



## A Long Haul

How the government's policy to modernize trucks collides with its policies to promote high-wage jobs

DAVID BENSMAN AND MOLLY GREENBERG | *September 6, 2010*

The Obama administration has defined the misclassification of employed workers as independent contractors to be an important problem resulting in workers losing legal protections and benefits, and governments losing tax revenue and insurance contributions from employers. Yet at the very same time, the administration's agencies are supporting and encouraging misclassification in at least two sectors of the trucking industry -- port trucking ("drayage") and ground express delivery.

Drayage is that part of the trucking industry that hauls containers from ports to railroad yards, warehouses, and distribution centers, where containers are broken down and the goods repacked for delivery to retail stores. The industry "employs" more than 110,000 drivers at seaports on the West Coast, Gulf Coast, and the Atlantic seaboard as well as at large inland ports such as Chicago.

Most of the drivers work under the legal status of independent contractors, which means that they own their trucks and use them to contract transport services to licensed motor carriers (LMCs), the trucking firms that contract with shippers like Wal-Mart, Target, and Home Depot to deliver import -- containers to their warehouses and distribution centers. For the past three years, a coalition of labor, environmental, environmental -- justice, faith-based, and public-health groups (under the banner of the Coalition for Clean and Safe Ports) has been challenging the notion that these drivers are truly independent contractors, arguing rather that they are misclassified employees who work under the control of the LMCs. Furthermore, the coalition argues, low earnings force drivers to use old diesel engines that pollute the air in port-adjacent communities and along freight routes, resulting in billions of dollars in medical costs to treat lung cancer, heart disease, and asthma.

Federal agencies have been supporting the industry's misuse of independent contractors by establishing grant and subsidized-loan programs designed to enable drivers to replace old, polluting trucks with either new trucks that meet federal pollution standards or with engine retrofits that reduce diesel emissions -- rather than requiring normalization of their employment status. While these programs are well -- intentioned, they are doomed to fail, because they rely on a broken business model -- namely the hypercompetitive drayage sector, where small, poorly capitalized firms compete for business by squeezing misclassified drivers. Even worse, the loan programs reinforce the drivers' dependence on the very drayage firms that are squeezing them. As a result, the loan programs are scenes of exploitation where drivers are doomed to fail as they can't meet the terms of their loans. One federal initiative is at odds with another, and millions of federal dollars could be wasted in the process.

### Not Such a Smart Way

Consider the 2008 Smart Way Program by which the Environmental Protection Agency (EPA) partnered with the Southern California Air Quality Monitoring District to lend \$5 million to Cal Cartage, a drayage firm operating at the ports of Los Angeles and Long Beach, to replace 132 pre-1995 diesel trucks with new trucks powered by liquid

natural gas costing \$150,000 each. Federal funds subsidized leases to Cal Cartage's so-called independent contractors. Under the terms of those leases, the drivers bound themselves to drive for Cal Cartage exclusively. Moreover, the leases stipulated that the drivers had to haul a specified number of containers each month or incur a penalty. Drivers found the lease terms insupportable. Payments on their new trucks ate away at their net monthly earnings, which averaged only \$2,500.

Furthermore, drivers couldn't always make the required number of hauls. As a result, drivers' earnings dropped from \$10 to \$11 per hour (with no benefits) to just \$6 to \$7 per hour. Many drivers are now also in danger of defaulting on their loans. In sum, the EPA's truck-replacement program intensified the drivers' dependence on the trucking companies, reduced their income, and contributed nothing to environmental goals.

At a recent hearing by the U.S. House Subcommittee on Highways and Transit that examined other truck lease-to-own arrangements, Rep. Jerry Nadler of New York described these arrangements as "serfdom" because drivers will be financially indebted to their employer. Under questioning, the American Trucking Association and another industry association -- the Coalition for Responsible Transportation -- admitted that, to their knowledge, no driver had successfully completed any of these lease agreements to own a truck. The subcommittee's chair, Peter DeFazio, announced at the hearing's conclusion that the Transportation and Infrastructure Committee would begin an investigation into the employment and truck-leasing practices of harbor trucking companies to determine the extent and impacts of worker misclassification.

The EPA's support of the Port of Oakland's truck cleanup produced similarly troubling outcomes. In 2009, the Bay Area Air Quality Monitoring District received \$2 million in Recovery Act funds to subsidize replacement or retrofitting of pre-1994 diesel engines. Oakland's cleanup program provided independent contractors with grants of up to \$5,000 each to purchase new filters that reduced fine-particle emissions and cost \$16,000 to \$21,000. Under the program, the drivers had to borrow \$10,000 to \$20,000, resulting in monthly loan payments of \$300 to \$500, but this was just the beginning of the cost of the retrofit, because the filters are delicate and must be rigorously maintained or else they become clogged and crack.

One Oakland driver says that in order to get his truck ready for the retrofit, he had to spend \$3,000 to upgrade its 1995 diesel engine. Once the retrofit was completed, he had to bring his truck to a mechanic every time a warning light signaled that diesel soot was clogging the filter. In the first four months, he had to bring in his truck 11 times. He was off the road for five to eight hours every time the filter was cleaned. These unforeseen costs of engine maintenance mean the truck-cleanup program has been far costlier than advertised. Many drivers, who are already financially squeezed, have held off applying for loans.

A third troubled EPA-supported loan program is the Port of Houston's truck-replacement subsidy plan, which combines \$36 million in state grants with \$9 million in Recovery Act funding. Under the plan, the state of Texas provides up to 80 percent of the cost of replacing a truck with a pre-2004 engine, and federal funding subsidizes the "bridge loan" covering the remaining cost. The plan allows for replacing only 207 trucks, but the program is so inefficient that the money available for grants and loan subsidies could pay to purchase new trucks loan-free for all 207 drivers. Nevertheless, because of the high cost to hard-pressed drivers, to date there have been only eight applications, of which three have been approved. Of the five that were denied, three were rejected on the basis of the independent contractors' credit history. Patricia Lawhorn from the Houston-Galveston Area Council commented: "We have encountered about three drivers with soft credit scores and profiles that the loan committee was not comfortable with making loans to. This has prompted us to go back to the drawing board to see how we could make this program more accessible to people who really need it. ... It all comes down to the monthly payment. For some drivers, the loan rate and fuel efficiency don't matter, just what [they] can afford a month." The failure of the Houston program demonstrates that even with access to a generous subsidy program, independent contractors have such poor credit records that they don't apply, much less qualify, for grants and loans to replace their old trucks.

This conclusion is supported by the record of The Port of New York and New Jersey's truck-replacement program, which has less money available (\$28 million in grants and loans) to subsidize far more (600) replacements of pre-2004 trucks. With independent contractors earning only \$28,000 in the spring of 2008, and doubtless less in the slow times since, few independent contractors have applied for the subsidized loans. As of early July, only 100 loan applications had been received and just six had been approved. These loan programs aimed at independent contractors are based on a faulty business model that assumes independent contractors can afford clean diesel engines.

### **Express Misclassification**

FedEx offers another example where the Obama administration's effort to improve job quality is being undermined by an executive agency -- in this case, the Department of Defense. While a joint task force made up of the Labor Department and the Internal Revenue Service has been established to crack down on worker misclassification, a practice of which the FedEx Ground division has been repeatedly found guilty, the Department of Defense continues to award FedEx huge contracts.

For years, FedEx's ground-delivery system has saved money and resisted unionization by disguising its drivers as contractors or temps -- something that is illegal under labor law. In the most recent court decision against FedEx, U.S. District Court Judge Robert Miller found in May that delivery drivers were employees under the Illinois Wage Act in everything but name. They were required to buy or lease trucks that met company specifications, pay for the company logo to be painted on their trucks, and dress in company uniforms, down to the color of their socks and shoes. They made pickups and deliveries on routes assigned by the company, were barred from using their trucks to haul loads for other companies, and had to park their trucks in company-assigned spaces.

The court found that FedEx Ground misclassified its drivers as independent contractors as an illegal means to avoid paying state unemployment insurance and workers' compensation insurance. Judge Miller's ruling was significant because it is the first in a multidistrict class-action suit filed on behalf of 27,000 current and former FedEx Ground drivers in 20 states. Rulings on additional suits are expected later this year. The ruling follows a 2008 decision by the California Supreme Court, which upheld a trial-court decision in *Estrada v. Fedex Ground Systems, Incorporated*, finding that FedEx Ground drivers were employees, not independent contractors. In denying FedEx's appeal, the California court found that "the drivers look like FedEx employees, act like FedEx employees, are paid like FedEx employees, and receive many employee benefits."

Court rulings like these would seem to make FedEx a prime example of the worker misclassification on which the Obama administration promised to crack down when it created a joint IRS-Labor Department task force that will audit 6,000 companies over the next three years to determine whether they are illegally misclassifying their employees as independent contractors, and, in the process, failing to pay Social Security, unemployment-insurance, and workers' compensation taxes as well as denying workers the protection of federal and state labor laws.

Yet according to the Federal Procurement Data System, in 2009, FedEx received \$1.5 billion in contracts from the Department of Defense for "Charter Programs Team Arrangement." Why is the Obama administration rewarding the very companies that are defying its efforts to enforce labor law?

### **Using Legislation and Executive Authority**

The proposed Employee Misclassification Protection Act, introduced in April by Democratic Sen. Sherrod Brown of Ohio, and proposed regulations against misclassification by the Department of Labor's Wage and Hour Division could erode the drayage industry's reliance on misclassification. But there is plenty that the executive branch of the U.S. government can do right now. If the Department of Defense began using contractors who were not flouting labor laws to move goods and material, the Obama administration would send a strong signal that it is serious about

cracking down on misclassification. As far as port trucking is concerned, the EPA needs to recognize economic reality. Independent contractors are squeezed by licensed motor carriers; they can't afford modern diesel engines. Loan programs aimed at diesel -- emission reduction should be directed at trucking companies that can afford modern engines. More generally, the federal government should help the drayage industry restructure so that well-capitalized, employee-based trucking companies become the norm.

The proposed Clean Ports Act of 2010, sponsored by Rep. Nadler, would give port authorities the power to regulate freight movement within their regions in order to achieve environmental, congestion, and safety goals. Some ports, such as Los Angeles and Long Beach, have attempted this, but their authority to do so has been challenged in court. Only in a restructured industry will trucking companies be able to afford the modern engines that make pollution reduction possible. And in a restructured industry, companies won't misclassify drivers, and drivers can earn a decent living.



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