3:17cv490CWR-LRA

10) I am compensated at an hourly rate of $500/hour for my work on this case.

Purpose of the Report

I was asked by counsel to review documents and deposition testimony associated with this case on the business of TransAm Trucking Inc. (hereafter "TransAm") and assess:

- Whether the opportunities and constraints experienced by TransAm's lease drivers are typical of business-to-business relationships between motor carriers and owner-operators in the long-haul trucking industry;
- Whether TransAm has made misrepresentations and/or omissions in its description and offering of its lease driver positions to potential new drivers;
- The type and extent of control exercised over TransAm lease drivers by TransAm;
- How workplace experiences and compensation of TransAm lease drivers differ from what similar drivers would experience as employees; and
- If and how the use of the lease driver model benefits TransAm.

This report presents preliminary analysis based on the data produced thus far in the case.

Overview of the Findings

- TransAm utilizes an extreme version of a labor management model found in much of the long-haul trucking industry, particularly among its larger competitors in refrigerated trucking.
- While TransAm presents lease driving as a chance to own a business, control over lease driver behavior by TransAm differs little from employee trucking jobs and may actually be greater.
- TransAm staff actively manage lease drivers as if they were employees, regularly monitoring their activity in real time and encouraging them to work harder or threatening them with financial penalties or loss of work.
- While TransAm promises lease drivers the opportunity to earn more than they could as employees, the experiences of the named and opt-in plaintiffs suggest that lease driver compensation is far inferior to what drivers could have earned elsewhere.
- TransAm controls all of the terms of the relationship with its lease drivers and can and does change those terms at will to the disadvantage of drivers.
- Despite the remarkable turnover of workers, TransAm appears to profit handsomely from using lease drivers.
- In the end, this management system means that TransAm likely pays lease drivers less than half of what other companies pay in labor costs.

From an economic perspective, these facts each suggest that TransAm lease drivers are not running a small business. The relationship between TransAm lease drivers and TransAm is a labor management model completely determined by TransAm. The best way to think about lease drivers and TransAm company drivers is as two sets of employees performing the same work but under different compensation schemes – essentially one (the lease driver) is responsible for paying the fixed and variable costs of the equipment they operate and the other (the company driver) is not.

Glossary of Terms As Used in this Report[1]

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

Commercial Driver's License (CDL) – The driver's license required to operate a commercial vehicle. Issued by states. A Class A license is required to drive tractor trailers over 26,000lbs.

Company Driver – An employee driver not responsible for truck expenses.

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. 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 can be hauled in refrigerated trailers as well.

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

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[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.

own operating authority to provide freight services to customers (which could include shippers, freight brokers or other motor carriers).

Lease Driver – A driver who is responsible for a large portion of the fixed and operating expenses of their tractor and works under a long-term contract for a motor carrier. Lease drivers may own trailers, but typically do not. Lease drivers operate under the operating authority of a motor carrier, which typically finds and prices all of the loads hauled by the lease driver.

Less-than-truckload (LTL) – Freight service moving shipments 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 typically 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 – 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 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 also 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 often have 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, large enough to fill a truck to capacity either based on legal allowable weight or trailer volume. Truckload freight 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.

This Report in 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 17 years. I have performed extensive comparisons of company drivers, lease driver 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 organization of work and labor market experiences 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 law or regulation.

Background on the Lease Driver Labor Management Model

TransAm uses the lease driver labor management model common in the primary segment in which it competes. The sort of basic long-haul, point-to-point movement of full trailers of refrigerated goods that is the core business of TransAm is often done by lease drivers.

While this management model is regularly portrayed by motor carriers 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 drivers. In fact, the lease driver 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, technological change, and a thorough transformation of norms in the industry's labor markets.[2]

A. Deregulation of the Industry and Labor

The trucking industry was historically subject to extensive economic regulation that limited both price competition and market entry by new firms. Prior to deregulation of the 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 wages were taken out of competition and working conditions standardized across the nation. As a result, 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).[3]

Regulation was enacted in 1935 to combat the industry's 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 barriers to entry are low, so when trucking is profitable new firms enter the market and existing firms can increase capacity quickly, reducing rates.

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

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[2] Viscelli, Steve. 2016. *The Big Rig: Trucking and the Decline of the American Dream*. Berkeley: University of California Press.
[3] Ibid. Chapter 1.

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.

These characteristics of the industry mean that trucking markets are 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 is why firms like TransAm shift the costs and liability of owning trucks to workers using the lease driver labor management model.

B. Owner-Operators in Long-Haul Trucking

Deregulation at the end of the 1970s plunged the industry into chaos as excessive competition immediately became the norm. Over the following decade most 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.[4] 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."[5]

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, to shed the costs of expensive, inflexible unionized labor. Firms also began using owner-operators within their own fleet 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.[6]

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

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[4] 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.
[5] Belzer, Michael. 2000. *Sweatshops on Wheels: Winners and Losers in Trucking Deregulation.* New York: Oxford University Press.
[6] See 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.

large geographical areas. Owner-operators were being squeezed by declining rates and unable to invest in their equipment, resulting in poor customer service and low productivity. In contrast the high asset utilization achieved by the profitable truckload companies that emerged after deregulation required that trucks be dependable and that drivers accept whatever loads were assigned to them by the increasingly sophisticated load planning systems that were being developed, including those using satellite linked computers.[7] Owner-operators, while appealing in terms of low pay and reducing capital costs and the likelihood of unionization, were less willing or able to submit to the dispatching requirements and achieve the equipment reliability required by the new breed of truckload firms 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-1980s to the mid-1990s, the leading truckload carriers generally favored non-union company driver labor. But continually deteriorating pay and working conditions were causing increasingly high levels of employee turnover and associated costs. To retain drivers longer and gain the cost advantages of independent owner-operators, carriers began adopting a new model in the mid-1990s. Firms began consciously transforming the labor market institutions around contracting, to create a new kind of owner-operator that would fit their needs: the lease driver.[9]

The use of lease drivers is deeply intertwined with the use of sophisticated technologies. Satellite- and cellular-linked computers allow firms to more efficiently monitor trucks, plan loads, and coordinate and dispatch drivers.[10] But in order to maximize the return on the greater information these systems provide and the control they facilitate, planners must be able to assume that drivers will accept the load they have assigned to them and do what they are instructed to do. Research suggests this contributed to the decline in the use of owner-operators with such rights.[11] 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 long-haul firms have sought efficiency gains and profit since deregulation. While lease drivers are promised and nominally have the right to refuse to haul a load – such as TransAm's lease drivers' right to refuse

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[7] Hubbard, Thomas N., "Information, Decisions and Productivity: On Board Computers and Capacity Utilization in Trucking", American Economic Review, Vol 93, No 4, September 2003, pp.1328-1353.
[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. Chapter 3.
[10] Hubbard, Thomas N., "Information, Decisions and Productivity: On Board Computers and Capacity Utilization in Trucking", American Economic Review, Vol 93, No 4, September 2003, pp.1328-1353.
[11] Baker, George P. and Thomas N. Hubbard. "Contractibility and Asset Ownership: On-Board Computers and Governance in U. S." *The Quarterly Journal of Economics*, Vol. 119, No. 4 (Nov., 2004), pp. 1443-1479.

loads - carriers can easily get them to behave like company drivers by controlling all the immediately available work.[12] Rather than being able to pick and choose among different loads or negotiating what they will be paid for a load, lease drivers, like those at TransAm, are presented with one load at a time and given the choice to move that load or wait unpaid for alternative work to be assigned to them. As they wait the cost of the truck and other expenses that will be deducted from their earnings continue adding up.

Through various individual and industry-wide recruitment and informational efforts (e.g. websites), truckload firms create a pool of lease drivers very different from previous owner-operators that can be incorporated into more efficient fleets utilizing satellite-linked computers.[13] In the mid-70's, a majority of all owner-operators were union members in many segments; virtually none are today.[14] Just before deregulation, 33% of all owner-operators owned more than one truck and 16% of all owner-operators owned more than 5 trucks.[15] By 1997, less than 14% of all owner-operators owned more than 1 truck and less than 2% owned more than 5 trucks.[16] There have not been representative surveys done since that time that could accurately estimate the number of lease drivers 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 drivers received their payments through a permanent lease to haul freight exclusively for a single company.[17] 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.[18]

Independent owner-operators in long-haul trucking, those truckers we might consider as owning and operating their own trucking business, are distinguished on numerous dimensions from lease drivers but primarily by the fact that they:

- operate under their own operating 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 or brokers in finding and pricing loads;
- set the rates they charge to customers based on market conditions both relative to their costs and competition;
- choose freight based on what it pays;

[12] See Viscelli, 2016. Chapter 4.
[13] 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 drivers were not always clearly distinguished in research.
[14] Wyckoff, Daryl D. 1979. *Truck Drivers in America.* Lexington, MA: Lexington Books.
[15] Agar, Michael. 1986. *Independents Declared: The Dilemmas of Independent Trucking.* Washington, DC: Smithsonian Institution Press.
[16] 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.
[17] Ibid.
[18] Wyckoff, 1979; Agar, 1986.

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

In contrast to independent owner-operators, lease drivers are best understood from an economic perspective as employees who pay all the costs associated with the tractor they drive. Motor carriers gain essential advantages by using lease drivers and how effectively firms execute the lease driver labor management model has a significant role in determining their profitability, as I will illustrate for TransAm below. The relationship between motor carrier and lease driver is clear, however; firms like TransAm structure every detail of this relationship. They mislead inexperienced workers – who often have no experience even driving a truck, let alone experience with the economics of freight movement – by convincing them that leasing a truck is their best or only immediately available option. Lease drivers then pay for the tractor, fuel, maintenance, and insurance, and more and firms shift operational costs entirely to them, translating into much lower overall costs per unit of work for the motor carrier, as I will detail below for TransAm drivers.

The Lease Driver Labor Management Model at TransAm

Documents and testimony produced so far in this case indicate that TransAm uses an extreme version of the kind of management system outlined above. TransAm employs less experienced truckers and serves as an entry level employer. Very few motor carriers can employ brand-new drivers because they cannot insure them. The fact that new drivers generally have few options means that TransAm can hire them as lease drivers and pay them rates far below what drivers with just one year of experience can earn.

While many companies develop a "pipeline" of drivers that moves them through stages, from student, to trainee, to employee and then lease driver – more aggressive companies, like TransAm, recruit inexperienced drivers to become lease drivers immediately after they obtain their CDL. Motor carriers use a combination of promises of high income and freedom, alongside threats of a driver having to sit and wait unpaid for a company driver truck to become available, to convince drivers, often far from home and desperate to work, that lease-operating is in their best interest. These kinds of high-pressure sales tactics are widespread in the industry, as I detail in my book on the subject.[19]

Without significant experience under their belts, drivers are simply unable to assess the opportunity of lease-driving. If they were, they would see it is most often a terrible one. In the case of TransAm, they could not have benefited from being a lease driver because, as demonstrated below, the terms set by TransAm ensured that even drivers that stayed on the road continually would make far less than they could have as company drivers.

How TransAm Misrepresents Lease Driving

TransAm makes a number of claims about how being a lease driver differs from being an employee or "company driver." These arguments are commonly used across the truckload segment to convince workers to become lease drivers.[20]

Here is what Ray Cochran, who served as Director of Driver Recruiting, among other roles, said at his deposition about explaining lease driving to drivers.

> "We had nothing to hide. We would gladly explain anything to them.
> Q. Would you talk about being an independent contractor versus a company driver with anyone?
> A. If they asked me the differences, I would tell them the differences.
> Q. And what would you tell them?

[19] Viscelli 2016, Chapter 3.
[20] Ibid.

> A. If they would ask me the differences, it's pretty clear what the differences are, that – if I think – it's been a while since I thought about it. Well, right off the bat, a company driver is assigned a truck. As an independent contractor, you can look through all these trucks and pick the truck you want, the color you want, the year. A company driver has four days of home time a month. An independent contractor has flexible home time; you can go home whenever you want. A company driver must follow the Fuel Optimization Program and fuel where it tells him and put in however much it tells them. You, as an independent contractor, can fuel anywhere you want to. Now, as an option, you can have the Fuel Optimization Program. It's a good program. It'll save you money, and you should want to save money as a business owner. And so it's a good program, but you have the option to fuel anywhere you want, any time you want, however much you want. And a company driver cannot refuse loads. As an independent contractor, you can refuse loads. If you don't like the load that the dispatcher gives you, that's up to you; you don't have to take it. So it gives you more flexibility, being an independent contractor. You also have the opportunity to make more money as an independent contractor. You're a business owner, no different than if you make a choice to buy a restaurant or go into a franchise, you know. It's a choice you're making." [76:2-77:17]

New truckers have very few of the most important facts when they choose whether to become a lease driver, including that lease drivers typically work more and make less than company drivers. New truckers have little ability to assess the claims made by TransAm. This is why TransAm's lease driver program has such extraordinary turnover. As the record indicates, in November of 2021 TransAm had about 160 trucks driven by lease drivers, but had employed over 4,481 lease drivers over the preceding few years – an astounding rate of turnover [Deposition of Russell McElliot, 21]. The vast majority of these lease drivers failed to complete a lease. And those "successful" drivers who did are the most unfortunate as they spent the most time trying to make it work in a program clearly designed for failure to be the norm.

Claim 1 - Lease Drivers Benefit by Choosing the Truck

Mr. Cochran, who was also Director of ONE Leasing[21], suggests that drivers being able to pick which truck they want is important. He is how he describes it:

[21] Olathe Noble Equipment Leasing, Inc. (ONE Leasing) is an affiliate of TransAm Trucking, Inc. that owns and leases most of the trucks in TransAm's fleet, whether leased directly to TransAm or to TransAm's lease drivers. Both companies are wholly-owned subsidiaries of Jacobson Holdings, Inc. [Droescher Dep., 9-15, 27-29]

Q. "Is there any advantage for an IC driver, from a business perspective, a financial perspective, of choosing the newest truck versus a three-year-old truck?
A. I think the independent contractor would have to weigh out the entire package.
Q. What is the entire package?
A. I mean, he's going to have to -- he's going to have to look at everything that he finds important. He's going to have to look at what's the average fuel economy, how is the maintenance, how many miles is on it, what's a truck payment. There's tons of stuff he could look at. And then that's why each of them are given their own option to make their own decision on which truck they want to choose." [91:6-92:1]

In contrast, the plaintiffs describe being brought out into a lot in a group with a limited number of trucks that they could choose from [Deposition of Terrance Colvin-Williams, 47-48; Deposition of Kirk Roberts, 124; Deposition of Nassir Truitt, 78-79]. They did not have the experience and knowledge to assess the value of the truck on the spot, or determine the likely costs of operating or repairing the truck. Even true independent owner-operators with lots of experience have difficulty with such assessments and often need to rely on trained mechanics to evaluate used vehicles.

Claim 2 – Lease Drivers Benefit by Deciding Home Time

TransAm claims that drivers will be able to control their hometime; that company drivers are allowed just 4 days a month at home, but lease drivers can go home when and for as long as they want. Company drivers may be limited to a certain number of days off, but if they want to maximize their pay, they stay out on the road longer. Though lease drivers are told they can take days off whenever they want, going home imposes even greater costs for them, since, unlike company drivers, they not only forego income but must also cover continuing truck costs when they do. The choice of going home for lease drivers is to essentially "go in the hole" as they will still be responsible for the fixed costs of the truck and those costs will get taken out from their future settlements.

As Mr. Colvin-Willams explained during his deposition:

Q. (By Ms. Johnson) · How often would you go home and take your truck out of service when you were driving for TransAm?
A. Not -- at that point in time, I didn't -- I stayed on the road a lot. I didn't -- I barely -I barely went home.
Q. Why not?

A. If I -- I couldn't afford it. I mean, I was -- I was barely -- I was barely getting --making any pay when I was out for a month, two months at a time. · I definitely couldn't – I couldn't even think about taking a day -- a day or two -- a day or two at home and expect to – you know, I -- I was already barely surviving. [63:21-64:9]

Not only will drivers pay the fixed expenses of the truck while they are home and not working, but they will have to pay the cost to get themselves home from wherever the freight TransAm has contracted to move puts them. As Teresa Henshaw, a former driver manager for TransAm, explained during her deposition, if a driver chooses to pay the cost to go home, it could put them in the hole even before they take time off.

Q. Is there a goal for how close you [as a driver manager] get somebody to their home when [they] request home time?
A. No
Q. What is considered "close enough"?
A. It depends on the freight there we have available and the flexibility with the home time request.
Q. So there are no guarantees, ever?
A. No. If a driver has an appointment they can't miss and we can get them within 500 miles, and they feel that 500 miles is close enough, then they'll take that load and they'll go 500 miles. Some of them will think that their appointment can be rescheduled until they can get closer, so they'll reschedule their appointment and get something closer.
Q. So it's dependent on -- whether a driver can get the home time they've requested is dependent on the availability of freight?
A. No. They can get their home time regardless of the availability of freight.
Q. But whether they can do it in a way that doesn't put them in the hole depends on freight?
A. Well, 130 miles won't put a driver in the hole.
Q. But 500 miles might, right?
A. 500 miles might. [134:6-135:8]

While a fuel surcharge may defray some of the impact of high fuel prices for lease drivers, fuel surcharge is only paid on miles dispatched by TransAm [DEF-0001226]. Lease drivers pay the full cost of fuel when they drive home. At current fuel prices, a driver who decided to make that trip might be paying $500 or more to get home – more than these drivers make in many weeks. This provides an enormous advantage to TransAm because, as Ms. Henshaw suggests, facing the choice of going in the hole or staying out on the road, lease drivers regularly choose the latter, saving TransAm the fuel expense of sending out a company driver and keeping the lease driver's tractor available to move TransAm's freight.

And if drivers are dispatched far from home, they no choice but to sit and wait for TransAm to get them closer, as Mr. Truitt, who lived in New Jersey, explained at his deposition.

> Q. Did you understand that as an owner-operator, you could take as much home time as you wanted?
> A. I was told that, but that's not the way they -- they -- well, they kept you on the road. They kept you even sitting for the most part or they kept -- kept you away from home as much as they could.
> Q. Okay. When you say they kept you sitting for the most part, tell me what you mean by that.
> A.You can be -- you can take a load to, for instance, Colorado, and take a load to Colorado, and you might -- you might take it on a Wednesday or Thursday, deliver it on Thursday, and you might not have a load ready until, like, Sunday or Monday; so you're sitting out there with nothing. [85:5-20]

Far from a benefit, in either economic or personal terms, lease driver "control" over home time is a severe liability.

Claim 3 – Lease Drivers Benefit by Controlling Fueling

Another area where lease drivers can supposedly exert control and profit is choosing where to fuel their truck. Company drivers are limited to stopping at the stations where TransAm has agreements to purchase fuel and has authorized its EFS cards (the payment card issued to company drivers). TransAm negotiates discounts for these stops. Lease drivers also use EFS cards issued by the company, receive discounted fuel prices, and can get the "optimized" fuel routing for a charge of $3 a week. [Neyens Dep., 64:6-65:6; Cochran Dep. 76:20-77:6; Fuel Optimizer Authorization, DEF-00050126; Duffie Dep., 66 ("The fuel solution is offered. . . by TransAm as a way for drivers to -- independent contractors to maximize their profit. And so in my role, I was trying to the help the driver utilize that program to its fullest potential to help this driver increase revenue for their business."); Duffie Dep., 90:7-94:1 ("I just coached drivers in saying that there was an advantage to taking the fuel program because you didn't have to guess, you didn't have to do a whole bunch of work to find out where to fuel at, and you were going to be getting a discount of some sort.")]

In fact, fueling is yet another area where we see not benefit and control by lease drivers but liability and dependence on TransAm, which uses that dependence to its own advantage and to control drivers.

The most basic fact to recognize here is that lease drivers simply cannot afford to buy fuel. They use TransAm's fuel card, essentially getting advances from

TransAm, and then have the cost of fuel deducted from their pay. Without that card and the advances from TransAm, lease operators literally cannot move the truck because they can't buy fuel [DEF-00041313] and have to request authorization for even a "little fuel" to move their trucks [DEF-00032145].

TransAm uses that dependence to control drivers, such as turning off the fuel card until drivers approve log edits [DEF-00034914] or possibly until they get their trucks serviced or to prevent charges not approved by TransAm [Henshaw Dep., 186-7]

Perhaps the most remarkable demonstration of TransAm's complete control of their relationship with lease drivers, as well as how it misleads drivers about pay, is around the fuel surcharge lease drivers were paid. A fuel surcharge is an extra payment that is meant to defray the cost of increased fuel prices.

At the start of the class period, TransAm was paying drivers 84 cents per mile and a fuel surcharge [DEF-00072046]. By late 2018, it had given its lease drivers a "raise" to $1.04 per mile [DEF-00072092]. This 20 cents per mile increase in their mileage rate, however, was accompanied by a 20 cent decrease in driver fuel surcharge payments. Presumably TransAm did this because it understood that drivers were more likely to notice the mileage rate than the fuel surcharge.

Daryl Salmon, for instance, signs an IC agreement on 2/5/2020 with the fuel surcharge schedule that existed at the beginning of the class period [DEF-00081275]. He is paid by that fuel surcharge schedule on his first settlement on 2/21/20 [DEF-00081815] but then paid by a new schedule on his next settlement on 2/28/20 [DEF-00081816], about 20 cents per mile below what he had agreed to for fuel surcharge payments.

This change in the fuel surcharge further suggests the reality of what paying for fuel means for TransAm's lease drivers. The fuel surcharge is meant to reduce the risk of high fuel prices. But when TransAm changed the payment schedule to make it appear as if they were giving drivers a raise, they set the rate so low that if fuel prices dropped below $2.46 per gallon, the fuel surcharge is negative [DEF-00081681]. In fact, that happened in the Spring of 2020 as the COVID19 pandemic caused fuel prices to drop. At that point rather than lease drivers benefitting from lower fuel prices, TransAm *began deducting from Mr. Truitt's and other drivers' pay for the fuel surcharge* – negating some of the raise they had given drivers [DEF-0007017]. It is hard to imagine clearer evidence that TransAm structured the terms of its arrangement with lease drivers so as to maximize its return rather than allowing lease drivers a chance to benefit from the additional burdens and risk they take on. In this case, lease drivers didn't get the raise TransAm promoted but rather a pay cut when fuel prices dropped.

Claim 4 – Lease Drivers Benefit by Controlling Work and Refusing Loads

Refrigerated truckload firms engage in two basic activities that constitute the core of their businesses. The first is sales activity to identify and contract to haul the highest revenue freight possible. The second is a trucking operation geared to deliver that freight at the lowest cost while meeting the expectations of its customers.

Sales works with customers to set the basic parameters of freight movements and price without consulting specific drivers, regardless of whether they are lease drivers or company drivers, who will move the freight. Coordinating the movement of that freight will be a later task performed by the operations side of TransAm. This means that as it decides what freight to haul, TransAm is trying to get the most profitable rates it can, without concern for whether lease drivers or company drivers will perform the work or even if TransAm has drivers currently available to service that freight [Deposition of Hannah Murray, 35-36]. However, once TransAm commits to haul a load, it is responsible for meeting the specific requirements of that contract. TransAm, like other firms, uses a standard process applied across its fleets of lease drivers and company drivers to ensure that happens, with no meaningful variation except basic requirements of the freight service itself set by customers.

Truckload drivers, regardless of their classification by employers, make the same kinds of decisions about when and how to carry out their work. It is in TransAm's interest that truckers make decisions that maximize the use of TransAm's equipment, such as trailers, and complete loads in a timely manner. In other words, the goal is that workers make decisions that maximize returns for their employer.

Across different kinds of work and businesses, there is a range of management approaches to this challenge. The key dimension of variation is 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"). 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 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. On the other end of the spectrum are consensual 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*.

Consensual systems are designed to align the interests of workers with that of their employer and employ all kinds of incentives to achieve this, but the most important features involve compensation. Consensual management systems frequently use compensation systems intended to incentivize higher productivity by rewarding it directly (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, 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.

Most truck drivers in long-haul trucking are paid by the piece. This could be by the mile or as a percentage of revenue of each load hauled. TransAm pays its drivers by the mile. Like other pieceworkers, TransAm drivers will 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, well-designed piecework systems that allow workers limited autonomy to plan and carry out their work result in significantly higher productivity. Michael Burawoy (1979) 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 company drivers or lease drivers.[22]

Long-haul truckers want to drive as many miles as possible and make decisions about how and when to drive. Though carriers often suggest that lease drivers can behave very differently than company drivers, the decisions made by lease drivers and company drivers do not differ meaningfully at most long-haul motor carriers.

[22] Burawoy, Michael. 1979. *Manufacturing Consent*. Chicago: University of Chicago Press.

Based on data produced thus far in the case, it does not appear that TransAm's management of lease drivers differs in this regard.

Within the rules set by the Federal Motor Carrier Safety Administration for how many hours drivers can work and drive, known as Hours of Service or HOS, 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. Good loads involve more driving time and less unpaid work and waiting time. 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.[23]

Load quality determines most aspects of the job from how many hours the drivers 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 company drivers nor lease drivers have meaningful control over load selection. Again, as explained above, a motor carrier's sales department has already agreed to haul the loads "offered" to lease drivers and dispatchers have already figured out the optimal way to assign those loads to available trucks.[24]

Loads are planned without consulting drivers and done in a way that most efficiently matches drivers to loads by origin, destination and timing. The goal of this planning is to schedule loads as far in advance as possible. If a driver refuses a load, then other assignments may need to be reworked or the firm may not have a driver to cover a commitment to a customer. Punishment of drivers in the refrigerated segment is commonplace because load planners' and dispatchers' jobs are made more difficult when lease drivers refuse loads and customer service may suffer. As Murray Droescher, TransAm's Chief Financial Officer, states, lease drivers can "hurt" TransAm "seriously" if they don't make good decisions servicing TransAm's customers. [Droescher Dep., 55]

When drivers get a bad load at TransAm, there is little they can do about it except refuse the load and ask to be reassigned. They cannot go out and get themselves a different load. Lease drivers are only able to work for TransAm while under lease to the company (they cannot drive the leased truck for other companies) and as such are dependent on the company for all of their revenue. [Neyens Dep., 37:20-39:4]

[23] Viscelli 2016, Chapter 2.
[24] Ibid.

Lease drivers may have the nominal right to refuse loads, but since they don't know what other work is available, all they can do is wait to be assigned another load. Driver managers have the ability to simply tell drivers that no other work is available and make them sit, or threaten that they will sit. This is demonstrated by these messages from a TransAm driver manager to Mr. Colvin-Williams after he refused a load.

> YOU DON'T HAVE TO, IT IS COMPLETELY UP TO YOU. I'M JUST LETTING YOU KNOW THE SITUATION. YOU HAVE EVERY RIGHT TO WAIT FOR DAYS TO COME IN JUST IN CASE THEY BOOK NEW FREIGHT IN THAT AREA THAT MAY BE GOING THAT WAY. I'M JUST LETTING YOU KNOW WHAT WE HAVE FOR TONIGHT. IF YOU WOULD LIKE TO WAIT, YOU CAN. OR WE CAN PUT YOU BACK ON THE LOAD THAT YOU PREVIOUSLY REFUSED. JUST LET US KNOW.
>
> THERE ARE NO LOADS IN THE AREA THAT YOU ARE IN THAT GO TO BUFFALO, NY. IF YOU TAKE THE PREPLAN THAT WE HAD ON YOU, THERE IS A MUCH BETTER CHANCE TO GET A LOAD GOING THAT DIRECTION. THE CLOSEST THING THAT WE WOULD HAVE IN THAT AREA TO WHERE YOU ARE REQUESTING DELIVERS IN PA AND DOESN'T PICK UP FOR 3 DAYS [DEF-00031212]

And this message to Mr. McRoberts:

> THAT IS WHT IT SAYS YOU CAN REFUSE IF YOU DON'T WANT I DON'T KNOW IF THERE IS ANYTHING ELSE ON YARD RIGHT [DEF-00031398]

While the common rhetoric is that carriers do not punish lease drivers, the reality experienced by drivers is often quite different. In fact, it is the potential of this punishment that incentivizes lease drivers to accept virtually all loads. And planners and driver managers clearly have the power and incentive to punish when drivers refuse loads and make their work more difficult. Drivers know that they are dependent on the company for loads and believe that refusing loads puts them at risk.

Extensive management is evident in the assigning and reassigning of loads. In the refrigerated segment bad loads generally require drivers to perform more live loading and unloading (i.e. they wait while the trailer is loaded or unloaded). In the case of TransAm loads, since most are refrigerated, availability of freight and loading times are more prominent than for other kinds of freight. This is because trailers are often not preloaded and available for a "drop and hook"; instead, they must be "live-loaded" and "live-unloaded," which means the driver waits while the freight is loaded and unloaded [Henshaw Dep., 63], a process that can take hours, even after the driver may have waited hours to "get in the door" for this process to start.

Once loads are underway, TransAm actively tracks the progress of loads to ensure on-time delivery. TransAm uses satellite-linked computers to monitor lease drivers as they carry out the company's work. This system can provide a range of information to dispatchers but is most often used to find the location of a truck to estimate its arrival time at the destination. This information is sent from the truck to the system at regular intervals and dispatchers can see a truck's current location.

Driver managers can also ensure that TransAm drivers' trailers are in the proper temperature range and will instruct drivers on what to do if there is a problem with the temperature of a load.

There are no differences among drivers in how they are monitored once hauling freight, regardless of how they are classified by TransAm. At times, because these drivers are inexperienced, driver managers will coach lease drivers, instruct them how to log their hours, and how to manage their schedule [DEF-00030312; DEF-00030309; DEF-00042285; DEF-00041721].

Here is an example of a driver manager telling a lease driver how to use their hours to complete their work:

> SO IF YOU GO TO THE WALMART, LIKE YOU STATED, AND SHUT DOWN NOW AND LOG YOUR 10 HOUR BREAK NOW, IT WILL END AT 0330CST AND YOU CAN THEN JUST ROLL INTO THE SHIPPER FOR YOUR 0400 APPOINTMENT TIME THAT THEY GAVE YOU. NOT AN ISSUE [DEF-00032021]

Or, even, driver managers will call to wake lease drivers up to get them driving to ensure on-time delivery, as one reports doing in the following message.

> CARL I'M ON THE PHONE SAYING HELLO. I'M TRYING TO WAKE YOU UP BECASUE WE NEED YOU TO START ROLLING WITH YOUR LOAD. CALICO [DEF-00081681]

In combination with information from the truck, information about a driver's available HOS and the estimated time of availability to haul their next load are what allow load planners to assign loads in a way that maximizes TransAm resources and profit while ensuring that it meets its commitments to customers. Driver managers at TransAm are just that: managers.

If TransAm driver managers believe that a load will be late based on GPS data provided by the computer system, they will direct drivers to meet another TransAm truck to swap trailers, so that a driver with sufficient HOS can complete the load on-time. This is a common practice in the truckload segment, particularly in refrigerated freight, known as a repower [Deposition of Christopher Duffie, 120-121]. Drivers often don't want to have loads "taken off" of them, but they have little choice as TransAm driver managers need to ensure that the motor carrier meets the promises it made to its customers. Here driver managers could try to reschedule appointments for loads but will threaten drivers with financial penalties or sitting unpaid (i.e.waiting to work), as this driver manager communicated to Mr. Roberts in the message below.

> YOU CAN REFUSE THE RELAY BUT IF YOU ARE LATE FOR ANY REASON YOU BECOME RESPONSIBLE FOR ANY LATE/RESCHEDULE FEES. THAT INCLUDES A BREAKDOWN, FLAT TIRE, TRAFFIC ETC. THEY SYSTEM IS CURRENTLY SHOWING YOU NOT ABLE TO MAKE IT AND YOU WILL HAVE TO SIT ON LOAD UNTIL WE GET A NEW APPT. [DEF-00028880]

Repowers demonstrate, from an economic perspective, TransAm's interest and ability to manage and direct the labor of lease drivers to produce trucking services for TransAm. TransAm is not, in fact, contracting with a separate business for a discrete trucking service of moving a load from one place to another in a specified time when TransAm offers a load to a contractor, TransAm is engaging in its core activity of producing trucking services.

The record suggests that lease drivers often can't make their scheduled appointments and repower the load. And yet, Henshaw reports there aren't consequences for lease drivers breaking that commitment to deliver the load on time as long as the driver then complies with repower directions [Henshaw Dep., 68]. If, in fact, TransAm was contracting with lease drivers by the load there would be consequences for not fulfilling the contract. The fact is, however, that an individual lease driver can't reliably perform the freight service TransAm customers expect and so ultimately it is up to TransAm to provide that service.

OTHER CLAIMS OF CONTROL

Routing Decisions

Truckers receive load information and often specific driving directions and will plan their routes using electronic mapping devices or paper maps, if they are not familiar with a route, to ensure that it takes them on truck-approved roads. There is virtually always one best route to haul a load. While lease drivers may be nominally free to choose a different route and company drivers nominally required to take a prescribed one, in reality this makes no significant difference. The routes on which

TransAm plans loads are already the best ones available for that freight and the timing of the load delivery accounts for that and the drivers' available hours. Any meaningful deviation in routing would cost the lease driver in additional fuel and increase travel time, which would lead to lower productivity and higher costs.

In fact, TransAm does not monitor the exact routes of its drivers because it is only concerned about the delivery time. The ability to choose routes almost certainly makes no meaningful difference to the work and earnings of lease drivers because it constrained by the basic geography of moving the load and planning of TransAm.

Where and When Maintenance is Done

The ability to perform maintenance is an area where an owner-operator could in theory reduce their costs by performing their own labor. TransAm, however, because it ultimately has an interest in preserving the value of the tractor it owns, requires regular maintenance of its lease drivers' trucks and uses its control over dispatch to force drivers to get preventative maintenance done when TransAm wants it done. [Henshaw Dep., 195:7-196:11] Significantly, much of the maintenance that TransAm requires its lease drivers to get done on their trucks is <u>not</u> done by TransAm on its company trucks. [Deposition of Thore Hammitt, 116:17-118:8]

If lease drivers were going to perform their own maintenance, it would almost always be preventive maintenance. TransAm requires that lease drivers have such regular maintenance performed by a specific kind of technician, precluding the lease driver from saving money by performing his/her own oil changes and routine maintenance. The lease-purchase contract for the tractor requires the lease driver to have the inspections performed and follow the maintenance guidelines in the leasing agreement. If drivers refuse to perform that service as ONE Leasing requires, TransAm will shut them down until they do [DEF-00031340]. If lease drivers could control that maintenance they might try to delay it, perhaps to save money or to work more that week because of bills at home.

Claim 5 – Lease Drivers Benefit by Making More Money

TransAm claims that drivers have the opportunity to make more money as a lease driver than as a company driver by, among other things, getting paid a higher mileage rate [Cochran Dep., 77-78; DEF-00034914- DEF-00070519]. As I will demonstrate below, the actual mileage pay of lease drivers is far below that of company drivers after TransAm deducts all the costs of leasing – costs either entirely determined by TransAm or those that vary based on mileage on schedules set by TransAm. TransAm also claims drivers can earn significantly more by working more, not going home, or "keeping the restaurant open" more [Henshaw Dep., 226]. The data in the record shows that this is not true. The drivers for which there is complete data were, in fact, “keeping the restaurant open” far more that the average TransAm company driver and yet they still neither earned as much as a TransAm student driver nor earned anywhere close to the total earnings of a comparable company driver.

As Table 1 shows, the plaintiffs generated $744 more per week in average weekly revenue than the average truck in TransAm’s long-haul fleet (i.e., trucks driven by company drivers). That represents about 20% greater productivity. All of the drivers were right around the average or significantly above it.

While I do not have fleet productivity measures for company drivers in terms of days on the road per week, month or year for comparison, the greater productivity of lease drivers typically results from taking less home time.

Table 1. Weekly Productivity of TransAm Lease Drivers In Average Weekly Revenue			
TransAm Lease Driver Plaintiff Weekly Average Revenue			***$4,386***
2021 TransAm Long Haul per Truck Weekly Revenue Goal 2021			*$4,000*
2021 TransAm Long Haul per Truck Weekly Average Revenue[25]			*$3,642*
Drivers with Data Available to Compare Productivity			
	Total Revenue Generated For TransAm	*Approx. Weeks Worked*	*Revenue per Week for TransAm*
Otis	$22,436.89	6	$3,740.00
McRoberts	$28,929.01	7	$4,133.00
Wright	$57,711.17	10	$5,771.00
Colvin-Williams	$52,343.36	15	$3,490.00
Roberts	$123,072.00	26	$4,733.00
Salmon	$109,427.00	26	$4,209.00
Jarmon	$105,916.18	29	$3,652.00
Truitt	$686,210.04	128	$5,361.00

Despite their greater productivity, these drivers were not rewarded with greater compensation. Table 2 shows a conservative estimate of the mileage rate paid to lease drivers. [26] As Table 2 shows, these drivers are paid far less in compensation than company drivers at TransAm. And they are paid far less than they would be at

[25] Weekly revenue reported in DEF-00092215 is for Jan. 7th – Nov. 18th, 2021.

[26] Driver mileage pay was calculated by adding all pay and advances except: stop pay, tuition reimbursement, referral bonuses, birthday pay, relay pay, sign-on bonuses, retention bonuses, and reimbursement for motels and other expenses. These are all expenses company drivers could be eligible for and are not included in ATA's benchmarking estimate for basic mileage pay used in the table. The mileage rate for TransAm includes breakdown pay, availability bonuses, lost utilization pay, anything labeled "extra pay," advances on the drivers fuel cards (which I understand are labeled beginning "HL-" on settlement sheets, and recovery pay. Arguably some of these would also be paid to employee drivers, meaning that the estimated rate could be higher than it should be for the best comparison to the ATA rate. See Appendix A for lease driver data used in the calculation.

other jobs they could easily get according to 2019 driver compensation benchmarking by the American Trucking Associations.

Table 2. Mileage Rate Comparison *TransAm Lease Driver Pay Per Mile (2018-2021) to TransAm New Employees (2019) and Inexperienced Drivers in Refrigerated Segment (2019)*				
TransAm Lease Driver Plaintiff Average				**$0.18**
TransAm Student Driver Pay Rate				$0.31
TransAm New Employee Pay Rate				$0.32
Refrigerated Segment New Employee[27]				$0.45
Drivers with Sufficient Data to Calculate a Mileage Rate				
	Approximate Weeks Worked	*Total Miles Driven*	*Total Mileage Pay*	*Mileage Rate Per Mile*
Otis	6	10,738	$1,200.72	**$0.11**
McRoberts	7	15,490	$3,089.49	**$0.20**
Wright	10	24,621	$4,676.15	**$0.19**
Colvin-Williams	15	27,809	$2,504.75	**$0.09**
Roberts	26	62,877	$13,306.67	**$0.21**
Salmon	26	56,190	$12,090.22	**$0.22**
Jarmon	29	56,515	$8,798.99	**$0.16**
Truitt	128	336,526	$79,547.10	**$0.24**

Nassir Truitt's Income in Comparison

Lease drivers at TransAm have no chance to earn good incomes relative to what they could elsewhere. The most successful lease driver in the record, Mr. Truitt, who completed five consecutive leases illustrates this. Despite herculean efforts, he

[27] Karickhoff, Alan and Bob Costello. 2020. ATA 2020 Driver Compensation Study. Arlington, VA: American Trucking Associations.

simply couldn’t get enough miles at the low rate that TransAm pays to make it work out financially. As he describes:

> It's pretty much they, like, counting your miles and -- you know, I talked to my dispatch about getting, you know, 3,000 miles or more. I’m wanting to do it, and nowhere near that. 2000 -- 22, 24, 26. Barely got 26. Like, I had to push to do that, to get those type of miles.
> to get those type of miles.
> Q. You wanted more miles and make --
> A. I want --
> Q. -- more money?
> A. Right. [85:21-86:5]

Despite being far more productive than the average TransAm driver and far exceeding the company’s per-truck goals, Mr. Truitt summarized his experience like this:

> Q. You drove for TransAm for a long time?
> A. Yeah, I -- I gave no reason. Like, you know, my dispatchers and them, they didn’t – they didn’t want to see me go, they -- but it wasn’t doing nothing for me and my family. Like, I stuck in as long as I could in the -- between the COVID and no miles and not being home and stuff like that, just -- it just broke me. [87:3-10]

In 2019 Mr. Truitt generated $254,339 in revenue for TransAm. That works out to about $4,890 per week in revenue, far above the $4,000 per week goal that TransAm has for long haul trucks in its fleet, and even further above the average revenue generation of its long-haul trucks, which in 2021 generated an average of about $3,640 per week. Assuming the revenue per truck was comparable in 2019, Mr. Truitt was roughly 34% more productive than that the average truck.

Despite his productivity Mr. Truitt earned just $33,126 in 2019, including all of his mileage pay, bonuses and advances from TransAm. The median earnings of an employee in refrigerated trucking is about $67,600 according to the American Trucking Association – twice what Mr. Truitt was earning. And that is before we take into account additional self-employment taxes.

It is worth noting that better paying jobs across the trucking industry are likely to include employer contributions to health and retirement benefits – equivalent to almost an additional 1/3 of employee salaries according to the American Transportation Research Institute data described below. Obviously, if these were included, the total annual compensation, Mr. Truitt is much worse off than he would have been elsewhere. In fact, at points, he works for weeks or months without ever digging himself out of the hole, surviving on $150-500 a week in advances and loans from TransAm.

Table 3. 2019 Annual Earnings for Nassir Truitt[28] and 2019 Median Earnings Employees by Industry Segment as reported by the American Trucking Associations[29]	
Mr. Truitt 2019	**$33,126**
Refrigerated Employee *(not including benefits)*	$67,600
Less Than Truckload OTR Employee *(not including benefits)*	$66,188-$80,000
Private Employee *(not including benefits)*	$84,929

TransAm's lease driver program is clearly designed to constrain lease driver compensation to a narrow band. They cannot make more per mile if they work more, because if they utilize the truck at a higher rate, their maintenance costs go up and TransAm charges an excess mileage fee [Droescher Dep., 55:11-56:24; DEF-00050094].

If drivers work too little (which they often can't help because TransAm simply may not have enough work for them to do), they end up doing whatever work they can get from TransAm essentially for free because their "revenue" doesn't exceed their costs. If they work too much, i.e. incur excess mileage charges, then TransAm has structured the terms of their contracts so that drivers will never earn even as much as an inexperienced driver, let alone what they could earn at other firms.

How TransAm Profits from this Labor Management System

[28] Truitt's total annual earnings were calculated by adding together all settlement payments and advances made to him in 2019. See Appendix A for data used in the calculation. For
[29] Karickhoff, Alan and Bob Costello. 2020. ATA 2020 Driver Compensation Study. Arlington, VA: American Trucking Associations, pgs. 40, 61-74.

Teresa Henshaw, in response to a question as to whether there were sufficient loads for lease drivers to run 3000 miles a week, stated that, “We would give an IC a load over a company driver any day” [Henshaw Dep., 248: 4-5].

Indeed, at the rates TransAm was paying lease drivers, it should prefer to have lease drivers run its freight as it would be several times as profitable as using company drivers.

The American Transportation Research Institute conducts a survey of operational costs of trucking annually. That survey has historically shown that driver compensation is the largest cost for motor carriers. In 2019, total driver compensation represented about 42% percent of all costs for carriers per mile. Driver wages were 32% of costs per mile and benefits were 10%. There is no data in the record that would allow for calculation of TransAm total per-mile costs on average but we can see the total revenue that it collected for the named and opt-in plaintiffs. On average, TransAm’s total costs for lease driver labor in the case records was just 11.3%. In the case of Mr. Truitt, over the two and half years he worked for TransAm, his truck generated 686,210.04 in revenue. He was paid $82,207.20 or just 12.0% of the revenue he generated.

Truckload firms rarely have an operating ratio (costs as a percent of revenue) below 90% and in 2019 operating ratios for truckload firms were quite a bit higher than that on average. The record does not contain data on TransAm’s operating costs or profitability, so it is difficult to know with precision, but its labor costs when using lease drivers is an incredible advantage. As Table 4 indicates, it is likely that, as percentage of costs or per mile, TransAm spends between one-quarter and one-third of what the average trucking firm spends on labor by using lease drivers.

Table 4. Labor Cost Comparison[30] *TransAm Lease Drivers and Industry Employees*	
TransAm Lease Driver Compensation as % of Revenue	**11.3%**
Industry Average Driver Compensation as % of Costs (Inc. Wages and Benefits)	42%
TransAm Lease Driver Average Compensation Per Mile	**$.227**
Industry Average Driver Compensation Per Mile (Large Fleet Average, Inc. Wages and Benefits)	$.709

Drivers with Sufficient Data to Compare Compensation Costs

	Total Revenue Generated For TransAm	*Total Compensation (Mileage + Bonus)*	*Compensation % of TransAm Revenue*	*Total Compensation per mile*
Otis	$22,436.89	$1,579.20	7.0%	0.147
McRoberts	$28,929.01	$3,262.28	11.3%	0.211
Wright	$57,711.17	$7,424.15	12.9%	0.302
Colvin-Williams	$52,343.36	$4,602.00	8.8%	0.165
Roberts	$123,072.00	$16,296.67	13.2%	0.259
Salmon	$109,427.00	$15,655.22	14.3%	0.279
Jarmon	$105,916.18	$11,708.99	11.1%	0.207
Truitt	$686,210.04	$84,932.00	12.4%	0.252

[30] See Appendix A for data used in the calculation for lease driver. Comparison data is from Williams, Nathan and Dan Murray. November 2020. "An Analysis of the Operational Costs of Trucking: 2020 Update." Minneapolis, MN: American Transportation Research Institute, Tables 11 & 16.

12. Conclusion

The lease driver model has been compared by drivers and researchers to historical practices of indentured servitude, company stores, or sharecropping. While I don't use those terms, this is obviously a labor model designed to maximize profitability through misinformation, financial coercion, and hyper-exploitation. In short, it takes advantage of the lack of knowledge and the financial vulnerabilities of workers already at a disadvantage in the labor market. I have studied the lease driver model in long-haul trucking for more than 15 years and seen these kinds of practices before. I have interviewed hundreds of truck drivers and opined on the lease driver model at a number of large and small firms. Through that work I have analyzed the pay and work records of tens of thousands of drivers. In that time I have not, however, seen any firm take as extreme an approach as TransAm across on so many dimensions of the model.

From an economic perspective there is no doubt that TransAm lease drivers are not operating their own small business but are, rather, employees of TransAm. From an economic perspective the issue of whether 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.

The data produced thus far in this case suggests that to carry out its core business of transporting full truckloads of freight as efficiently and cheaply as possible, TransAm manages lease drivers extensively using uniform load planning, monitoring and dispatching systems. When TransAm's interests are at risk, particularly due to service failures, TransAm intervenes and coordinates the labor of lease drivers with that of other workers to ensure that it fulfills commitments to customers.

TransAm appears to have designed its system to produce remarkable labor costs savings at the expense of the highest turnover rates I have ever encountered. Certainly, there are costs associated with that turnover, including additional recruitment, training and truck recovery. But the degree to which TransAm underpays these drivers is truly stunning - likely between a third and a half of what they could have earned elsewhere. These drivers struggled week after week on the road, sometimes earning no take-home pay and surviving on advances and loans from TransAm. TransAm certainly benefits from these practices handsomely. The plaintiffs in this case had the misfortune to end up convinced that TransAm was the best opportunity they had to enter the trucking industry. They were clearly wrong, and it appears that thousands of others similarly suffered over the period covered by this case.