

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

XPO CARTAGE, INC.

and

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS**

**Cases 21-CA-150873
21-CA-164483
21-CA-175414
21-CA-192602**

**ORDER FURTHER CONSOLIDATING CASES, THIRD
CONSOLIDATED COMPLAINT AND NOTICE OF HEARING**

On August 23, 2016 a Second Consolidated Complaint and Notice of Hearing issued in Cases 21-CA-150873, 21-CA-164483, and 21-CA-175414 alleging that XPO CARTAGE, INC. (Respondent) had engaged in unfair labor practices that violate the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq. Pursuant to Section 102.33 of the Rules and Regulations of the National Labor Relations Board (the Board) and to avoid unnecessary costs or delay, IT IS ORDERED THAT those cases are further consolidated with Case 21-CA-192602, filed by INTERNATIONAL BROTHERHOOD OF TEAMSTERS (Union) which alleges that Respondent has engaged in further unfair labor practices within the meaning of the Act.

This Third Consolidated Complaint and Notice of Hearing, issued pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, is based on these consolidated cases and alleges that Respondent has violated the Act as described below.

1. (a) The charge in Case 21-CA-150873 was filed by the Union on April 24, 2015, and a copy was served on Respondent by U.S. mail on April 24, 2015.
- (b) The first amended charge in Case 21-CA-150873 was filed by the Union on June 29, 2015, and a copy was served on Respondent by U.S. mail on June 30, 2015.
- (c) The second amended charge in Case 21-CA-150873 was filed by the Union on August 11, 2015, and a copy was served on Respondent by U.S. mail on August 11, 2015.
- (d) The third amended charge in Case 21-CA-150873 was filed by the Union on August 20, 2015, and a copy was served on Respondent by U.S. mail on August 21, 2015.
- (e) The fourth amended charge in Case 21-CA-150873 was filed by the Union on April 14, 2016, and a copy was served on Respondent by U.S. mail on April 14, 2016.
- (f) The fifth amended charge in Case 21-CA-150873 was filed by the Union on June 1, 2016, and a copy was served on Respondent by U.S. mail on June 2, 2016.
- (g) The charge in Case 21-CA-164483 was filed by the Union on November 18, 2015 and a copy was served on Respondent by U.S. mail on November 19, 2015.
- (h) The first amended charge in Case 21-CA-164483 was filed by the Union on February 25, 2016 and a copy was served on Respondent by U.S. mail on February 29, 2016.
- (i) The charge in Case 21-CA-175414 was filed by the Union on May 3, 2016 and a copy was served on Respondent by U.S. mail on May 4, 2016.
- (j) The first amended charge in Case 21-CA-175414 was filed by the Union on June 28, 2016 and a copy was served on Respondent by U.S. mail on June 30, 2016.
- (k) The charge in Case 21-CA-192602 was filed by the Union on February 3, 2017 and a copy was served on Respondent by U.S. mail on February 7, 2017.

(l) The first amended charge in Case 21-CA-192602 was filed by the Union on February 9, 2017 and a copy was served on Respondent by U.S. mail on February 10, 2017.

2. (a) At all material times, Respondent, a Delaware corporation, has been engaged in the business of transportation logistics services, with a place of business located at 5800 Sheila Street, Commerce, California (herein Commerce facility).

(b) During the 12-month period ending December 31, 2015, a representative period, Respondent, in conducting its business operations described above in paragraph 2(a), performed services valued in excess of \$50,000 in States other than the State of California.

3. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

5. (a) At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Enrique Flores	Safety Manager
Ezequiel Chevez	Recruiter
Hector Bannelos	Dispatch Manager/Supervisor
Miguel Camacho	Yard Manager
Steve (unknown last name)	Assistant to the Security Department
Javier (unknown last name)	Recruiter
Javier (unknown last name)	Yard Manager

(b) At all material times, the following individual held the position set forth opposite his name and has been an agent of Respondent within the meaning of Section 2(13) of the Act:

Armando (unknown last name)

Dispatcher

6. On or about February 26, 2015, Respondent, by Hector Banuelos, at the dispatch window at the Commerce facility, told an employee that the employee was not receiving work assignments because he was wearing Union insignia.

7. On or about March 4, 2015, Respondent, by Dispatcher Armando, at the dispatch window at the Commerce facility, prohibited employees from talking about the Union during working hours while permitting employees to talk about other non-work subjects.

8. On or about March 6, 2015, Respondent, by Ezequiel Chevez, in the hallway outside of Enrique Flores's office at the Commerce facility, prohibited employees from wearing Union insignia at work while permitting employees to wear other insignia.

9. On or about April 22, 2015, Respondent, by Enrique Flores, at Flores's office at the Commerce facility:

(a) interrogated an employee about the employee's union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees;

(b) implicitly threatened an employee with job loss and/or unspecified reprisals if the Union won or came into the Commerce facility.

10. On or about April 27, 2015, Respondent, by Ezequiel Chevez and Miguel Camacho, by photographing and/or video recording employees engaging in a strike outside the Commerce facility, engaged in surveillance or created the impression of surveillance of employees engaged in union activities.

11. On or about May 5, 2015, Respondent, by Enrique Flores, in Flores's office at the Commerce facility:

(a) interrogated an employee about the employee's union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees;

(b) by soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employees;

(c) threatened an employee with less desirable work because of his Union support and activity, or if the Union came into the Commerce facility.

12. On or around September 30, 2015, Respondent, by Miguel Camacho, by photographing and/or video recording employees engaging in handbilling outside the Commerce facility, engaged in surveillance or created the impression of surveillance of employees engaged in union activities.

13. (a) At all material times since at least about February 11, 2015, Respondent has maintained as a condition of employment for its employees and has required its employees to sign and be bound by Equipment Lease Agreements and Independent Contractor Hauling Agreements (Agreements) which contain provisions that require employees to resolve disputes through individual arbitration proceedings and relinquish any rights they have to resolve disputes through collective or class action

(b) At all material times, employees would reasonably conclude that the provisions of the Agreements described above in paragraph 13(a) preclude employees from engaging in conduct protected by Section 7 of the Act.

(c) At all material times, employees would reasonably conclude that the provisions of the Agreements described above in paragraph 13(a) interfere with employees' access to the Board and its processes.

14. On or around March 10, 2016, Respondent, by Dispatcher Armando, at the dispatcher window, conditioned work assignments on the removal of Union insignia.

15. Since at least December 30, 2014, Respondent has misclassified its employee-drivers as independent contractors, thereby inhibiting them from engaging in Section 7 activity and depriving them of the protections of the Act.

16. (a) On or around February 26, 2015, Respondent refused to assign work to its employee Humberto Canales.

(b) Beginning at least by January 3, 2017, Respondent was hiring employees.

(c) About January 5, 2017, Respondent refused to consider for hire or hire Humberto Canales.

(d) Respondent engaged in the conduct described above in paragraphs 16(a) and 16(c) because Humberto Canales assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

17. (a) In or about the months of March through June 2015, Respondent denied a truck-repair loan to its employee Domingo Avalos, and then required him to make a large cash payment to have the truck repaired.

(b) On or around June 18, 2015, Respondent prohibited its employee Domingo Avalos from working.

(c) Respondent engaged in the conduct described above in paragraphs 17(a) and (b) because Domingo Avalos assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

18. By the conduct described above in paragraphs 6 through 15, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

19. By the conduct described above in paragraphs 16 and 17, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

20. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

Wherefore, as part of the remedy for the unfair labor practices alleged above in paragraphs 16 and 17, the General Counsel seeks an order requiring that discriminatees Humberto Canales and Domingo Avalos be made whole, including reasonable consequential damages incurred as a result of the Respondent's unlawful conduct.

Further, as part of the remedy for the unfair labor practices alleged above in paragraphs 6 through 17, the General Counsel seeks an Order requiring that at a meeting or meetings scheduled to ensure the widest possible attendance, Respondent's representative read the Notice to the employees in English and in Spanish on worktime in the presence of a Board agent. Alternatively, the General Counsel seeks an order requiring that Respondent promptly have a Board agent read the notice to employees during worktime in the presence of Respondent's supervisors and agents identified above in paragraphs 6 through 12.

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the third consolidated complaint. The answer must be received by this office on or before April 5, 2017, or postmarked on or before April 4, 2017.

Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **E-File Documents**; enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the third consolidated complaint not heretofore answered are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **July 24, 2017**, 1 pm at the National Labor Relations Board, Region 21, 888 South Figueroa Street, Ninth Floor, Hearing Room 902, Los Angeles, CA, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this third consolidated complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

DATED at Los Angeles, California this 22nd day of March 2017.



William B. Cowen, Regional Director
National Labor Relations Board, Region 21
888 South Figueroa Street, Ninth Floor
Los Angeles, CA 90017-5449

Attachments

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case Nos. 21-CA-150873, 21-CA-164483, 21-CA-175414 and 21-CA-192602

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

XPO Cartage, Inc.
5800 Sheila Street
Commerce, CA 90040-2300

Santos Castaneda, Teamsters Organizer
International Brotherhood of Teamsters
25 Louisiana Avenue
Washington, DC 20001

Little Mendelson, P.C.
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Attn.: Philip Baldwin, Attorney at Law
333 Bush Street, 34th Floor
San Francisco, CA 94104

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Wohlner Kaplon Cutler Halford & Rosenfeld
16501 Ventura Boulevard, Suite 304
Encino, CA 91436-2067

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlr.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.
- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence:** At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.
- **Exhibits:** Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered

in evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts:** An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.
- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.
- **Date for Filing Post-Hearing Brief:** Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.
- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.
- **Exceptions to the ALJ's Decision:** The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

**CERTIFICATION OF SERVICE BY MAIL
(C.C.P. 1013A) OR CERTIFIED MAIL**

I, Nelida Contreras, do hereby certify that I am a resident of or employed in the County of Los Angeles, over 18 years of age, not a party to the within action, and that I am employed at and my business address is:

LABOR COMMISSIONER, STATE OF CALIFORNIA
300 Oceangate, Suite 302
Long Beach, CA 90802
Tel: (562) 590-5048 Fax: (562) 499-6467

I am readily familiar with the business practice of my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 14, 2017 at my place of business, a copy of the following document(s):

Order, Decision or Award

was(were) placed for deposit in the United States Postal Service in a sealed envelope, by first class mail, with postage fully prepaid, addressed to:

NOTICE TO: International Brotherhood of the Teamsters
Attn: Santos Castaneda
3888 Cherry Ave.
Long Beach CA 90807

and that envelope was placed for collection and mailing on that date following ordinary business practices.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on: April 14, 2017 at Long Beach, California

STATE CASE NUMBER: 05-66694 KR



Nelida Contreras

BEFORE THE LABOR COMMISSIONER
OF THE STATE OF CALIFORNIA

1
2
3 NAPOLEON GAITAN; DOMINGO) Case Nos. 05-66467 KR; 05-66468 KR;
4 AVALOS; JOSE A. LOPEZ; and JOSE) 05-66595 KR; and 05-66694 KR
5 HERRERA,)
6 Plaintiffs,) ORDER, DECISION, OR AWARD OF
7 vs.) THE LABOR COMMISSIONER
8)
9 XPO CARTAGE, INC., a Delaware)
10 corporation, dba XPO Logistics,)
11 Defendant.)
12

13 Hearings for the above-referenced matters were conducted in Long Beach, California,
14 on December 20, 2016, before the undersigned hearing officer designated by the Labor
15 Commissioner to hear this matter. Plaintiffs appeared and were represented by Jessica
16 Durrum, Senior Research and Policy Analyst of Los Angeles Alliance for a New Economy
17 (LAANE). XPO Cartage, Inc., a Delaware corporation, doing business as XPO Logistics
18 ("Defendant") appeared by and through their attorneys Steven B. Katz and Sean Kramer for
19 the sole purpose of objecting to the hearing. Defendant did not otherwise participate in the
20 hearing.

21 Alma Castrejon, Researcher, and Isaac Ramirez-Perez, Teamster Representative,
22 appeared as observers.

23 Moshe Rodriguez provided Spanish translation services.

24 Due consideration having been given to the testimony, documentary evidence, and
25 arguments presented, the Labor Commissioner hereby adopts the following Order, Decision,
26 or Award.
27

1 BACKGROUND

2 Plaintiff Napoleon Gaitan (State Case No. 05-66467 KR) filed an initial claim with the
3 Labor Commissioner's Office on January 26, 2016 against Defendant. The Complaint alleges
4 that he is owed the following for the period of January 26, 2012 up to and through the date of
5 the hearing: (1) wages for hours not compensated while earning a piece rate, claiming
6 \$49,080.00; (2) unlawful deductions in the amount of \$154,252.80; (3) meal period premiums
7 in the amount of \$16,607.47; (4) rest period premiums in the amount of \$16,607.47; (5) wages
8 for rest periods taken during hours worked earning a piece-rate, in the amount of \$3,126.88;
9 and (6) attorney's fees.

10 Plaintiff Domingo Avalos (State Case No. 05-66468 KR) filed an initial claim with the
11 Labor Commissioner's Office on January 26, 2016 against Defendant. The Complaint alleges
12 that he is owed the following for the period of June 1, 2012 up to and through the date of the
13 hearing: (1) wages for hours not compensated while earning a piece rate, claiming \$81,972.00;
14 (2) unlawful deductions in the amount of \$154,252.80; (3) meal period premiums in the
15 amount of \$18,125.04; (4) rest period premiums in the amount of \$18,125.04; (5) wages for rest
16 periods taken during hours worked earning piece-rate wages, in the amount of \$3,126.88; and
17 (6) attorney's fees.

18 Plaintiff Jose A. Lopez (State Case No. 05-66595 KR) filed an initial claim with the
19 Labor Commissioner's Office on January 26, 2016 against Defendant. The Complaint alleges
20 that he is owed the following for the period of January 5, 2012 up to and through the date of
21 the hearing: (1) wages for hours worked not compensated while earning a piece rate,
22 claiming \$81,972.00; (2) unlawful deductions in the amount of \$154,252.80; (3) meal period
23 premiums in the amount of \$18,125.04; (4) rest period premiums in the amount of \$18,125.04;
24 and (5) wages for rest periods taken during hours worked earning piece-rate wages, in the
25 amount of \$3,126.88.

26 Plaintiff Jose Herrera (State Case No. 05-66694 KR) filed an initial claim with the Labor
27 Commissioner's Office on March 3, 2016 against Defendant. The Complaint alleges that he is

1 owed the following for the period of January 1, 2013 up to and through the date of the
2 hearing: (1) wages for hours worked not compensated while earning a piece rate, claiming
3 \$52,752.00; (2) unlawful deductions in the amount of \$197,071.47; (3) expenses in the amount
4 of \$36,780.00; (4) meal period premiums in the amount of \$22,297.47; (5) rest period
5 premiums in the amount of \$22,297.47; and (6) wages for rest periods taken during hours
6 worked earning a piece-rate, in the amount of \$2,430.88.

7 Additionally, each Plaintiff claims liquidated damages pursuant to Labor Code section
8 1194.2, waiting time penalties pursuant to Labor Code section 203, and interest pursuant to
9 Labor Code sections 98.1(c), 1194.2, and/or 2802(b).

10 FINDINGS OF FACT

11 **A. Plaintiff Napoleon Gaitan**

12 Plaintiff Napoleon Gaitan ("Gaitan") performed personal services for Defendant as a
13 truck driver in the County of Los Angeles, California from July 18, 2011 to present. As of the
14 date of the hearing, Gaitan was still employed by Defendant. Gaitan testified that he worked
15 an average of 11.5 hours per day, five days per week, at a piece rate per load.

16 Defendant changed its name from Pacer to XPO in June of 2014. Gaitan filled out an
17 application when he started working for Defendant. Iziquiel Chavez presented the
18 application to him. Gaitan had to take a test.

19 From 2011 to 2013, Gaitan drove trucks that other drivers leased from Defendant. In
20 2014, Gaitan signed a lease with Pacer with Pacer's representatives. Defendant obtained
21 insurance for the truck. The certificate of insurance shows both Defendant and Gaitan as
22 insured parties. (Plaintiff's Exhibit 25.) No one else drove Gaitan's truck when it was no
23 longer his shift.

24 Defendant determined Gaitan's schedule by telling him what time to start and end.
25 Gaitan could not take time off. Gaitan did not refuse assignments. If he did, there could be
26 retaliation. For example, they could just keep him waiting for work the next day. The
27 dispatchers supervised Gaitan's work. They verified load arrival times and pick-up times.

1 They made sure the load he had was the correct one. They would call him to verify.

2 On a typical workday, Gaitan would present himself at the office and ask for work
3 from the dispatchers. Sometimes he had to wait because there was not much work. After
4 completing the first assignment, he would take an empty container from the yard and go to
5 the client to pick up merchandise. Gaitan regularly started at 7:00 am. The day does not end
6 until the dispatcher tells him there is no more work. Gaitan did three to five movements per
7 day.

8 Gaitan spends about 15-30 minutes each day to inspect his truck. After the first
9 dispatch, Gaitan has to wait for one to two hours because there is no work. Gaitan goes back
10 to the yard when he has to wait for the next load. Gaitan also has to wait when he goes to the
11 customer. The first hour of waiting time is not paid. Gaitan waits anywhere from two hours
12 to eight hours. He has to scan documents and submit paperwork at the end of the day. This
13 could take anywhere from two to three hours. On average, there are about five hours a day
14 of unpaid time. Gaitan drives seven to eight hours a day on average.

15 Gaitan receives assignments from the dispatcher through his phone through a special
16 program. The dispatcher provides the trailer number and the pick-up and delivery locations.
17 Gaitan always received dispatches directly regardless of whether it was his truck or someone
18 else's truck. Gaitan has an assigned planner who resolves any problems with clients. Gaitan
19 was not able to obtain his own customers.

20 Defendant pays Gaitan per trip. Defendant provided Gaitan with a rate sheet.
21 (Plaintiff's Exhibit 21.) Gaitan does not know how much customers pay Defendant. Gaitan
22 received 40% of what the driver made when he was driving someone else's truck. Gaitan
23 recorded his moves on log sheets. (Plaintiff's Exhibit 23.)

24 Defendant paid Gaitan weekly and provided a settlement statement that served as a
25 detailed wage statement. According to Gaitan's evidence, Defendant deducted the following
26 for fuel, license, insurance, and lease after he leased his own truck on October 14, 2014: (1) a
27 total of \$7,682.52 in 2014; (2) a total of \$40,968.81 in 2015; and (3) a total of \$37,557.54 in 2016.

1 (Plaintiff's Exhibit 22.) Gaitan does not claim deductions while he drove someone else's
2 truck.

3 Defendant paid Gaitan for waiting time at the rate of \$40.00 per hour after one hour of
4 waiting. Defendant paid Gaitan a fuel surcharge in the total amount of \$25,792.98 during the
5 claim period. Defendant also paid Gaitan clean truck incentives in the total amount of
6 \$7,705.00 during the claim period. (Plaintiff's Exhibit 22.)

7 Defendant did not have a meal period policy. Gaitan testified that he never took a 30-
8 minute uninterrupted meal break or a 10-minute rest break. Defendant did not instruct
9 Gaitan not to take a meal break. However, Gaitan felt pressure to keep working and not take
10 a meal period because the dispatchers could call him at any time. Gaitan brought his lunch
11 all of the time. He never went to a restaurant to eat. He ate in his truck, sometimes while
12 driving and other times while parked at the client site. Gaitan claims missed meal periods for
13 every day of his employment.

14 Gaitan continues to be employed by Defendant. As of the date of the hearing, Gaitan
15 had not been paid his full and final wages.

16 **B. Plaintiff Domingo Avalos**

17 Plaintiff Domingo Avalos ("Avalos") performed personal services for Defendant as a
18 truck driver in the County of Los Angeles, California from June 1, 2010 to present. As of the
19 date of the hearing, Avalos was still employed by Defendant. Avalos testified that he worked
20 an average of 11 hours per day, six days per week, at a piece rate per load.

21 Defendant's name was previously Pacer. Avalos filled out an application with Iziquiel
22 Chavez, Driver Recruiter, when he started working for Defendant. Avalos drove someone
23 else's truck when he started. Avalos testified that between 2013 and March 2015, he leased a
24 truck from Defendant. Avalos submitted his lease agreement, which is dated September 25,
25 2012 and identifies CTP Leasing, Inc. as the lessor. (Plaintiff's Exhibit 29.) The truck's
26 registration card shows the registered owners of the truck as "PACCAR FNCL CORP LSR"
27 and "CTP LSG INC/AVALOS DOMINGO LSE." (Plaintiff's Exhibit 32.) The truck broke

1 down in March 2015 and Avalos did not have money to fix it. Beginning in March 2015,
2 Plaintiff drove Marco Ruiz's truck, who pays Plaintiff 45% of his earnings.

3 The dispatchers determined Avalos's schedule. They would give him a start time, and
4 he would abide by the hours stated. Avalos needed approval in order to take time off.
5 Avalos did not refuse assignments. He could not because there would be retaliation.
6 Avalos's work was supervised indirectly by the dispatchers. They would call and ask how
7 much time before he gets to the location.

8 On a typical workday, Avalos starts by inspecting the truck for about 15 minutes. He
9 picks up a load and takes it to the client. He waits at the client site for a "light load," which
10 means it needs to be unloaded. Avalos waits two or more hours. The first hour of waiting
11 time is unpaid. After the first hour, Defendant pays for waiting time. Avalos did three to
12 four moves per day. At the end of the day, Avalos needs to prepare paperwork and scan it.
13 Avalos prepares a daily log and scans it into Defendant's computer system. (Plaintiff's
14 Exhibit 30.) Defendant only has three computers for 150 drivers. Avalos has to wait about 30
15 minutes to use the scanner.

16 If there is a problem with a customer, Avalos has to call Defendant's employees.
17 Avalos calls Armando, who is a planner. Avalos does not negotiate the price of loads with
18 customers. Defendant provided Avalos with a rate sheet. (Defendant's Exhibit 26.)

19 Defendant paid Avalos weekly and provided a settlement statement that served as a
20 detailed wage statement. According to Avalos's evidence, Defendant deducted the following
21 for fuel, license, lease, and insurance: (1) a total of \$49,082.75 in 2013; (2) a total of \$30,202.41
22 in 2014; and (3) a total of \$7,683.61 in 2015. (Plaintiff's Exhibit 28.)

23 Defendant paid Avalos for waiting time at the rate of \$40.00 per hour after one hour of
24 waiting. Defendant paid Avalos a fuel surcharge in the total amount of \$35,829.89 during the
25 claim period. (Plaintiff's Exhibit 28.)

26 Avalos testified that he cannot take a 30-minute lunch break or a 10-minute rest break
27 without interruption. He is responsible for the truck. When the truck is loaded, the drivers

1 have orders not to abandon the truck. He cannot take a break after he delivers a load. He felt
2 pressure to keep working because he will not make money if he does not move loads.
3 Defendant provides loads with just enough time to arrive at the destination. When he is
4 waiting for assignments, his name is on the list of drivers. So Avalos has to be in front of the
5 dispatchers to be present when called.

6 Avalos was not instructed not to take a meal break. He brought his lunch sometimes.
7 Other times, he would purchase his lunch and eat on the side of the road at a lunch truck or
8 fast food restaurant. Avalos ate at the client's site once a week. He would heat up food and
9 eat at the yard once or twice a week. He ate out the majority of the time. Avalos claims
10 missed meal periods for every day of his employment.

11 Avalos was not instructed not to take a rest break. Avalos claims missed rest periods
12 for every day of his employment.

13 Avalos continues to be employed by Defendant. As of the date of the hearing, Avalos
14 had not been paid his full and final wages:

15 C. Plaintiff Jose A. Lopez

16 Plaintiff Jose A. Lopez ("Lopez") performed personal services for Defendant as a truck
17 driver in the County of Los Angeles, California from August 18, 2006 to present. Lopez
18 testified that he worked an average of 14 hours per day, five days per week, at a piece rate
19 per load.

20 Defendant changed its name from Pacer Cartage, Inc. to XPO Cartage, Inc., effective
21 April 21, 2015. (See Letter from Defendant, dated May 11, 2015, Plaintiff's Exhibit 14.)

22 Lopez determines when to start, but not when to finish his work. Lopez needs to
23 obtain approval in order to take time off. Lopez could not refuse assignments. He testified
24 that he could not because Defendant would fire him. Miguel Camacho supervised his work.

25 On a typical workday, Lopez starts his day by inspecting his truck for 15 minutes. He
26 then has to call the dispatcher so the dispatcher can give him the load that he is going to
27 move. Lopez has to wait 30 minutes to one hour for a dispatch. If the load is at the yard,

1 Lopez obtains it from the yard and takes it to the client. If not, Lopez has to travel to the rail,
2 and pulls the load from the rail to the client. Lopez reports to the client and the company
3 that he has arrived at the yard. It takes one to two hours to load the container. After one
4 hour, Lopez gets paid for waiting time. Lopez waits anywhere from one to five hours at the
5 customer site. Lopez goes to a client two to three times each day, and wait two to three hours
6 per client. Lopez spends about eight hours actually driving.

7 Lopez takes time at the end of the day to prepare paperwork and scan paperwork into
8 the company's computer system. On April 10, 2014, Defendant issued a notice to its
9 contractors stating that all drivers are required to scan their paperwork in order to get paid:
10 "for any driver paperwork not scanned, those moves will not be paid until the driver scans
11 those moves." (Plaintiff's Exhibit 15.) It takes about an hour to an hour and a half to scan all
12 the paperwork. In total, Lopez is not compensated for five hours every day.

13 The dispatcher assigns work and tells Lopez where to deliver loads. The dispatcher
14 provides a document or sends information through text message. Lopez does not know how
15 much clients pay Defendant. If there is a problem with the customer, Lopez has to call the
16 dispatcher. Lopez's assigned planner is Maria. Lopez cannot obtain his own customers. The
17 planner is the person who needs to know the exact time the load should be with the
18 customers, that the load has not been lost and arrived timely at the destination. For example,
19 if a client refuses a load because it is late, or there are no documents assigned to that load,
20 then the driver needs to call the planner.

21 Defendant paid Lopez weekly and provided a settlement statement that served as a
22 detailed wage statement. According to Lopez's evidence, Defendant deducted the following
23 for fuel, license, lease, insurance, and Mobilecom: (1) a total of \$40,291.51 in 2013; (2) a total of
24 \$35,822.43 in 2014; (3) a total of \$27,082.00 in 2015; and (4) a total of \$39,496.04 in 2016.
25 (Plaintiff's Exhibit 17.) Defendant provided Lopez with a Comdata card for fuel purchases.
26 (Plaintiff's Exhibit 18.) Lopez could not negotiate the deductions.

27 Defendant paid Lopez for waiting time at the rate of \$40.00 per hour after one hour of

1 waiting. Defendant paid Lopez a fuel surcharge in the total amount of \$39,567.58 during the
2 claim period. Defendant also paid Lopez clean truck incentives in the total amount of
3 \$7,470.00 during the claim period. (Plaintiff's Exhibit 17.)

4 Lopez leased a truck from Defendant in January 2010. Iziquiel Chavez presented the
5 lease to Lopez. The truck's registration card shows the registered owners as "PACCAR
6 FNCLCORP LSR" and "CTP LSG INC/LOPEZ JOSE ABRAHAM LSE." (Plaintiff's Exhibit
7 19.) Lopez testified that CTP Leasing is a dealer, and Paccar is one of Defendant's branches
8 that provides the money to purchase the truck. Defendant provided insurance for the truck.
9 Lopez's name was not on the insurance card; Defendant's name appeared on the card. Lopez
10 was responsible for the repairs for the truck.

11 Defendant told Lopez to take 30-minute lunch breaks due to Department of
12 Transportation regulations. However, Lopez could not. Lopez never took a 10-minute rest
13 break because he has to attend to the truck. He could take breaks at the yard. Most loads
14 have appointments. Lopez ate when he got to the client while waiting for the client to load or
15 unload. He cannot go to a restaurant while waiting for the client to load/unload. The truck
16 has to be in his sight at all times. Lopez always ate at restaurants when bobtailing. He would
17 go to a restaurant two to three times per week while waiting for loads.

18 Lopez continues to be employed by Defendant. As of the date of the hearing, Lopez
19 had not been paid his full and final wages.

20 **D. Plaintiff Jose Herrera**

21 Plaintiff Jose Herrera ("Herrera") performed personal services for Defendant as a
22 truck driver in the County of Los Angeles, California from January 27, 2010 to present.
23 Herrera testified that he worked an average of 11 hours per day, six days per week, at a piece
24 rate per load.

25 The dispatchers determined Herrera's schedule according to the work available.
26 Herrera usually started work at 7:00 am. Herrera would call the dispatchers, and they would
27 tell him if there is work. The dispatchers determine Herrera's start time according to what is

1 available. Herrera could refuse assignments. However, the dispatchers could make him wait
2 more for the next job, or they will not give him another job for a while. The person in charge
3 of dispatch, Felipe Inu, supervised Herrera. Drivers have to call him if they are late due to
4 traffic or an accident.

5 On a typical workday, Herrera starts the day by inspecting his truck for 15-30 minutes.
6 Then he waits 15 minutes to an hour for his first assignment. Herrera puts his name down on
7 a list if work is not immediately available. Herrera waits at the rail yard for 30 minutes once
8 or twice a week. He waits at a client site for 15 minutes to an hour for them to approve the
9 delivery. Defendant pays Herrera if he waits more than an hour. On average, Herrera waits
10 one to two hours at a client site. Herrera has paperwork he has to fill out at the end of the
11 day, which takes 45 minutes to 1.5 hours to complete. The total amount of time spent on non-
12 driving work is about four to five hours per day.

13 Herrera does not know how Defendant arrives at the rates paid to him. He could not
14 negotiate directly with the customer. He does not know how much the customer pays
15 Defendant. If there is a problem with a customer, the dispatchers resolve the problem. The
16 customers have their own rules.

17 Defendant paid Herrera weekly and provided a settlement statement that served as a
18 detailed wage statement. According to Herrera's evidence, Defendant deducted the
19 following for fuel, insurance, licenses, road tax, and truck lease: (1) a total of \$47,595.17 in
20 2013; (2) a total of \$51,200.93 in 2014; (3) a total of \$48,797.99 in 2015; and (4) a total of
21 \$35,715.02 in 2016. (Plaintiff's Exhibit 3.) Defendant provided Herrera with a Comdata card
22 so he could purchase fuel. (Plaintiff's Exhibit 4.) Herrera was not able to negotiate the
23 deductions.

24 Defendant paid Herrera for waiting time at the rate of \$40.00 per hour after one hour
25 of waiting. Defendant paid Herrera a fuel surcharge in the total amount of \$75,971.93 during
26 the claim period. Defendant also paid Herrera clean truck incentives in the total amount of
27 \$7,290.00 during the claim period. (Plaintiff's Exhibit 3.)

1 Herrera cannot enter the rail yard if he is not dispatched by Defendant. Herrera has to
2 be fingerprinted to enter the rail yard. Defendant pays Herrera based on hot tickets and
3 manifests. Herrera recorded his moves on manifests provided by Defendant. (Plaintiff's
4 Exhibit 5.) Herrera must turn in bills of lading to Defendant in order to get paid. (Plaintiff's
5 Exhibit 6.) Defendant asked Herrera to scan the bills of lading.

6 Herrera is required to keep the dispatcher advised of his status every day. Defendant
7 has rules that Herrera must follow. Defendant provided Plaintiff with a document entitled
8 "Orientation Guidelines," which lists numerous company policies and procedures regarding
9 paperwork, inspections, dispatches, hours of service, logs, accidents, and safety. (Plaintiff's
10 Exhibit 7.) Defendant also issued CSA Compliance rules regarding disqualification for
11 various violations, e.g., speeding, using hand-held mobile devices while driving, using radar
12 detectors, unauthorized passengers, seat belts, etc. (Plaintiff's Exhibit 8.)

13 Herrera incurred out-of-pocket expenses for fuel, maintenance, road tax, and tires. A
14 detailed review of the receipts submitted into evidence shows that his expenses during the
15 claim period were \$2,878.59 in 2013, \$12,468.63 in 2014, \$150.00 in 2015, and \$5,459.61 in 2016.
16 (Plaintiff's Exhibit 9.)

17 Herrera testified that he leased a truck from Defendant. The registered owners on his
18 truck's registration card appear as "PACCAR FNCL CORP LSR" and "CTP LEASING INC
19 LSE." (Plaintiff's Exhibit 10.) Herrera's name and Pacer Cartage appear as the insured
20 parties on the insurance card. (Plaintiff's Exhibit 11.) Plaintiff operated under Defendant's
21 Motor Carrier Permit. (Plaintiff's Exhibit 12.)

22 Defendant stated Herrera needed to register his lunches in the log book. Herrera
23 never took a 30-minute lunch break without interruption. He also never took a 10-minute
24 uninterrupted rest break. Herrera cannot stop after he leaves a customer. Defendant does
25 not permit it because when the job is over, he has to call the dispatcher and the dispatcher
26 tells him where to go next. Sometimes they have one or two hours to get to the next
27 assignment, and they do not have time to take a break.

1 Herrera continues to be employed by Defendant. As of the date of the hearing,
2 Herrera had not been paid his full and final wages.

3 **E. Common Testimony**

4 In addition to the facts above, Plaintiffs testified to the following:

- 5 • Defendant determined the rates paid to Plaintiffs. Plaintiff could not negotiate the
6 rates.
- 7 • Plaintiffs transported loads from the rail to the client, and from the client to the rail.
8 They did not drive to the Los Angeles or Long Beach ports.
- 9 • Defendant determined Plaintiffs' schedules.
- 10 • Plaintiffs did not work for other companies during their claim periods.
- 11 • Customers: Defendant obtained the customers. Plaintiffs could not obtain their
12 own customers. Plaintiffs did not know what the customers paid Defendant.
- 13 • The company dispatcher assigned work to Plaintiffs.
- 14 • Defendant paid Plaintiffs for waiting time after one hour of waiting.
- 15 • Trucks: Defendant arranged lease agreements for Plaintiffs.
- 16 • Parking: Plaintiffs parked their trucks at the company yard.
- 17 • Plaintiffs could not use the trucks for other companies.
- 18 • Insurance: Defendant obtained insurance for the trucks.
- 19 • Placard: The trucks had placards on them with Defendant's logo, CA, MC, and
20 USDOT numbers.
- 21 • GPS: The trucks had GPS mechanisms, which Defendant used to monitor or track
22 Plaintiffs' location.
- 23 • License: Plaintiffs were required to have a Class A Driver's Licenses.
- 24 • Defendant did not have a rest and meal break policy.

25 **F. Defendant's Objection**

26 Defendant's counsel appeared at the hearing only for the purpose of objecting to the
27 hearing and did not otherwise participate in the hearing. Defendant objected to the Labor

1 Commissioner's hearing on grounds that Plaintiffs signed arbitration agreements. Defendant
2 submitted a written Objection to the Labor Commissioner's Proceeding with a Berman
3 Hearing, wherein Defendant raises the defense that Plaintiffs were independent contractors.

4 **LEGAL ANALYSIS**

5 **A. Statute of Limitations**

6 The statute of limitations for filing a claim based on a statutory right is three years
7 from the date the right to reimbursement occurred. (Code Civ. Proc., § 338.) The statute of
8 limitations on a claim for wages based on a written contract is four years. (Code Civ. Proc., §
9 337.) No evidence was presented to support Plaintiffs' claims that Defendant employed them
10 pursuant to the terms of a written agreement. The evidence showed Plaintiffs executed
11 written independent contractor agreements, not written employment agreements. Thus,
12 Plaintiffs' claims for wages for hours worked not compensated while earning a piece rate,
13 unlawful deductions under Labor Code section 221, business expenses under Labor Code
14 section 2802, meal period premiums under Industrial Welfare Commission Order No. 9,
15 section 11, rest period premiums under Industrial Welfare Commission Order No. 9, section
16 12, wages for rest periods taken during hours worked earning a piece rate under Labor Code
17 section 226.2, and liquidated damages under Labor Code section 1194.2 are subject to a three-
18 year statute of limitations.

19 Plaintiffs' claims include periods outside the statute of limitations. Plaintiffs Gaitan,
20 Avalos, and Lopez filed their claims on January 26, 2016 and Plaintiff Herrera filed his claim
21 on March 3, 2016. Accordingly, Plaintiffs Gaitan, Avalos, and Lopez's claims for the prior to
22 January 26, 2013 and Plaintiff Herrera's claims for the period prior to March 3, 2013 are
23 dismissed.

24 **B. Burden of Proof**

25 Plaintiff, as the party asserting the affirmative, has the initial burden of proof to
26 establish by a preponderance of the evidence the validity of his or her claims. (Evid. Code, §
27 115.) However, there are defenses, if raised, that shift the burden to the party seeking to

1 avoid liability. (Evid. Code, § 500.) Asserting that one is an independent contractor is one
2 such burden-shifting defense. (*S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48
3 Cal.3d 341, 349.)

4 Employment is defined broadly and there is a general presumption that any person
5 "rendering service for another" is an employee. (Lab. Code, § 3357; *Borello, supra*, 48 Cal.3d at
6 p. 354.) The party seeking to avoid liability has the burden of proving that the individual
7 whose services he or she has retained are independent contractors rather than employees.
8 (Lab. Code, § 5705(a); *Borello, supra*, 48 Cal.3d at p. 349.) Here, Defendant raised the defense
9 that Plaintiffs were at all times independent contractors and should not be considered
10 employees. As such, Defendant holds the burden of proof on their affirmative defense.

11 C. Independent Contractor or Employee

12 The determination of whether an individual providing service to another is an
13 employee or an independent contractor does not rest on a single determinative factor. Prior
14 to 1970, the principle test was whether the person to whom the service was rendered had the
15 right to control the manner and means of accomplishing the result desired. *S.G. Borello &*
16 *Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 brought a departure from
17 the focus on control over the work details as the determinative factor in analyzing an
18 employee-employer relationship.

19 The *Borello* court identified the following additional factors that must be considered:
20 (1) whether the person performing services is engaged in an occupation or business distinct
21 from that of the principal; (2) whether or not the work is part of the regular business of the
22 principal; (3) whether the principal or the worker supplies the instrumentalities, tools, and
23 the place for the person doing the work; (4) the alleged employee's investment in the
24 equipment or materials required by his or her task or his or her employment of helpers; (5)
25 whether the service rendered requires a special skill; (6) the kind of occupation, with
26 reference to whether, in the locality, the work is usually done under the direction of the
27 principal or by a specialist without supervision; (7) the alleged employee's opportunity for

1 profit or loss depending on his or her managerial skill; (8) the length of time for which the
2 services are to be performed; (9) the degree of permanence of the working relationship; (10)
3 the method of payment, whether by time or by the job; and (11) whether or not the parties
4 believe they are creating an employer-employee relationship. (*Borello, supra*, 48 Cal.3d at p.
5 351.)

6 The individual factors cannot be applied mechanically as separate tests; they are
7 intertwined and their weight depends often on particular combinations. (*Id.* at p. 352.) Even
8 if the parties expressly agree in writing that an independent contractor relationship exists, the
9 label that parties place on their employment relationship "is not dispositive and will be
10 ignored if their actual conduct establishes a different relationship." (*Estrada v. FedEx Ground*
11 *Package System, Inc.* (2007) 154 Cal.App.4th 1, 10.)

12 1. Control

13 By statute, the question of control remains highly pertinent to the distinction between
14 employees and independent contractors. (See Lab. Code, § 3353.) The statutory test of
15 control may be satisfied even where "complete control" or "control over details" is lacking
16 when an employer retains pervasive control over the operation as a whole, the worker's
17 duties are an integral part of the operation, and the nature of the work makes detailed control
18 unnecessary. (*Yellow Cab Cooperative, Inc. v. Workers' Compensation Insurance Appeals Board*
19 (1991) 226 Cal.App.3d 1288.)

20 The evidence shows Defendant retained pervasive control over the drayage operation
21 as a whole. Defendant obtained the customers and the customers paid Defendant directly.
22 Defendant determined the prices the customers paid, and Plaintiffs did not know the prices
23 charged to Defendant's customers. Defendant determined the rates paid to Plaintiffs, and
24 Plaintiff could not negotiate the rates. If there were issues with customers, Defendant had
25 designated planners who resolved customer problems. Thus, Defendant retained all
26 necessary control over its operations. (See *JKH Enterprises, Inc. v. Dept. of Industrial Relations*
27 (2006) 142 Cal.App.4th 1046, 1064 ["By obtaining the clients in need of the service and

1 providing the workers to conduct it, JKH retained all *necessary* control over the operation as a
2 whole.”].)

3 Defendant controlled the work assignments and Plaintiffs’ work schedules. Plaintiffs
4 could refuse assignments, but would face retaliation if they did so. For example, the
5 dispatchers could make Plaintiffs wait longer for the next assignment. The dispatchers
6 supervised Plaintiffs’ work by keeping in contact with Plaintiffs throughout the workday to
7 ensure timely deliveries. The trucks had GPS mechanisms, which Defendant used to monitor
8 and track Plaintiffs’ location. Defendant had numerous rules that Plaintiffs had to follow.
9 Defendant issued rules and guidelines, enumerating policies and procedures regarding
10 paperwork, inspections, dispatches, hours of service, logs, accidents, safety, and driving
11 violations, among other things. (Plaintiff’s Exhibits 7 & 8.)

12 Significantly, Plaintiffs could not use their trucks for other companies. “A mere lessor
13 has no interest in restricting the lessee’s freedom to render service to another.” (*Yellow Cab*,
14 *supra*, 226 Caql.App.3d at p. 1298.) Imposition of such a restriction demonstrates a form of
15 control typical of employment.

16 Finally, Plaintiffs’ duties of truck driving and transporting cargo are an integral part of
17 Defendant’s motor carrier business of transporting commodities. Without truck drivers,
18 Defendant’s business would not exist. Based on the foregoing, Defendant exercised all
19 necessary control over Plaintiffs’ work, and the statutory test of control was satisfied.

20 2. Additional Factors

21 a. *Distinct Occupation or Work Part of Principal’s Regular Business*

22 Many of the additional factors identified in *Borello* also support a finding of
23 employment. Plaintiffs were not engaged in a distinct occupation or business from that of
24 Defendant. Plaintiffs did not hold themselves out as engaged in a separate business or have
25 their own customers. Plaintiffs delivered goods solely for Defendant’s customers and
26 Plaintiffs’ work was an integral part of Defendant’s regular business of transporting
27 commodities. Indeed, Plaintiffs’ work is the basis for Defendant’s business. Defendant

1 obtains customers who are in need of delivery services and provide the workers who conduct
2 the service on behalf of Defendant. Without drivers, Defendant would not be able to operate
3 its business.

4 *b. Instrumentalities, Tools, and Place of Work*

5 Defendant supplied the primary tool necessary for Plaintiffs' work. Plaintiffs leased
6 their truck from CTP Leasing and obtained financing from Paccar. However, Defendant
7 arranged the lease agreements and the financing. Defendant provided insurance, parking,
8 and fuel, and deducted these costs from Plaintiffs' weekly compensation. The trucks had
9 Defendant's placard on them, along with Defendant's MC, CA, and USDOT numbers. In
10 light of the fact that Defendant supplied the trucks by arranging the truck leases, this factor
11 weighs in Plaintiffs' favor. (See *Ruiz v. Affinity Logistics Corp.* (9th Cir. 2014) 754 F.3d 1093,
12 1104 [where "Affinity supplied the drivers with the major tools of the job by encouraging or
13 requiring that the drivers obtain the tools from them through paid leasing arrangements",
14 this factor favored employee status.])

15 *c. Investment in Equipment or Materials*

16 Plaintiffs made no investment in the equipment or materials used to transport
17 commodities for Defendant's customers.

18 *d. Skill Required*

19 Although a significant level of expertise or specialized skill is not required for the job
20 of truck driving, the job does require abilities beyond that of a general laborer or those
21 possessed by a regular driver with an ordinary driver's license. Plaintiffs' work requires a
22 Class A Commercial Driver's License, but little other skill. Accordingly, this factor does not
23 favor either party.

24 *e. Work under Principal's Direction or without Supervision*

25 In the locality, personal services of a truck driver are performed both by employees
26 and independent contractors. The actual task of driving is usually performed without
27 supervision. However, this independence from supervision is inherent in the work itself, and

1 not necessarily because the work is highly specialized. (See *Yellow Cab, supra*, 226 Cal.App.3d
2 at p. 1299 [the work "is usually done without supervision whether the arrangement was
3 lessee or employee, and the skill required on the job is such that it can be done by employees
4 rather than specially skilled independent workmen."].)

5 *f. Opportunity for Profit or Loss*

6 Plaintiffs did not have any opportunity for profit or loss depending on their
7 managerial skill. They were simply paid by the number of loads they hauled. Defendant
8 controlled the work assignments, and Plaintiffs performed whatever work was assigned to
9 them each day. Defendant established the rates payable to Plaintiffs. Thus, Plaintiffs'
10 opportunity to earn more compensation was entirely dependent on what jobs Defendant
11 assigned and how much Defendant decided to pay for the jobs. Plaintiffs' own
12 entrepreneurial skills and judgment did not determine how much money they could make.

13 *g. Length of Time for Services and Degree of Permanence of Working Relationship*

14 The longer the working relationship, or if it is for an indefinite period of time, the more
15 likely the existence of an employment relationship. Plaintiffs worked full-time for Defendant
16 and regularly worked 10-14 hours per day, five to six days per work. Plaintiffs worked
17 anywhere from five to ten years for Defendant. The regularity of their work and length of
18 time for which Plaintiffs performed services for Defendant are indicative of a permanent
19 relationship that is commonly associated with employment.

20 *h. Payment by Time or by Job*

21 Defendant paid Plaintiffs by the job, which is typically indicative of an independent
22 contractor relationship. However, "payment may be measured by time, by the piece, or by
23 successful completion of the service, instead of a fixed salary, and still constitute employee
24 wages if other factors indicate an employer-employee relationship." (*Germann v. Workers'*
25 *Compensation Appeals Board* (1981) 123 Cal.App.3d 776, 787.)

26 *i. Parties' Belief*

27 Plaintiffs entered into independent contractor agreements. Even if the parties

1 expressly agree in writing that an independent contractor relationship exists, the label that
2 parties place on their employment relationship "is not dispositive and will be ignored if their
3 actual conduct establishes a different relationship." (*Estrada, supra*, 154 Cal.App.4th at p. 10.)

4 Further, independent contractor agreements can be and often amount to subterfuge to
5 avoid paying payroll and income taxes as well as workers' compensation insurance liability.
6 Whether a person who provides services is paid as an independent contractor without
7 payroll deductions and with income reported through an IRS 1099 form, instead of a W-2
8 form, is irrelevant. "These are merely the legal consequences of an independent contractor
9 status not a means of proving it. An employer cannot change the status of an employee to
10 one of independent contractor by illegally requiring him to assume burdens which the law
11 imposes directly on the employer." (*Toyota Motor Sales v. Superior Court* (1990) 220
12 Cal.App.3d 864, 877.)

13 The existence of a written agreement purporting to establish an independent
14 contractor relationship is not determinative. The Labor Commissioner and courts will look
15 behind any such agreement in order to examine the facts that characterize the parties' actual
16 relationship and make their determination as to employment status based upon their analysis
17 of such facts and application of the appropriate law.

18 *j. Conclusion*

19 In sum, the majority of *Borello* factors weigh in favor of a finding that Plaintiffs were
20 Defendant's employees. Defendant retained pervasive control over the operation as a whole,
21 and Plaintiffs' services were an integral part of Defendant's business. Substantial evidence
22 supports the finding that Plaintiffs were functioning as employees rather than as true
23 independent contractors.

24 **D. Wages for Nonproduction Hours**

25 Labor Code section 226.2 requires employees who are compensated on a piece-rate
26 basis to be separately compensated for "other nonproductive time," which is defined as
27 "time under the employer's control, exclusive of rest and recovery periods, that is not

1 directly related to the activity being compensated on a piece-rate basis." (Lab. Code, § 226.2.)
2 Piece-rate wages for production work cannot be used to satisfy the employer's obligation to
3 pay for work not directly related to the production of pieces, and each hour of
4 nonproduction work must be separately compensated by an additional payment equal to or
5 exceeding the minimum wage. (*Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th
6 36.)

7 Defendant is subject to the provisions of Industrial Welfare Commission Order No. 9-
8 2001 (the "Order"), which regulates wages, hours, and working conditions for the
9 Transportation Industry. Section 4 of the Order requires payment of at least the minimum
10 wage for all hours worked in the payroll period: eight dollars (\$8.00) per hour, effective
11 through June 30, 2014; nine dollars (\$9.00) per hour, effective July 1, 2014; and ten dollars
12 (\$10.00) per hour, effective January 1, 2016. Section 2(H) of the Order defines "hours
13 worked" as "the time during which an employee is subject to the control of an employer, and
14 includes all the time the employee is suffered or permitted to work, whether or not required
15 to do so."

16 Defendant paid Plaintiffs for all piece-rate work. At issue are the hours when they
17 performed non-piece-rate work, but did not receive any compensation. Plaintiffs testified
18 that they were not paid for time spent inspecting their trucks, waiting for assignments,
19 waiting at client sites, and scanning documentation required by Defendant at the end of the
20 day. Plaintiffs were subject to Defendant's control during their time spent waiting for
21 assignments and customers and performing pre- and post-shift duties, such as conducting
22 vehicle inspections and submitting paperwork. These tasks are not directly related to the
23 activity being compensated on a piece-rate basis, i.e., the transportation of goods. Therefore,
24 Plaintiffs must be separately compensated for these nonproduction hours.

25 Plaintiff Gaitan testified that he spends an average of 15 to 30 minutes inspecting his
26 truck, one to two hours waiting for dispatches, two to eight hours waiting at client sites, and
27 two to three hours scanning paperwork at the end of the day, for a total of five hours of

1 unpaid time each day. According to proof, Plaintiff Gaitan worked a total of 4,405 days
2 during the claim period. (Plaintiff's Exhibit 22.) Thus, Plaintiff Gaitan worked a total of 4,405
3 nonproduction hours during the claim period, for which he was not compensated.
4 **Accordingly, Plaintiff Gaitan is awarded \$39,250.00 in earned, but unpaid hourly wages**
5 **for nonproduction hours worked.**

6 Plaintiff Avalos testified that he spends an average of 15 minutes inspecting his truck,
7 two or more hours waiting at client sites for three to four moves per day, and half an hour
8 scanning paperwork at the end of the day, for a total of five hours of unpaid time each day.
9 According to proof, Plaintiff Avalos worked a total of 851 days during the claim period.
10 (Plaintiff's Exhibit 28.) Thus, Plaintiff Avalos worked a total of 4,255 nonproduction hours
11 during the claim period, for which he was not compensated. **Accordingly, Plaintiff Avalos is**
12 **awarded \$38,290.00 in earned, but unpaid hourly wages for nonproduction hours worked.**

13 Plaintiff Lopez testified that he spends an average of 15 minutes inspecting his truck,
14 30 minutes to an hour waiting for a dispatch, one to five hours waiting at client sites, and an
15 hour to an hour and a half scanning paperwork at the end of the day, for a total of five hours
16 of unpaid time each day. According to proof, Plaintiff Lopez worked a total of 825 days
17 during the claim period. (Plaintiff's Exhibit 17.) Thus, Plaintiff Lopez worked a total of 4,125
18 nonproduction hours during the claim period, for which he was not compensated.
19 **Accordingly, Plaintiff Lopez is awarded \$36,755.00 in earned, but unpaid hourly wages for**
20 **nonproduction hours worked.**

21 Plaintiff Herrera testified that he spends an average of 15 to 30 minutes inspecting his
22 truck, 15 minutes to an hour waiting for a dispatch, one to two hours waiting at client sites
23 for four to five moves, and 45 minutes to an hour and a half scanning paperwork at the end
24 of the day, for a total of four to five hours of unpaid time each day. According to proof,
25 Plaintiff Herrera worked a total of 865 days during the claim period. (Plaintiff's Exhibit 3.)
26 Thus, Plaintiff Herrera worked a total of 4,325 nonproduction hours during the claim period,
27

1 for which he was not compensated. Accordingly, Plaintiff Herrera is awarded \$38,055.00 in
2 earned, but unpaid hourly wages for nonproduction hours worked.

3 E. Unlawful Deductions

4 Labor Code section 221 prohibits an employer from making any deductions from an
5 employee's wages. Labor Code section 224 provides for four exceptions that allow an
6 employer to make deductions from an employee's wages:

- 7 1. Deductions authorized by state or federal law;
- 8 2. Deductions expressly authorized in writing by the employee to cover
9 insurance premiums, hospital or medical dues;
- 10 3. Deductions not amounting to a rebate or deduction from the standard
11 wage arrived at by collective bargaining or pursuant to wage agreement
12 or statute; and
- 13 4. Deductions to cover health and welfare or pension plan contributions that
14 are expressly authorized by a collective bargaining or wage agreement.

(Lab. Code, § 224.)

15 Defendant made weekly deductions from Plaintiffs' settlements for various truck
16 related costs and business expenses incurred for Defendant's benefit. These deductions do
17 not fall within the narrow parameters of lawful deductions as outlined in Labor Code section
18 224. Further, Labor Code section 2802 prohibits employers from passing on the expenses
19 related to their business to employees. Thus, Defendant must reimburse Plaintiffs for these
20 business expenses that were deducted from Plaintiffs' wages.

21 According to proof, Defendant deducted \$86,208.87 from Plaintiff Gaitan's
22 compensation during the relevant claim period from January 26, 2013 through December 20,
23 2016 for fuel, licenses, lease, and insurance. (Plaintiff's Exhibit 22.) Specifically, deductions
24 amounted to \$7,682.52 in 2014, \$40,968.81 in 2015, and \$37,557.54 in 2016 for a subtotal of
25 \$86,208.87, minus \$25,792.98 in fuel surcharge and \$7,705.00 in clean truck incentives paid by
26 Defendant during the claim period, for a total of \$52,710.89. Accordingly, the evidence
27 supports an award of \$52,710.89 to Plaintiff Gaitan for unlawfully deducted wages.

According to proof, Defendant deducted \$86,968.77 from Plaintiff Avalos's

1 compensation during the relevant claim period from January 26, 2013 to March 2015 for fuel,
2 licenses, lease, and insurance. (Plaintiff's Exhibit 28.) Specifically, deductions amounted to
3 \$49,082.75 in 2013, \$30,202.41 in 2014, and \$7,683.61 in 2015 for a subtotal of \$86,968.77, minus
4 \$35,829.89 in fuel surcharge paid by Defendant during the claim period, for a total of
5 \$51,138.88. **Accordingly, the evidence supports an award of \$51,138.88 to Plaintiff Avalos**
6 **for unlawfully deducted wages.**

7 According to proof, Defendant deducted \$142,691.98 from Plaintiff Lopez's
8 compensation during the relevant claim period from January 26, 2013 to December 20, 2016
9 for fuel, licenses, lease, and insurance. (Plaintiff's Exhibit 17.) Specifically, deductions
10 amounted to \$40,291.51 in 2013, \$35,822.43 in 2014, \$27,082.00 in 2015, and \$39,496.04 in 2016
11 for a subtotal of \$142,691.98, minus \$39,567.58 in fuel surcharge and \$7,470.00 in clean truck
12 incentives paid by Defendant during the claim period, for a total of \$95,654.40. **Accordingly,**
13 **the evidence supports an award of \$95,654.40 to Plaintiff Lopez for unlawfully deducted**
14 **wages.**

15 According to proof, Defendant deducted \$183,309.11 from Plaintiff Herrera's
16 compensation during the relevant claim period from March 3, 2013 through December 20,
17 2016 for fuel, licenses, lease, and insurance. (Plaintiff's Exhibit 3.) Specifically, deductions
18 amounted to \$47,595.17 in 2013, \$51,200.93 in 2014, \$48,797.99 in 2015, and \$35,715.02 in 2016
19 for a subtotal of \$183,309.11, minus \$75,971.93 in fuel surcharge and \$7,290.00 in clean truck
20 incentives paid by Defendant during the claim period, for a total of \$100,047.18.
21 **Accordingly, the evidence supports an award of \$100,047.18 to Plaintiff Herrera for**
22 **unlawfully deducted wages.**

23 **F. Expenses**

24 Labor Code section 2802(a) provides:

25 An employer shall indemnify his or her employee for all necessary expenditures
26 or losses incurred by the employee in direct consequence of the discharge of his
27 or her duties, or of his or her obedience to the directions of the employer, even
though unlawful, unless the employee, at the time of obeying the directions,
believed them to be unlawful.

1 Plaintiff Herrera incurred out-of-pocket business expenses for fuel, maintenance, road
2 tax, and tires in direct consequence of the discharge of his duties while employed by
3 Defendant. As such, Plaintiff Herrera is entitled to reimbursement from Defendant for these
4 out-of-pocket expenses. A detailed review of the receipts submitted into evidence show
5 Plaintiff Herrera's fuel expenses during the claim period totaled \$2,190.03 in 2013, \$8,453.49
6 in 2014, \$150.00 in 2015, and \$1,231.42 in 2016 for a total of \$12,024.94. (Plaintiff's Exhibit 9.)
7 Receipts for purchases related to the repair of Plaintiff's truck were submitted into evidence
8 as well. Receipts relevant to the claim period show purchases in the amounts of \$688.56 in
9 2013, \$4,015.14 in 2014, and \$4,228.19 in 2016, for a total of \$8,931.89. (Plaintiff Exhibit 9.)

10 Therefore, Plaintiff Herrera is awarded a total of \$20,956.83 for out-of-pocket
11 business expenses incurred during the claim period.

12 **G. Meal Period Premiums**

13 Section 11 of the Order provides:

14 (A) No employer shall employ any person for a work period of more than five (5)
15 hours without a meal period of not less than 30 minutes, except that when a
16 work period of not more than six (6) hours will complete the day's work the meal
period may be waived by mutual consent of the employer and the employee.

17 (B) An employer may not employ an employee for a work period of more than
18 ten (10) hours per day without providing the employee with a second meal
19 period of not less than 30 minutes, except that if the total hours worked is no
20 more than 12 hours, the second meal period may be waived by mutual consent of
the employer and the employee only if the first meal period was not waived.

21 (C) Unless the employee is relieved of all duty during a 30 minute meal period,
22 the meal period shall be considered an "on duty" meal period and counted as
23 time worked. An "on duty" meal period shall be permitted only when the nature
24 of the work prevents an employee from being relieved of all duty and when by
25 written agreement between the parties an on-the-job paid meal period is agreed
to. The written agreement shall state that the employee may, in writing, revoke
the agreement at any time.

26 (D) If an employer fails to provide an employee a meal period in accordance with
27 the applicable provisions of this order, the employer shall pay the employee one
(1) hour of pay at the employee's regular rate of compensation for each workday

1 that the meal period is not provided.

2 As the California Supreme Court held in *Brinker v. Superior Court* (2012) 53 Cal.4th
3 1004, an employer must provide a meal period to its employees, but need not ensure that
4 each employee takes his meal periods. "The employer satisfies this obligation if it relieves its
5 employees of all duty, relinquishes control over their activities and permits a reasonable
6 opportunity to take an uninterrupted 30-minute break, and does not impede or discourage
7 them from doing so." (*Id.* at p. 1040.) "The employer is not obligated to police meal breaks
8 and ensure no work thereafter is performed." (*Ibid.*) However, an employer may not
9 undermine a formal policy of providing meal breaks by pressuring employees to perform
10 their duties in ways that omit breaks. (*Ibid.*)

11 Section 7(A)(3) of the Order further requires an employer to maintain "[t]ime records
12 showing when the employee begins and ends each work period. Meal periods, split shift
13 intervals and total daily hours worked shall also be recorded." When an employer fails to
14 fulfill its statutory obligation to keep time records, testimony of the affected employee is
15 sufficient to establish the amount of hours worked even though the result may be only
16 approximate. (*Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727.) "If an employer's
17 records show no meal period for a given shift over five hours, a rebuttable presumption
18 arises that the employee was not relieved of duty and no meal period was provided."
19 (*Brinker v. Superior Court* (2012) 53 Cal.4th 1004, 1053 [concurring opinion].)

20 Here, Plaintiffs testified that they were unable to take uninterrupted meal periods of at
21 least 30 minutes. Although Defendant did not instruct Plaintiffs not to take a meal break,
22 Plaintiffs testified that they felt pressured by the dispatchers to keep working and not take an
23 uninterrupted meal period. When assigned a load, Plaintiffs are usually provided with just
24 enough time to arrive at the destination. Once they arrive at the client site, Plaintiffs must
25 wait by their trucks for the client to load or unload the containers. When waiting for loads,
26 Plaintiffs have to place their names on a list and remain in front of the dispatchers to be
27 present when called. Thus, Plaintiffs did not have an opportunity to take uninterrupted meal

1 breaks relieved of all duty.

2 Defendant failed to attend the hearing and submit any time records or other evidence
3 demonstrating Plaintiffs took their meal periods. Thus, there is no evidence before the Labor
4 Commissioner from Defendant to rebut Plaintiffs' testimonies that they were unable to take
5 meal breaks every day of their employment.

6 Accordingly, Plaintiffs are awarded meal period premium pay for their missed meal
7 periods during their respective claim periods. The meal period premium pay is calculated by
8 multiplying the total number of days worked by the respective hourly rate of each Plaintiff.
9 The hourly rate is calculated by dividing the total gross earnings during the claim period by
10 the total number of days worked to obtain the daily rate. The daily rate is then divided by
11 the average number of hours worked per day to arrive at the hourly rate.

12 According to proof, Defendant failed to provide Plaintiff Gaitan a bonafied meal
13 period for 881 days at an average hourly piece rate of \$29.08 during the claim period (total
14 gross earnings of \$294,590.92 divided by 10,131.50 hours equals \$29.08). **As such, Plaintiff**
15 **Gaitan is awarded a total of \$25,619.48 for meal period premium pay.**

16 According to Proof, Defendant failed to provide Plaintiff Avalos a bonafied meal
17 period for 851 days at a varying piece rate during the claim period. **As such, Plaintiff Avalos**
18 **is awarded a total of \$19,483.80 for meal period premium pay.**

19 According to Proof, Defendant failed to provide Plaintiff Lopez a bonafied meal
20 period for 825 days at an average hourly piece rate of \$24.23 during the claim period (total
21 gross earnings of \$279,912.19 divided by 11,550 hours equals \$24.23). **As such, Plaintiff is**
22 **awarded a total of \$19,989.75 for meal period premium pay.**

23 According to proof, Defendant failed to provide Plaintiff Herrera a bonafied meal
24 period for 865 days at the hourly piece rate of \$42.64 during the claim period (total gross
25 earnings of \$405,705.45 divided by 9,515 hours equals \$42.64). **As such, Plaintiff Herrera is**
26 **awarded a total of \$36,883.60 for meal period premium pay.**

27

1 H. Rest Period Premiums

2 Section 12 of the Order provides:

3 (A) Every employer shall authorize and permit all employees to take rest
4 periods, which insofar as practicable shall be in the middle of each work period.
5 The authorized rest period time shall be based on the total hours worked daily at
6 the rate of ten (10) minutes net rest time per four (4) hours or major fraction
7 thereof. However, a rest period need not be authorized for employees whose
8 total daily work time is less than three and one-half (3½) hours. Authorized rest
9 period time shall be counted as hours worked for which there shall be no
10 deduction from wages.

11 (B) If an employer fails to provide an employee a rest period in accordance with
12 the applicable provisions of this order, the employer shall pay the employee one
13 (1) hour of pay at the employee's regular rate of compensation for each workday
14 that the rest period is not provided.

15 The employer's obligation under Section 12 of the Order is to "authorize and permit
16 all employees to take rest periods." "Authorize" means that employers have some
17 affirmative obligation to advise employees of the right to take rest periods in accordance with
18 the provisions of Section 12. "Permit" means that employers must allow employees to take
19 the rest periods to which they are entitled, and cannot deny permission to an employee or
20 make it impossible for an employee to exercise this right.

21 Plaintiffs testified that Defendant did not have a rest period policy and that they were
22 unable to take 10-minute rest breaks because they had to attend to their trucks at all times.
23 There was no evidence before the Labor Commissioner demonstrating that defendant
24 authorized and permitted rest breaks.

25 Accordingly, Plaintiffs are awarded rest period premium pay for their missed rest
26 periods during their respective claim periods. The rest period premium is calculated by
27 multiplying the total number of days worked by the respective hourly rate of each Plaintiff:
The hourly rate is calculated by dividing the total gross earnings during the claim period by
the total days worked to obtain the daily rate. The daily rate is then divided by the average
number of hours worked per day to arrive at the hourly rate.

1 According to proof, Defendant failed to provide Plaintiff Gaitan a rest period for 881
2 days at the hourly rate of \$29.08 during the claim period (total earnings during claim period
3 of \$294,590.92 divided by 10,131.50 hours equals \$29.08). As such, Plaintiff Gaitan is
4 awarded a total of \$25,619.48 for rest period premium pay.

5 According to Proof, Defendant failed to provide Plaintiff Avalos a paid rest period for
6 851 days at a varying piece rate during the claim period. As such, Plaintiff Avalos is
7 awarded a total of \$19,483.80 for rest period premium pay.

8 According to proof, Defendant failed to provide Plaintiff Lopez a paid rest period for
9 825 days at an average hourly piece rate of \$24.23 during the claim period (total gross
10 earnings of \$279,912.19 divided by 11550 hours equals \$24.23). As such, Plaintiff Lopez is
11 awarded a total of \$19,989.75 for rest period premium pay.

12 According to Proof, Defendant failed to provide Plaintiff Herrera a paid rest period for
13 865 days at the hourly piece rate of \$42.64 during the claim period (total earnings during
14 claim period of \$405,705.45 divided by 9515 hours equals \$42.64). As such, Plaintiff Herrera
15 is awarded a total of \$36,883.60 for rest period premium pay.

16 I. Wages for Rest Periods Taken During Hours Worked Earning Piece-Rate Wages

17 In *Bluford v. Safeway Stores, Inc.* (2013) 216 Cal.App.4th 864, the court held that the
18 piece-rate wages paid by the employer for piece-rate work cannot be used to satisfy the
19 employer's obligation to compensate the employee for the time spent taking a rest period.
20 *Bluford* establishes that, since piece-rate wages cover only actual piece-rate work, the time
21 spent taking a rest period must be separately compensated by an additional payment that
22 compensates the employee at the applicable rate of pay.

23 Plaintiffs testified that they did not take rest periods and seek rest period premiums
24 for missed rest periods. As no time was spent taking a rest period, no wages can be owed for
25 time spent taking a rest period. Accordingly, Plaintiffs take nothing on their claim for wages
26 for rest periods taken during hours worked earning a piece rate.

1 **J. Liquidated Damages**

2 Section 4 of the Order requires payment of at least the minimum wage for all hours
3 worked in the payroll period: eight dollars (\$8.00) per hour, effective through June 30, 2014;
4 nine dollars (\$9.00) per hour, effective July 1, 2014; and ten dollars (\$10.00) per hour, effective
5 January 1, 2016.

6 Labor Code section 1194.2(a) states:

7 In any action under Section 98, 1193.6, 1194, or 1197.1 to recover wages because
8 of the payment of a wage less than the minimum wage fixed by an order of the
9 commission or by statute, an employee shall be entitled to recover liquidated
10 damages in an amount equal to the wages unlawfully unpaid and interest
11 thereon. Nothing in this subdivision shall be construed to authorize the recovery
12 of liquidated damages for failure to pay overtime compensation.

13 Plaintiff Gaitan was not paid for a total of 4,405 nonproduction hours worked.
14 Pursuant to Labor Code section 1194.2, Plaintiff Gaitan is entitled to liquidated damages
15 for failure to pay at least the minimum wage for 4,405 hours, for a total of \$39,250.00.

16 Plaintiff Avalos was not paid for a total of 4,255 nonproduction hours worked.
17 Pursuant to Labor Code section 1194.2, Plaintiff Avalos is entitled to liquidated damages
18 for failure to pay at least the minimum wage for 4,255 hours, for a total of \$38,290.00.

19 Plaintiff Lopez was not paid for a total of 4,125 nonproduction hours worked.
20 Pursuant to Labor Code section 1194.2, Plaintiff Lopez is entitled to liquidated damages
21 for failure to pay at least the minimum wage for 4,125 hours, for a total of \$36,755.00.

22 Plaintiff Herrera was not paid for a total of 4,325 nonproduction hours worked.
23 Pursuant to Labor Code section 1194.2, Plaintiff Herrera is entitled to liquidated damages
24 for failure to pay at least the minimum wage for 4,325 hours, for a total of \$38,055.00.

25 **K. Interest**

26 Pursuant to Labor Code section 98.1, all awards granted pursuant to a hearing shall
27 accrue interest on all due and unpaid wages. Further, Labor Code section 1194.2 requires
that interest be awarded on any liquidated damages.

Plaintiff Gaitan is entitled to recover \$188,198.27 in interest accrued to date on the

1 amount due.

2 Plaintiff Avalos is entitled to recover \$5,251.77 in interest accrued to date on the
3 amount due.

4 Plaintiff Lopez is entitled to recover \$6,589.47 in interest accrued to date on the
5 amount due.

6 Plaintiff Herrera is entitled to recover \$8,534.62 in interest accrued to date on the
7 amount due.

8 **L. Waiting Time Penalties**

9 Labor Code section 201 requires that if an employee is discharged, all earned wages
10 are due immediately upon termination. Labor Code section 202 requires that if an employee
11 quits without providing at least 72 hours' notice of his resignation, all earned wages are due
12 within 72 hours of his resignation. Labor Code section 203 provides that if an employer
13 willfully fails to pay any earned wages of an employee in accordance with Labor Code
14 sections 201 and 202, the wages of such employee shall continue as a penalty from the due
15 date thereof at the same rate until paid, up to 30 days. As of the date of the hearing, Plaintiffs
16 remained employed by Defendant. Accordingly, Plaintiffs are not entitled to waiting time
17 penalties.

18 **M. Attorney's Fees**

19 Plaintiffs Gaitan and Avalos assert claims for attorney's fees. Labor Code section
20 2802(c) authorizes the recovery attorney's fees incurred by an employee in connection with a
21 claim for reimbursable business expenses. Plaintiffs Gaitan and Avalos did not bring claims
22 for reimbursable business expenses and therefore are not entitled to recover attorney's fees.
23 Accordingly, Plaintiffs Gaitan and Avalos take nothing on their claims for attorney's fees.

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CONCLUSION

In regards to Plaintiff Napoleon Gaitan
State Case Number 05-66467 KR

For all of the reasons set forth above, IT IS HEREBY ORDERED that Defendant XPO Cartage, Inc. shall pay Plaintiff Napoleon Gaitan a total of \$188,198.27, as follows:

1. \$91,960.89 for wages (with lawful deductions);
2. \$39,250.00 in liquidated damages pursuant to Labor Code section 1194.2;
3. \$25,619.48 in meal period premiums;
4. \$25,619.48 in rest period premiums;
5. \$0.00 for wages for rest periods taken during hours worked earning a piece rate;
6. \$5,748.42 in interest pursuant to Labor Code sections 98(c), 1194.2 and/or 2802(b);
7. \$0.00 in waiting time penalties pursuant to Labor Code section 203; and
8. \$0.00 in attorney's fees.

In regards to Plaintiff Domingo Avalos
State Case Number 05-66468 KR

For all of the reasons set forth above, IT IS HEREBY ORDERED that Defendant XPO Cartage, Inc. shall pay Plaintiff Domingo Avalos a total of \$171,938.25, as follows:

1. \$89,428.88 for wages (with lawful deductions);
2. \$38,290.00 in liquidated damages pursuant to Labor Code section 1194.2;
3. \$19,483.80 in meal period premiums;
4. \$19,483.80 in rest period premiums;
5. \$0.00 for wages for rest periods taken during hours worked earning a piece rate;
6. \$5,251.77 in interest pursuant to Labor Code sections 98(c), 1194.2 and/or 2802(b);
7. \$0.00 in waiting time penalties pursuant to Labor Code section 203; and
8. \$0.00 in attorney's fees.

In regards to Plaintiff Jose A. Lopez
State Case Number 05-66595 KR

For all of the reasons set forth above, IT IS HEREBY ORDERED that Defendant XPO Cartage, Inc. shall pay Plaintiff Jose A. Lopez a total of \$215,733.37, as follows:

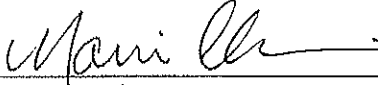
1. \$132,409.40 for wages (with lawful deductions);
2. \$36,755.00 in liquidated damages pursuant to Labor Code section 1194.2;
3. \$19,989.75 in meal period premiums;
4. \$19,989.75 in rest period premiums;
5. \$0.00 for wages for rest periods taken during hour worked earning a piece rate;
6. \$6,589.47 in interest pursuant to Labor Code sections 98(c), 1194.2 and/or 2802(b); and
7. \$0.00 in waiting time penalties pursuant to Labor Code section 203.

In regards to Plaintiff Jose Herrera
State Case Number 05-66694 KR


For all of the reasons set forth above, IT IS HEREBY ORDERED that Defendant XPO Cartage, Inc. shall pay Plaintiff Jose Herrera total of \$279,415.83, as follows:

1. \$138,102.18 for wages (with lawful deductions);
2. \$38,055.00 in liquidated damages pursuant to Labor Code section 1194.2;
3. \$20,956.83 for reimbursable business expenses;
4. \$36,883.60 in meal period premiums;
5. \$36,883.60 in rest period premiums;
6. \$0.00 for wages for rest periods taken during hours worked earning a piece rate;
7. \$8,534.62 in interest pursuant to Labor Code sections 98(c), 1194.2 and/or 2802(b); and
8. \$0.00 in waiting time penalties pursuant to Labor Code section 203.

Dated: April 14, 2017



Nami E. Chun
Hearing Officer

LABOR COMMISSIONER, STATE OF CALIFORNIA Department of Industrial Relations Division of Labor Standards Enforcement 300 Oceangate, Suite 302 Long Beach, CA 90802 Tel: (562) 590-5048 Fax: (562) 499-6467		
Plaintiff: NAPOLEON GAITAN		
Defendant: XPO CARTAGE, INC., A DELAWARE CORPORATION DBA XPO Logistics		
State Case Number 05 - 66467 KR	NOTICE OF PAYMENT DUE	

You have been served a copy of the Labor Commissioner's Order, Decision or Award.


If the full amount of the sums set forth in the Order, Decision or Award is received by this office within ten (10) days of the date the Order, Decision or Award was served upon you, no judgment will be entered in this matter.

Payment must be made by certified check, cashier's check or money order (no other tender will be accepted) made payable to the Plaintiff named in the Order, Decision or Award, and addressed to the Office of the Labor Commissioner at the address shown above.

DATED: April 14, 2017

Karen Ramos

 Karen Ramos Deputy Labor Commissioner
 562-590-5459

LABOR COMMISSIONER, STATE OF CALIFORNIA Department of Industrial Relations Division of Labor Standards Enforcement 300 Oceangate, Suite 302 Long Beach, CA 90802 Tel: (562) 590-5048 Fax: (562) 499-6467		
Plaintiff: DOMINGO AVALOS		
Defendant: XPO CARTAGE, INC., A DELAWARE CORPORATION DBA XPO Logistics		
State Case Number 05 - 66468 KR	NOTICE OF PAYMENT DUE	

You have been served a copy of the Labor Commissioner's Order, Decision or Award.

If the full amount of the sums set forth in the Order, Decision or Award is received by this office within ten (10) days of the date the Order, Decision or Award was served upon you, no judgment will be entered in this matter.


Payment must be made by certified check, cashier's check or money order (no other tender will be accepted) made payable to the Plaintiff named in the Order, Decision or Award, and addressed to the Office of the Labor Commissioner at the address shown above.

DATED: April 14, 2017

Karen Ramos

Karen Ramos
562-590-5459

Deputy Labor Commissioner

LABOR COMMISSIONER, STATE OF CALIFORNIA Department of Industrial Relations Division of Labor Standards Enforcement 300 Oceangate, Suite 302 Long Beach, CA 90802 Tel: (562) 590-5048 Fax: (562) 499-6467		
Plaintiff: Jose A. Lopez		
Defendant: XPO CARTAGE, INC., A DELAWARE CORPORATION DBA XPO Logistics		
State Case Number 05 - 66595 KR	NOTICE OF PAYMENT DUE	

You have been served a copy of the Labor Commissioner's Order, Decision or Award.


If the full amount of the sums set forth in the Order, Decision or Award is received by this office within ten (10) days of the date the Order, Decision or Award was served upon you, no judgment will be entered in this matter.

Payment must be made by certified check, cashier's check or money order (no other tender will be accepted) made payable to the Plaintiff named in the Order, Decision or Award, and addressed to the Office of the Labor Commissioner at the address shown above.

DATED: April 14, 2017

Karen Ramos

 Karen Ramos Deputy Labor Commissioner
 562-590-5459

LABOR COMMISSIONER, STATE OF CALIFORNIA Department of Industrial Relations Division of Labor Standards Enforcement 300 Oceangate, Suite 302 Long Beach, CA 90802 Tel: (562) 590-5048 Fax: (562) 499-6467		
Plaintiff: Jose Herrera		
Defendant: XPO CARTAGE, INC., A DELAWARE CORPORATION DBA XPO Logistics		
State Case Number 05 - 66694 KR	NOTICE OF PAYMENT DUE	

You have been served a copy of the Labor Commissioner's Order, Decision or Award.

If the full amount of the sums set forth in the Order, Decision or Award is received by this office within ten (10) days of the date the Order, Decision or Award was served upon you, no judgment will be entered in this matter.

Payment must be made by certified check, cashier's check or money order (no other tender will be accepted) made payable to the Plaintiff named in the Order, Decision or Award, and addressed to the Office of the Labor Commissioner at the address shown above.

DATED: April 14, 2017

Karen Ramos

Karen Ramos
562-590-5459

Deputy Labor Commissioner