OOIDA Litigation and the Arbitration of Motor Carrier Owner-Operator Disputes

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I. Introduction

As a general rule, it makes sense to avoid the quagmire of litigation. Litigation is costly, time consuming, and diverts attention from business and creative pursuits.

Business disputes frequently arise between parties who intend to or have had continuing relations. The outcome of a single dispute rarely, if ever, has any true significance on the business relationship unless it is blown out of proportion. This is a result frequently arising from adversarial confrontation. Despite the logic of settling disputes voluntarily, Americans are the most litigious people in the world and we turn any problem into the familiar pattern of a two-party adversarial trial and take it to court.

While many reasons underlie resorting to courts, the basic problem is that parties mainly focus on the legal issues when, in most instances, they

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should be concerned with addressing the reconciliation of their interests. In some instances, a negotiated settlement of respective interests cannot be successfully concluded and it would then behoove parties to seek resolution through alternative dispute resolution ("ADR") techniques, rather than formal litigation. This is true in respect to those disputes that arise between the motor carrier and the owner-operators[1] it engages under written contract to lease equipment with driver services[2] to transport freight tendered to the motor carrier for movement in commerce.

The relationship between the motor carrier and the owner-operator is one in which "interests" are significantly intertwined. The ability of the owner-operator to succeed economically under the lease is, to a degree, dependent upon the amount and type of traffic the motor carrier generates and can tender under the lease. The traffic which is offered to the motor carriers by shippers, on the other hand, is frequently, if not always, predicated on the ability of the owner-operator to handle loads on a timely and safe basis without loss or damage to the freight tendered and to deal with consignor[3] and consignee[4] personnel in a civil manner.

Further, there is considerable intercourse between the motor carrier's employees and the owner-operator related to important and common business functions including scheduling, dispatching,[5] permitting,[6]

1. Owner-Operators are individuals or entities. The lessor of the lease equipment is considered the "owner" under the federal Leasing and Interchange Regulations, 49 C.F.R. pt. 376 [hereinafter Leasing Regulations].

> A person (1) to whom title to equipment has been issued, or (2) who, without title, has the right to exclusive use of equipment, or (3) who has lawful possession of equipment registered and licensed in any state in the name of that person.

49 C.F.R. § 376.2(d) (2004). Owner-Operators are independent businesspersons and the lessor is considered by the lessee to be an independent contractor and even if the lessor actually drives the vehicle under the lease, the lessor is not to be considered an employee of the lessee-carrier. *See* James C. Hardman, *Administrative Bulls in the Delicate China Shop of Motor Carrier Operations – Revisited*, 18 TRANSP. L.J. 115 (1989).

2. The Leasing Regulations do not specify the person or persons who must operate the equipment while utilized under lease. In fact, equipment may be leased "with or without [a] driver." 49 C.F.R. § 376.2(e). Typically, the owner-operator/lessor with one unit leased will drive the vehicle, while lessors of multiple units under lease will employ drivers to operate the equipment in addition to driving a unit himself or herself. *See* James C. Hardman, *Workers' Compensation and the Use of Owner-Operators in Interstate Motor Carriage: A Need for Sensible Uniformity*, 20 TRANSP. L.J. 255, 261-64 (1992).

3. A consignor is the person or entity who consigns or tenders freight at an origin point. BLACK'S LAW DICTIONARY 327 (8th ed. 2004).

4. A consignee is the person or entity to whom the freight is shipped. *Id.*

5. The process involving conveyance of the shipper's needs and direction to the operator of the equipment transporting the freight is usually done by the motor carrier's employee, commonly called a "dispatcher." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000), *available at* http://dictionary.reference.com.

6. Depending upon the size and weight of the equipment and/or the freight or its nature, states may require a special permit to move the load. Because of the business practicality involved, motor carriers will apply for the permits as needed and see that the operators receive

and resolving of problems which occur in the movement of freight. The climate between motor carrier personnel and owner-operators is one which involves significant challenges to maintaining good personal and contract relationships particularly in a market where the number of competent, industrious, and safe owner-operators is limited on the one hand, and on the other, the number of motor carriers who compete among themselves for such operators.[7]

The avoidance of litigation is clearly a sensible goal in the above-referenced circumstances.

II. Arbitration as a Viable Alternative to Litigation

While various ADR techniques exist and each has advantages and disadvantages, in the context of motor carrier - owner-operator disputes, which cannot be settled by negotiation, arbitration appears to be the most feasible alternative. While arbitration can involve a binding or non-binding decision handed down by a third-party arbitrator, the cost and time of the respective parties can rarely, if ever, justify a non-binding decision necessitating the need for further proceedings if either party is discontent with the non-binding award.

The benefits of arbitration in the context of disputes between motor carriers and owner-operators include:[8]

(a) *Costs.* Generally, less overall legal costs are involved and less personal time is necessary than in litigation. Discovery and motion practice, the greatest expenses in litigation, frequently can be eliminated or confined.

The fact that all possible evidence has not been accumulated or discovered is not a legitimate reason to avoid ADR processes. In reality, most all cases settle before trial and on the proverbial "courthouse steps." So why go through the motions and expense of extensive trial preparation if it can be avoided? The outcome of litigation is never certain and the uncertainty of a party's position may promote a settlement.

A quick and modest payment in a case in which neither party has expended a great deal of time or money is frequently attractive to a mo-

them. *See generally* Oversize and Overweight Load Permit Information, http://ops.fhwa.dot.gov/freight/sw/permit_report.htm (last visited Aug. 27, 2005).

7. Motor carriers consider driver capacity as their single most pressing problem. *See generally* Global Insight Inc., The U.S. Truck Driver Shortage: Analysis and Forecasts 4 (May 2005), http://www.truckline.com/NR/rdonlyres/E2E789CF-F308-463F-8831-0F7E283A0218/0/ATADriverShortageStudy05.pdf.

8. *See generally* Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 Rutgers L. Rev. 253 (1985); Thomas J. Moyer, *Essay: ADR as an Alternative to Our Culture of Confrontation*, 43 Clev. St. L. Rev. 13 (1995).

tor carrier or an owner-operator who wants to get on to more profitable pursuits.

(b) *Expertise.* Complicated facts can be sifted through and considered by knowledgeable arbitrators rather than by non-expert lay juries or judges with limited knowledge of the specific law involved. This is particularly important where a defined body of law exists or the dispute is basically factually orientated.

Private organizations, such as the American Arbitration Association, the Transportation ADR Council, Inc. and similar organizations, have set qualifications for arbitrators with expertise in transportation disputes.

These professionals are familiar with controlling statutes, administrative rules, case law, and, maybe most important, industry practices to help achieve a more positive result.

(c) *Fair.* While arbitration is an adversarial type of dispute resolution, it is most frequently consensual and the parties can establish their own boundaries as to the procedures and limits of the process. Also, the issues presented to the arbitrator may be limited, discovery and evidentiary considerations agreed to by the parties, and the arbitrator may be bound by existing law as well as to the remedy or remedies which may be awarded. Coupled with the fact that the parties generally select the arbitrator leads to the realization that arbitration is also a fair mode of dispute resolution.

(d) *Prompt Disposition.* Routine disputes can be disposed of efficiently and rapidly. In most instances, if not most, arbitration can be completed in one day or within a minimal number of days while judicial litigation can linger for years.

The ability to resolve a business dispute in the *current* business climate cannot be overstated. An arbitration award can be based on current conditions. A final court judgment, however, arises after a possible appeal, some years after the controversy. Considering the value of the claim at the later date, the disruption to all parties' business, the change in the business climate and the cost of litigation, the question is raised: *who has really won?*

(e) *Convenience.* Arbitration can be scheduled as promptly as agreed to by the parties and for a date or dates certain. The parties are not subject to the whims of a court calendar with the frequent possibilities of cancellation or delay.

It is also advantageous to be able to select a convenient place for the process rather than being bound to the selected forum of the party initiating a lawsuit.

(f) *Confidentiality.* If disputes involve highly sensitive information of

the motor carrier, the owner-operator and their mutual customers, confidentiality can be basically assured.

Typically, business litigation not only exposes the facts of the dispute to the opposition, but also the parties' business practices, philosophy, and style of doing business, all of which may be of interest and economic value to third parties.

In arbitration, the parties and arbitrator may agree to the proceeding being closed to third parties and the award is kept confidential except to the extent it is necessary to enforce the award in a court or competent jurisdiction.

Arbitration has some drawbacks and may not be speedy and cost effective in some complex cases although the process has been successful in such cases. In addition, parties are not always assured that they will be able to secure critical information for use at the hearing. The exchange of information, documents, and attendance of witnesses is dependent upon the arbitration rules or agreement of the parties.

Some parties feel that the lack of application of the rules of evidence may also hinder a predictable and fair hearing and that an award not constrained by precedent may not be just and be contrary to law.

Unless the parties request a reasoned decision, many arbitration awards merely express a simple finding and decision. The parties will not know why a decision was made and how the result was reached and thus no basis exists for precedents and is void of expressed educational value. The limited appealability of awards is also of concern as one party may be obligated to pay an award and yet feel aggrieved without the opportunity for further review.

III. Arbitration of Transportation Disputes

While arbitration has been extensively utilized and proven successful in various industries, it has not been widely used in the motor carrier transportation industry despite the advantages of cost containment, fairness, prompt disposition, convenience, and confidentiality.[9] Based on the efforts of certain trade and professional groups to educate industry members of the availability and advantages of arbitration and other ADR techniques in recent years,[10] it appears that there has been some increase in ADR occurring, including arbitration between motor carriers and owner-operators.

9. *See* Stuart B. Robbins, *ADR in Today's Transportation Industry*, 65 J. Transp. L., Logistics & Pol'y 19, 21 (1997).

10. The Transportation Lawyers Association ("TLA") has presented many papers on the subject at conferences it has sponsored. This is also true of the American Trucking Associations and state bar and trucking associations.

The emergence of litigation involving the Owner-Operator Independent Driver Association ("OOIDA")[11] and its members against specified motor carriers related to the federal Leasing and Interchange Regulations has increased awareness of arbitration and raised significant issues concerning consensual final and binding contractual arbitration.[12] In a minimum of four of the major cases, the motor carriers defendants have attempted to compel arbitration in lieu of judicial proceedings based on contract clauses between them and owner operators.[13] In only one instance has the motor carrier been successful in compelling arbitration and the issues raised in these cases and their resolution could have far-reaching consequences in determining the future use of arbitration within the industry.[14]

IV. THE FAA AND THE TRANSPORTATION WORKER EXCLUSION

The most important issue arising in the OOIDA litigation is whether owner-operators are excluded from the coverage of the Federal Arbitration Act ("FAA").[15] This issue is arises on the basis that the contract between the motor carrier and the owner-operator is a "contract of employment" involving a "class of workers engaged in foreign or interstate commerce" which are excluded under the FAA.[16]

11. This trade association for owner-operators boasts a membership in excess of 128,000 members. It publishes educational materials for its members, monitors legislative and administrative transportation matters and actively participates in advocating or opposing such governmental endeavors, and engages in litigation on behalf of individual members. *See generally* OOIDA, Owner-Operator Independent Drivers Association, http://www.ooida.com.

12. In the past nine years there has been at least twenty civil lawsuits filed by OOIDA members and the organization under 49 U.S.C. § 104704(a)(1) and (2) complaining that the motor carrier defendants have violated various provisions of the Leasing Regulations resulting in the need for injunctive relief and monetary damages. While many cases have been settled, other cases are still being litigated or have been judicially resolved with mixed results. In some instances, such as *Gagnon v. Service Trucking, Inc.,* OOIDA was not a participating party, but the litigation was predicated on the same statutory provisions and based on the same principles. 266 F. Supp. 2d 1361, 1362 n.2 (M.D. Fla. 2003) [hereinafter *Gagnon I*]. The parties in *Gagnon I* settled the case and, pursuant to the Settlement Agreement, the court vacated its Order entered May 1, 2003. Gagnon v. Service Trucking, Inc., No. 5:02-CV-342-OC-10GRJ, 2004 WL 290743, at *1 (M.D. Fla. Feb. 3, 2004) [hereinafter *Gagnon II*].

13. *See Gagnon I*, 266 F. Supp. 2d at 1362; Owner-Operator Indep. Drivers Ass'n v. Landstar Sys., Inc., No. 3:02-CV-1005-J-25HTS, 2003 WL 23941713, at *1 (M.D. Fla. Sept. 30, 2003); Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co., 288 F. Supp. 2d. 1033, 1034 (D. Ariz. 2003); Owner-Operator Indep. Drivers Ass'n v. C.R. Eng., Inc., 325 F. Supp. 2d 1252, 1255 (D. Utah 2004).

14. *See Swift Transp.*, 288 F. Supp. 2d at 1034.

15. The United States Arbitration Act, commonly referred to as the Federal Arbitration Act, is codified at 9 U.S.C. §§ 1-16 (2000).

16. *See id.* § 1 (providing that the FAA does not apply to "contracts of employment of seamen, railroad employees and any other class of workers engaged in interstate commerce.") [hereinafter "Transportation Worker" exclusion]. The Supreme Court has clarified the exemp-

The FAA was signed on February 12, 1925 by President Calvin Coolidge, in part, to overcome the hostility of the judiciary to arbitration and to address the increase in business disputes stemming from industrialization in the 1920s.[17] The FAA declared "a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[18]

However, in enacting the FAA, Congress specifically provided that, "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[19] This provision, which has little legislative history, was seemingly based on Congress' concern to assure that the transportation industry and the necessary role of the companies in the free flow of goods in interstate commerce was critical to the country.[20]

Congress had previously enacted federal legislation specifically providing for arbitration of disputes involving seamen.[21] The same was true in respect to railroad employees under the Interstate Commerce Act.[22] Thus, it is reasonable to conclude that Congress excluded seamen and railroad workers for the "simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers."[23]

While motor carriage existed in the 1920s, it was in its infancy and, thus, was not regulated, and was not precluded under common law from the use of arbitration. Further, there is no specific evidence that motor carriers or their employees were specifically considered in the context of section 1 of the FAA.[24] The same was true of airlines and employees of airlines.[25]

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tion as applying to workers actually engaged in the movement of goods in interstate commerce, namely contracts of employment of transportation workers. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001).

17. Preston D. Wigner, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499, 1500-03 (1995).

18. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

19. 9 U.S.C. § 1.

20. *Adams*, 532 U.S. at 121.

21. *See* Shipping Commissioner Act of 1872, ch. 322, 17 Stat. 262 (1872).

22. *See* Transportation Act of 1920, ch. 91, 41 Stat. 456 (1920); Railway Labor Act, ch. 347, 44 Stat. 577 (1926).

23. *Adams*, 532 U.S. at 121.

24. *See* 9 U.S.C. § 1.

25. The airline employees were being considered for inclusion in the Railway Labor Act being drafted at the same time that the FAA was being considered. However, airlines and employees of airlines were not included under the Railway Labor Act until 1936. *See* 29 C.F.R. § 1202.13.

If Congress had some concern about including motor carrier workers and delayed inclusion under the FAA because of their significant involvement in the movement of interstate commerce, which might necessitate legislation similar to that in the seamen, rail, and airline industry, it must be recognized that no such need has arisen in over 100 years. This should, in and of itself, indicate that there is no justification to exclude personnel in the motor carrier industry, and particularly owner-operators, from voluntary arbitration and its attendant benefits.[26]

Further, if ever necessary, legislation could be passed providing for legislative specified handling of dispute and at the same time remove coverage under the FAA. In the meantime, it is felt that society, as well as motor carrier transportation workers, including owner-operator, should be able to enjoy the benefits of arbitration in resolving disputes.

The Transportation Workers exclusion, as related to owner-operators, was first raised in OOIDA-type litigation in *Gagnon I* when the motor carrier defendant filed a Motion to Compel Arbitration under a contract clause reading, "To the extent any dispute arises under this agreement or its interpretation, we both agree to submit such dispute to final and binding arbitration."[27] This agreement between the motor carriers also provided that the "entire agreement and understanding between us and is to be interpreted under the laws of the State of Florida."[28] However, the defendant did not advance its claim on the state's arbitration statute, but rather under the FAA because the case concerned interstate commerce.[29]

In *Gagnon I*, plaintiff opposed the Motion, in part, on the fact that the FAA was inapplicable because plaintiff and potential class members were within a "'class of workers engaged in foreign or interstate commerce'" and, therefore, excluded under 9 U.S.C. § 1.[30] The United States Magistrate to whom the Motion was referred recommended that the Motion be denied on the basis that the FAA exempts from its provisions the claims under employment contracts of truck drivers involved in interstate

26. It should be noted that when specific legislation was passed for seamen and rail and airline workers, it was clear only railroad employees fell within the legislation and the limitation to rail employees is a strong indication that the statutory provision did not apply to independent contractors. It should also be noted that the National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) covers employees in the motor carrier industry and presumably such employees could be covered by a collective bargaining agreement calling for arbitration. *See, e.g.*, Mason-Dixon Lines, Inv. v. Local Union No. 560, Int'l Bhd. of Teamsters, 443 F.2d 807, 809 (3d Cir. 1971) (enforcing such an arbitration clause under a collective bargaining agreement covering a driver and a motor carrier despite FAA section 1).

27. *Gagnon I*, 266 F. Supp. 2d at 1363.

28. Memorandum of Law in Support of Defendant's Motion to Compel Arbitration at 2, Gagnon v. Service Trucking, Inc., 266 F. Supp. 2d 1361 (M.D. Fla. 2003) (No. 5:02CV00342).

29. *Gagnon I*, 266 F. Supp. 2d at 1363.

30. *Id.* at 1364 (quoting 9 U.S.C. § 1).

commerce.[31] The Magistrate framed the relevant issue as two-fold, "whether the owner-operators, like Plaintiff, are workers engaged in interstate commerce" and, if so, "whether the Lease Agreement in this case is a 'contract of employment.'"[32] Citing various cases finding truck drivers to be workers engaged in interstate commerce, the Magistrate addressed the issue whether a "contract of employment" existed under the FAA.[33]

Specifically noting that the FAA and its history was "not particularly helpful in defining the term 'contract of employment' nor [was] there any case law that expressly [dealt] with the issue of whether a Lease Agreement, like the one in the instant case, constitutes an employment contract for purposes of the FAA[,]" the Magistrate resorted to cases where the employment classification arose in other areas of law.[34]

Relying on the decision of *Judy v. Tri-State Motor Transit Co.* and other cases which were based on finding employment relationships in connection with tort liability of carriers for personal injuries sustained as a result of driver negligence while under the a lease contract, the Magistrate found a "statutory employer-employee relationship between the [truck driver] and the [motor carrier]."[35] Furthermore, the Magistrate noted that his finding was premised on 49 U.S.C. § 14102, "which requires motor carriers to assume control and responsibility of operating leased motor vehicles."[36] The Magistrate, recognizing the concept of a statutory employer-employee relationship arose in the context of tort claims, stated the same rationale applied to the *Gagnon I* situation because "the responsibility and the duty to control the vehicle" was a "key ingredient in determining" the employment classification issue.[37]

The Magistrate also resorted to agency principles under federal law to buttress the decision and found their application supported his conclusion.[38] Key provisions leading to an employment finding included "control over and responsibility" for the operation of the vehicle, the lease

31. *Id.* at 1367.

32. *Id.* at 1364.

33. *Id.* at 1364-66 n.8 (citing Am. Postal Workers Union v. U.S. Postal Serv., 823 F.2d 466, 473 (11th Cir. 1987); Rosen v. Transx, Ltd., 816 F. Supp. 1364, 1371 (D. Minn. 1993); Cent. States, S.E. & S.W. Area Pension Fund v. Tank Transport, Inc., 779 F. Supp. 947, 949 (N.D. Ill. 1991)).

34. *Id.* at 1364.

35. *Id.* at 1365 (citing Judy v. Tri-State Motor Transit Co., 844 F.2d 1496, 1500-01 (11th Cir. 1988); Price v. Westmoreland, 727 F.2d 494, 496-97 (5th Cir. 1984); Heaton v. Home Transp. Co., 659 F. Supp. 27, 31 (N.D. Ga. 1986)).

36. *Id.*

37. *Id.*

38. *Id.* at 1365-66 (citing Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) and quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989)) (setting forth the criteria used under the common law agency test).

agreement was renewable on a year-to-year basis, the work performed by the driver was the main focus of the carrier's regular business, and the carrier secured and distributed to the drivers "permits for road use, mileage and fuel taxes."[39] The Magistrate concluded the Lease Agreement constituted a contract of employment of a class of workers engaged in interstate commerce.[40]

In *Owner-Operator Independent Drivers Association. v. Landstar Systems, Inc.*, the same issue arose when Plaintiff submitted the *Gagnon I* decision as authority in response to the motor carrier's Motion to Compel Arbitration.[41] The court followed the analysis made in *Gagnon I*, finding that truck drivers fell within the exclusion of workers engaged in foreign or interstate commerce and then determined the carrier-owner-operator agreement was an employment contract thereby removing them from the dictates of the FAA.[42] The court merely reviewed the *Judy* and *Gagnon I* decisions and found the Defendant's leases with the owner-operators set out the terms of the employer-employee relationship under 49 U.S.C. § 14102.[43]

In a third case, *Swift Transportation,* the issue also arose.[44] While the parties did not address the arbitration issue to any extent in their pleadings, the court ruled that the Plaintiff did not meet its burden of establishing that the drivers should be considered "employees" under the Lease Agreement or in the circumstances of their working relationship.[45] In effect, the court ruled the exclusion of section 1 of the FAA only applied to an employee relationship and not an independent contractor relationship.[46] Arbitration was compelled.[47]

At the same time that the arbitration issue was before the *Swift Transportation* Court, it arose in *Owner-Operator Independent Drivers Association v. C.R. England, Inc.*[48] While the Defendant asserted that arbitration should be compelled under the Utah State Arbitration Act,[49] the Plaintiffs argued the owner-operators were exempt from arbitration under the FAA.[50] The court, in deciding the issue, declared that despite

39. *Id.* at 1366.
40. *Id.* at 1365-66.
41. *Landstar*, 2003 WL 23941713, at *2.
42. *Id.* at *8.
43. *Id.* at *7-8.
44. *Swift Transp.*, 288 F. Supp. 2d at 1035.
45. *Id.*
46. *See id.*
47. *Id.*
48. Owner-Operator Indep. Drivers Ass'n v. C.R. Eng., Inc., 325 F. Supp. 2d 1252, 1255-56 (D. Utah 2004).
49. *Id.* at 1258 (citing Utah Arbitration Act, UTAH CODE ANN. §§ 78-31a-101 to -131 (2003) [hereinafter "UAA"]).
50. *Id.*

the split of authority, it was "clear" that the Plaintiffs were a "class of workers engaged in interstate commerce, or [were] transportation workers," within the exception of the FAA.[51] The court rested its decision on the language of the agreement between the motor carrier and owner-operator which existed because the owner-operators were to perform personally or through other drivers certain functions related to the operation of the equipment for C.R. England's business, namely to operate the equipment together with all necessary drivers and labor to transport freight on the company's behalf, which it felt clearly established the agreement was a contract of employment of transportation workers and was excluded from arbitration under the FAA.[52]

The diversity of opinions rose primarily because the *Gagnon I* Court was not presented with the most critical issue and the administrative provision upon which it relied in reaching the decision had been substantially modified by a prior amendment to the regulation, which clearly indicated an opposite intent than that adopted by the court.

Because many courts in other areas of law involving the "employment classification" issue interpreted the Leasing Regulations as creating a per se employment status,[53] the administrative agency felt it necessary to clarify this misinterpretation of its intent. It modified the applicable section of the Leasing Regulations by adding a new subsection reading:

> Nothing in the provision required by paragraph (c)(1) of this section in intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements.[54]

Courts, subsequent to the adoption of 49 C.F.R. § 376.12(c)(4), have generally accepted the position that an independent contractor relationship can exist in a lease arrangement under the Leasing Regulations.[55] Despite the fact that this "oversight" in the *Gagnon I* case was brought to

51. *Id.* at 1257.

52. *Id.* at 1257-58 (rejecting *Gagnon I*'s reliance on the statutory employer-employee theory and the motor carrier safety regulations at 49 C.F.R. Parts 200 through 399, asserting that such reliance was not applicable because the cited cases relied upon as authority involved liability for personal injuries, whereas the applicable regulation in the present case was 49 C.F.R. § 376.12(c)(4)).

53. *See* Petition to Amend Leasing and Interchange of Vehicle Regulations, 8 I.C.C. 669, 671 (1992); *see also* James C. Hardman, *Public Responsibility of Motor Carriers Under the Leasing Regulations of the Interstate Commerce Commission*, 62 J. TRANSP. L., LOGISTICS & POL'Y 37 (1994).

54. 49 C.F.R. § 376.12(c)(4) (2005).

55. *See, e.g.*, Zamalloa v. Hart, 31 F.3d 911, 915 (9th Cir. 1994); Berger Transfer & Storage, Inc. v. Cent. States, S.E. & S.W. Area Pension Fund, Civ. No. 3-93-107, 1995 LEXIS 21503, at *40 (D. Minn. 1995), *aff'd*, 85 F.3d 1374 (8th Cir. 1996).

the attention of the *Landstar* Court, the court made no recognition or discussion of it in ruling against the motor carrier's Motion to Compel Arbitration.[56]

The Court in *C.R. England* did recognize that *Gagnon I*'s reliance on the statutory employer-employee theory and reference to the federal Motor Carrier Safety Regulations was misplaced, finding that such reliance was not applicable because the cases relied upon involved personal injuries, whereas the applicable regulation before it was 49 C.F.R. § 376.12(c)(4).[57]

In the circumstances, and particularly in light of the apparent evidence and arguments not raised, it is difficult to accept the decisions of the *Gagnon I* and *Landstar* Courts as sound precedent. OOIDA litigation, to date, has essentially created a proverbial "mess" in the segment of the motor carrier industry using owner-operators. Carriers are faced with the issues of: (1) whether independent owners, who also drive their leased vehicles under contract to the motor carrier, are excluded from FAA coverage whether employees and/or independent contractors; (2) whether all drivers will or should be considered statutory employees for purposes of section 1 of the FAA; and (3) what tests or criteria should the employment classification issue, to the extent relevant, be decided?

V. Coverage of Independent Contractors: The Employment Classification Issue

The cursory treatment of the issue of owner-operators being employees or independent contractors in OOIDA-type litigation presents a significant problem for motor carriers using such personnel. The issue is also frequently raised in many other areas of law. The proper determination of the issue is important in terms of federal and state employment taxes, labor management relations, workers' compensation, unemployment compensation, and in respect to tort and contract law.

The resolution of the employment classification issue in the context of OOIDA type litigation can and will have significant implications in motor carrier operations as a decision of "misapplication" of the issue in one area of the law frequently has consequences in other areas of law. For example, a finding of misapplication of the issues resulting in an IRS proceeding regarding employment taxes will invariably raise the issue by state revenue departments. A finding that any owner-operator is an "employee" for purposes of workers' compensation will result in inquiries or audits of the particular state's department of labor regarding unemployment compensation coverage.

56. *See Landstar*, 2003 WL 23941713.
57. *C.R. Eng.*, 325 F. Supp. 2d at 1257-58.

While each agency or court interpreting the employment classification issue under various statutory or administrative standards and the decision reached may seem to make sense, it must be realized that to a business attempting to determine business *modus operandi*, the plethora of tests utilized does not make sense and has led to explosive litigation obscuring the simple conclusion that there has to be a reasonably usable test to determine whether a person is an independent contractor or an employee.

In the *Landstar* case, an appeal was filed regarding the denial of the Motion to Compel Arbitration but subsequently withdrawn. As such, one can only speculate whether such action was driven, in part, by the fact that they may not have wanted this type of threat since Landstar is one of the largest motor carriers solely using owner-operators. Thus, they did not want the employment classification issue decided as a peripheral issue where an adverse decision could have significant, if not critical, affects on its operations.

While the United States Supreme Court in *Circuit City Stores, Inc. v. Adams* has limited the exclusion provision under the FAA to the "employment" of transportation workers, and characterized the relationship of those individuals as in an "employee" status, the specific issue of independent contractor coverage was not decided.[58] Likewise, in *Roadway Package Systems, Inc. v. Kayser*, a district court specifically found that the FAA exclusion only applied to driver-employees and did not include arbitration of owner-operator disputes.[59]

In the *Adams* case, Justice Kennedy stated the residual exclusion is linked to the two specific enumerated types of workers identified in the preceding portion of the sentence, that is seamen and rail employees and their employers.[60] Justice Kennedy also noted that air carriers and "their employees" were included under the Railway Labor Act in 1936.[61] Again, this decision indicates that only "employees" in transportation are excluded from FAA coverage.

This is the only logical conclusion to reach. To take the position that independent contractors in transportation are included would ignore the relationship existing between the statutory term "contract of employment" and "class of worker." It appears clear that a person in a "class of worker" must have a contract of employment such as seamen and railroad employees. The term "contract of employment" and "employee" should not be utilized improperly to extend the term "worker" to include

58. *Adams*, 532 U.S. at 119.

59. Rdwy. Package Sys., Inc. v. Kayser, No. CIV. A. 99-MC-111, 1999 WL 817724, at *4 n.4 (E.D. Pa. 1999), *aff'd*, 257 F.3d 287 (3d Cir.2001).

60. *Adams*, 532 U.S. at 121.

61. *Id.* (citing ch. 166, 49 Stat. 1189; 45 U.S.C. § 181-188).

independent contractors. If Congress, in fact, wanted to cover independent contractors, it would have been logical to word the exclusion to read, "nothing contained herein shall apply to seamen or any other class of transportation workers engaged in interstate commerce."

It is also significant that in the OOIDA litigation to date, it appears that the courts have not specifically considered the fact that agreements between motor carriers and independent businesspersons are not personal service contracts. This critical point would seemingly preclude any effective argument that an individual independent contractor is an employee or worker of the motor carrier for purposes of the FAA.

The Leasing Regulations, which are the predicate of the OOIDA suits, merely regulate the leasing of equipment and the terms of the agreement between the lessor and the lessee of the equipment.[62] The typical agreement does not require the lessor of the equipment to drive the vehicle nor is there any breakdown between the payment for the lease of the equipment and the driving of it, related service such as loading and unloading freight, maintenance of equipment, licensing it, and operational expenses.

The disputes that might arise under the Leasing Regulations, as they did in the OOIDA litigation, were not predicated on "wages and salary," "fringe benefits," or any real "employment" issue. Instead, the issues arose over items such as voluntary insurance purchases, use of voluntary fuel cards, business-based security deposits, and escrow funds.[63] These issues do not involve typical employer-employee provisions having a direct bearing on "wages or salary."

There is really no basis to argue that they relate to a "worker" dispute as opposed to two independent businesses disputing over a contract to accomplish a business purpose. The fact that OOIDA litigation involves transportation service under contract as opposed to a general contractor in the construction industry in a dispute with a plumbing subcontractor over a contract term, or a retailer in a dispute with a business person leasing floor space to sell cosmetics, does not change a business dispute into an employment dispute. Until the employment classification issue is reasonably defined and resolved, it will be a continuing issue in disputes under the FAA.

62. 49 C.F.R. § 376.12 (2005). Leases of equipment can include driver service or not. *Id.* § 376.2(h).

63. *E.g.*, Owner-Operator Indep. Drivers Ass'n v. Mayflower Transit, Inc., 204 Fed. Reg. 138, 140-41 (S.D. Ind. 2001); Owner-Operator Indep. Drivers Ass'n v. Concord EFS, Inc., No. M1999-02560-COA-R3-CV, 2000 WL 225945, at *1 (Tenn. Ct. App. 2000); Owner-Operator Indep. Drivers Ass'n v. New Prime, Inc., 398 F.3d 1067, 1068 (8th Cir. 2005); Owner-Operator Indep. Drivers Ass'n v. Arctic Express, Inc., 159 F. Supp. 2d 1067, 1068-69 (S.D. Ohio 2001).

VI. Federal – State Law Relationship

A second major issue in the use of arbitration between motor carrier and owner operators, arises when a state arbitration act exists and "transportation workers" are not excluded from coverage. Although this potential issue was recognized in *Gagnon I*, the defendant motor carrier appeared to have limited its argument that the FAA applied because the dispute concerned interstate commerce.[64] The parties agree as did the Magistrate holding the FAA controlled.[65]

In the *Landstar* case, however, the carrier defendants took a strong but different position on the issue arguing that the FAA was not controlling since arbitration could also be compelled under the Tennessee Uniform Arbitration Act.[66] Similarly, in *C.R. England*, the motor carrier although arguing the applicability of the FAA to some extent seemingly relied more strongly on the applicability of the Utah Arbitration Act, which did not include an exclusion provision similar to section 1 of the FAA.[67] However, the court in *C.R. England* rejected application of the Utah Arbitration Act on the basis of the decision in *Palcko v. Airborne Express, Inc.*,[68] which held that a state statutory provision similar to the Utah Arbitration Act would frustrate the congressional intent to exclude transportation workers' claims from arbitration.[69]

In the *Swift Transportation* case, the defendant motor carrier raised the arbitration issue relying upon the FAA and the Tennessee Uniform Arbitration Act.[70] Plaintiffs raised the exclusionary provision of Section 1 of the FAA and argued that the state Act was inappropriate because the FAA governed the issue.[71] The court, while not directly addressing the State arbitration issue, found that the FAA applied[72] and discussed other issues such as "unconscionability" in denying application of the

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64. *Gagnon I*, 266 F. Supp. 2d at 1363 n.3.

65. *Id.*

66. Defendant's Amended Motion to Stay and Compel Arbitration at 16-21, 27, Owner-Operator Indep. Drivers Ass'n v. Landstar Sys., Inc., No. 3:02-CV-1005-J-25HTS, 2003 WL 23941713 (M.D. Fla. Sept. 30, 2003); *see also* Defendant's Memorandum in Opposition and Plaintiff's Motion to Submit Supplemental Authority at 4, Owner-Operator Indep. Drivers Ass'n v. Landstar Sys., Inc., No. 3:02-CV-1005-J-25HTS, 2003 WL 23941713 (M.D. Fla. Sept. 30, 2003).

67. *C.R. Eng.*, 325 F. Supp. 2d at 1258 (citing Utah Code Ann. §§ 78-31a-101 to -131 (2003)).

68. *C.R. Eng.*, 325 F. Supp. 2d at 1258 (citing Palcko v. Airborne Express, Inc., No. Civ.A. 02-2990, 2003 WL 21077048 (E.D. Pa. 2003), *rev'd* 372 F.3d 588 (3d Cir. 2004)); Mason-Dixon Lines, 443 F.2d at 809 (recognizing that the effect of Section 1 is merely to leave the arbitrator of disputes in the excluded category as if the FAA has never been enacted).

69. Palcko v. Airborne Express, Inc., No. Civ.A. 02-2990, 2003 WL 21077048, at *4 (E.D. Pa. 2003), *rev'd* 372 F.3d 588 (3d Cir. 2004).

70. *Swift Transp.*, 288 F. Supp. 2d at 1034.

71. *Id.* at 1035.

72. *Id.* at 1035-36.

state laws referred to in the motor carrier owner operator agreement.[73] Thus, motor carriers and owner operators are faced with the propriety of consensual arbitration clauses under state statutes if the FAA, in fact, excludes arbitration.

In attempting to resolve this issue based on the OOIDA cases, it must initially be noted that the federal district court decision in *Palcko*, which was relied upon in the *C.R. England* case and, presumably, considered in other cases, was reversed by the Third Circuit Court of Appeals subsequent to the OOIDA decisions.[74] In *Palcko*, the plaintiff conceded to being an employee of the motor carrier and agreed by contract to arbitrate her claim under the federal Civil Rights Act and the Pennsylvania Human Relations Act under the FAA and Washington state law.[75] The district court noted that the plaintiff, as a transportation worker, engaged in interstate commerce was excluded from FAA coverage and that the FAA exclusion preempted the enforcement of the Washington state statute.[76] While concurring with the district court that the plaintiff's employment contract was excluded from coverage under the FAA, the Court of Appeals overruled the lower court, holding that the enforcement of the arbitration agreement, under Washington state law, was precluded by the FAA.[77]

The Court predicated its decision, in part, on the following basis: (1) "Congress enacted the FAA 'to ensure judicial enforcement of privately made agreements to arbitrate,' rather than restrict the force of arbitration agreements[;]" (2) in *Rodriguez de Quijas v. Shearson/American Express Inc.*,[78] seeking to fulfill the FAA's purpose, the U.S. Supreme Court "enforced an agreement to arbitrate claims under the Securities Act of 1933, even though prior case law stated that the Securities Act's language prohibit[ed] the arbitration of such claims[;]"[79] (3) the U.S. Supreme Court, in *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*,[80] "also stated that parties to an arbitration agreement '[h]aving made the bargain to arbitrate . . . should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory right at issue[;]'"[81] and (4) "[t]here is no language in the FAA that explicitly

73. *Id.* at 1038-40.

74. *See* Palcko v. Airborne Express, Inc., 372 F.3d 588, 597 (3d Cir. 2004).

75. *Id.* at 590.

76. *Id.*

77. *Id.* at 596.

78. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

79. *Palcko*, 372 F. .3d at 595 (citing Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989)).

80. Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

81. *Palcko*, 372 F.3d at 595 (citing Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

preempts the enforcement of State arbitration statutes," nor does the FAA "reflect a congressional intent to occupy the entire field of arbitration."[82]

The court further indicated that "'[i]n our view, the effect of Section 1 is merely to leave the arbitrability of disputes in the excluded categories as if the [Federal] Arbitration Act had never been enacted."[83] Based on the above, the court ruled that enforcement of the arbitration agreement under Washington state law was appropriate and did not contradict any of the statutory language, but, in contrast, furthered the general policy goals of the FAA favoring arbitration.[84] The Third Circuit Court of Appeal's decision in the *Palcko* case is well-reasoned and reflects the majority view.[85]

The U.S. Supreme Court in *Valdes v. Swift Transportation Company*, for example, stated that "[s]ection 1 does not, however, in any way address the enforceability of employment contracts exempt from the FAA. It simply excludes these contracts from FAA coverage entirely."[86] In opposition to the district courts' reasoning in the *Palcko* case, the court stated:

> [t]he conclusion flouts the principle that 'questions of arbitrability must be addressed with a healthy regard for the federal law favoring arbitration' . . . [a]nd most importantly, it essentially re-writes what is merely an exemption providing that the FAA does not apply into a substantive pronouncement that such clauses in transportation workers' contracts are unenforceable.[87]

In light of this precedent and in view of the decision and direction taken by the courts in OOIDA-type litigation, it would appear that a clarifying amendment to Section 1 of FAA may be warranted.

A provision could be added to Section 1 reading:

> . . . Nothing herein shall preclude seamen and railroad, airline, or other employees engaged in foreign or interstate commerce in the transportation industry from participating in consensual arbitration under applicable state law covering disputes unless federal legislation imposes a specific prohibition or has established a conflicting means or procedures of resolving such disputes.

The adoption of such a statutory provision would clearly resolve the

82. *Id.* at 595.
83. *Id.* at 596 (citing Mason-Dixon Lines, Inc. v. Local Union No. 560, Int'l Bhd. of Teamsters, 443 F.2d 807, 809 (3d Cir. 1971)).
84. *Id.* at 597.
85. *See* Valdes v. Swift Transp. Co., 292 F. Supp. 2d 524, 528 (S.D.N.Y. 2003); O'Dean v. Tropicana Cruises Int'l, Inc., No. 98 CIV. 4543 (JSR), 1999 WL 335381, at *1 (S.D.N.Y. 1999); Cent. States v. Tank Transp., Inc., 779 F. Supp. 947, 949 (N.D. Ill. 1991).
86. *Valdes*, 292 F. Supp. 2d at 529.
87. *Id.*

issues motor carriers and owner-operators now face as a result of the OOIDA-type litigation. In fact, by merely making the proposed amendment applicable to employees generally would help avoid any confusion in the area of federal-state arbitrability issues.

VII. The Arbitrability Issue

Apart from the exclusionary issue and the preemption issue, OOIDA litigation has also raised significant issues involving the determination of a specific claim's arbitrability. Under the FAA, an arbitration clause is valid, irrevocable, and enforceable in the absence of any grounds that would exist at law or in equity for the revocation of any contract.[88] By enacting the above provision, Congress desired to place arbitration agreements "upon the same footing as other contracts, where [they] belong."[89]

In the OOIDA litigation, various general contract issues have been raised including financial hardship of arbitrating, unconscionability and significantly these arguments have led to denial of various Motions to Compel Arbitration.

A. Financial Hardship

Courts such as *C.R. England*, in OOIDA litigation have relied heavily on the "hardship" issue to deny arbitration.[90] The court in *C.R. England* noted the decision in *Morrison v. Circuit City Stores, Inc.*,[91] as fleshing out the test to determine whether arbitration was a conscionable forum.[92] "Potential litigants must be given an opportunity, prior to arbitration on the merits, to demonstrate that the potential costs of arbitration are great enough to deter them and similarly situated individuals from seeking to vindicate their federal statutory rights in the arbitral forum."[93] The *Morrison* court acknowledged that a reviewing court should define the class of such similarly potential litigants by job description and socioeconomic background and indicated it should take the actual plaintiff's income and resources as representative of the larger class' ability to shoulder the cost of arbitration.[94]

The *C.R. England* court, however, noted that in the *Morrison* case it was not mandated that a searching inquiry be made into the employee's bills and expenses.[95] The *C.R. England* court held that the uncontested

88. 9 U.S.C. § 2.
89. H.R. Rep. No. 68-96 (1924).
90. *See C.R. Eng.*, 325 F. Supp. 2d at 1263.
91. Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003).
92. *C.R. Eng.*, 325 F. Supp. 2d at 1262.
93. *Id.* (citing Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003)).
94. *See Morrison*, 317 F.3d at 663.
95. *C.R. Eng.*, 325 F. Supp. 2d at 1262.

information provided by plaintiffs showed that the plaintiff's work as truck drivers necessarily takes them all over the country, that their incomes were modest, that their claims are generally small, usually around or under $3,000, that the company withheld funds pending resolution, and the cost of arbitration, the difficulty of coming to Utah, and the relatively small amount of the claims would deter their use of the arbitration to vindicate their statutory rights.[96]

The court in *Swift Transportation*, presumably with the same or substantially the same evidence, found plaintiffs failed to meet their burden as the evidence merely established "some evidence of what arbitration costs might be incurred in general through an AAA arbitration, their position [was] in effect based on speculation since arbitration costs depend upon various factors. . ." the specifics of which the plaintiffs failed to submit.[97]

The *C.R. England* court discussed the U.S. Supreme Court decision in *Green Tree Financial Corp. v. Randolph*[98] but indicated the court did not detail what evidence of prohibitive cost was required.[99] In *Green Tree*, the Plaintiff was purchasing a mobile home through Green Tree Financial, whose contract required that Randolph purchase insurance to protect the vendor or lien holder against the cost of repossession in the event of default.[100] The contract also stipulated that all disputes would be resolved by binding arbitration.[101] Randolph argued that the arbitration agreement's failure to disclose related costs and fees created a risk that she would have to bear in pursuing her claims in an arbitral forum left her unable to vindicate her statutory rights in arbitration.[102] Finding that the alleged prohibitive costs identified by Randolph were too speculative to justify the invalidation of the arbitration, the court stated that Randolph and others who would raise the prohibitively expense argument, had the burden of showing the likelihood of its cost being incurred.[103]

It would appear that the burden imposed upon the party resisting arbitration on the basis of prohibitive costs should be a fairly stringent one because it flies in the face of commonly accepted evidence and observers' conclusions that, in general, the cost of judicial resolution is more costly and time consuming than arbitration.[104] By not imposing a strict

96. *Id.* at 1261.
97. *Swift Transp.*, 288 F. Supp. 2d at 1038.
98. Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000).
99. *C.R. Eng.*, 325 F. Supp. 2d at 1262.
100. *Green Tree*, 531 U.S. at 82.
101. *Id.* at 83.
102. *Id.* at 89.
103. *Id.* at 91-92.
104. *See, e.g.*, Weaver v. State Farm Ins. Co., 609 N.W.2d 878, 884 (Minn. 2000); *see generally*

burden of proof upon the person raising the unconscionability argument, facts such as the AAA by rule provides for fees to be deferred or relieved in the extent of extreme hardship, which apparently was not considered in the *C.R. England* case.[105]

In many instances, it is common in arbitration awards to include hardship adjustment and allocation adjustment in final awards.[106] Hardship occurs in many circumstances whether it involved court rooms or arbitration hearing rooms. In *C.R. England*, for example, the lawsuit was initially filed in California and moved to Salt Lake City on the basis of legitimate venue considerations, for example, most of the witnesses necessary to testify about Plaintiff's claim resided in Utah.[107] Thus, it is difficult to understand that "travel costs" to arbitrate in Salt Lake City, Utah was a factor against arbitration as noted by the court. Further, while C.R. England is one of the largest motor carriers in the country, the position taken by the court in their OOIDA case is potentially dangerous in the transportation community.

As a whole, motor carriers are small businesses and the smaller the carrier, the more likely it utilizes owner-operators. Presumably, with owner-operators residing in various points in the United States, any one or all of them could file an OOIDA-type lawsuit at multiple points and justify it on the basis that arbitration would be too costly for the same reasons asserted in the *C.R. England* case.[108] But one should consider the cost of the small motor carrier who would be forced to litigate at points around the country and the cost of doing so based on local rules, schedules, attorney fees, and so on and then be subject to multiple judicial appeals.

Arbitration allows the parties to decide and agree that a dispute if it is reasonable to resort to adjudication, will generally be handled with less discovery, at a date definite, before an arbitrator of choice, if possible, and at a point agreed upon and has some reasonable relationship to the contractual relationship. One can also rightfully ask whether a party who feels aggrieved should be excused from a contractual obligation because a worst-case scenario would mean not only losing a substantive claim, but also the possible imposition of the cost of arbitration. This should be a factor all litigants face in entertaining the issue of filing or defending a lawsuit. Defendant motor carriers are frequently faced with the reverse

Al Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 253 (1985).

105. *See C.R. Eng.*, 325 F. Supp. 2d at 1252.

106. *See* Coty, Inc. v. Anchor Constr., Inc., No. 601499-02, 2003 WL 139551, at *10 (N.Y. Sup. Ct. June 8, 2003).

107. *See C.R. Eng.*, 325 F. Supp. 2d at 1255.

108. *See generally id.* at 1252-62.

side of the coin when an owner-operator files a small contractual money claim in a small home-town local court distant from the carrier's headquarters, necessitating local counsel, travel expenses, etc. As such, it becomes necessary to consider the practicality of litigation and a common sense economic settlement.

However, to remove the possibility of losing with attendant costs may encourage frivolous lawsuits or arbitrations as well as discourage the prosecution of claims when the costs of litigation suggest a reasonable settlement. At best, where an arbitration clause exists, it should be left to the arbitrator to decide arbitrability. The parties, in conjunction with the arbitrator should decide "cost cutting" and "sensible" procedures, including: (1) class or consolidated arbitrations;[109] (2) use of written affidavits;[110] (3) the assessment of costs and arbitrator fees; and (4) other factors that may make arbitration less costly and less time-consuming than a court proceeding.[111]

B. Class Actions

Because of the cost of arbitration and the small amounts of damages suffered by individuals, in deciding whether arbitration should be denied on the basis of "unconscionability" courts will note that requiring arbitration of each individual's claim is not appropriate.[112] This argument has arisen in pre-OOIDA litigation and rejected by a majority of the courts.

In *Champ v. Siegel Trading Company,* the Seventh Circuit held that the FAA does not permit a court to order class action arbitration where the arbitration did not expressly provide for such a procedure.[113] The *Champ* decision was predicated on the basis that it was necessary to "rigorously enforce the parties' agreement as they wrote it 'even if the result

109. Class action arbitrations are relatively new, but OOIDA type litigation may encourage their usage. In *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638-39 (4th Cir. 2002), *cert. denied*, 537 U.S. 1087 (2002), the Court rejected the need for a class action because of the small amount of damages suffered by prospective class members, where the statute, like that involved in the OOIDA litigation, provided for recovery of attorney fees to the prevailing party.

110. The use of written affidavit is allowed under the Arbitration Rules of Transportation ADR Council, Inc. and such usage is not uncommon in arbitration.

111. If one studies the OOIDA cases, it is clear that proceedings have been extremely costly to all parties because of motions, briefings, discovery, appeals, and time, thus, clearly exceeding the cost of reasonable arbitration.

112. *See C.R. Eng.*, 325 F. Supp. 2d at 1252-62.

113. Champ v. Siegel Trading Co., 55 F.3d 269, 275 (7th Cir. 1995); *see also* Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) (recognizing the need to allow courts to "'rigorously enforce' [private arbitration] agreements according to their terms."); *cf.* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 453 (2003) (holding that where an arbitration clause is silent regarding the availability of class-wide relief, an arbitrator and not a court, must decide whether a class action is permitted).

is piece-meal litigation.'"[114] The court explained that for the court to "'substitute our own notion of fairness in place of the explicit terms of [the parties] agreement would deprive them of the benefit of their bargain just as surely as if we refused to enforce their decision to arbitrate.'"[115]

Similar positions have been taken by the Court of Appeals in the Second, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits[116] and similar decisions have been made in state courts.[117] The majority approach has been readily taken by California courts as well as other state courts. For example, in *Keating v. Superior Court*, the California Supreme Court held that state law permitted a court to order class arbitration even where an arbitration clause did not provide for it.[118] The test to be applied was not solely the intent of the parties, but rather, included an analysis of which procedure offers "a better, more efficient, and fairer solution."[119]

The diversity of positions led to the U.S. Supreme Court in *Green Tree Financial Corp v. Bazzle*.[120] This decision shed some light on this

114. *Champ*, 55 F.3d at 277 (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

115. *Id.* at 275 (citing Universal Reinsurance Corp. v. Allstate Ins. Co., 16 F.3d 125, 130 (7th Cir. 1993).

116. *Id.* at 274; *see, e.g.*, Gov't of U.K. v. Boeing Co., 998 F.2d 68, 74 (2d Cir. 1993) (holding that "[a] district court cannot consolidate arbitration proceedings arising from separate agreements to arbitrate, absent the parties' agreement to allow such consolidation."); Am. Centennial Ins. Co. v. Nat'l Cas. Co., 951 F.2d 107, 108 (6th Cir. 1991) (holding that "a district court is without power to consolidate arbitration proceedings, over the objection of a party to the arbitration agreement, when the agreement is silent regarding consolidation."); Baesler v. Cont'l Grain Co., 900 F.2d 1193, 1195 (8th Cir. 1990) (holding that "absent a provision in an arbitration agreement authorizing consolidation, a district court is without power to consolidate arbitration proceedings."); Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp., 873 F.2d 281, 282 (11th Cir. 1989) (per curium) (quoting Del E. Webb Constr. v. Richardson Hosp. Auth., 823 F.2d 145, 150 (5th Cir. 1987) in holding that "'the sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration.'"); Weyerhaeuser Co. v. W. Seas Shipping Co., 743 F.2d 635, 637 (9th Cir. 1984) (holding that the court "can only determine whether a written arbitration agreement exists . . .."); *contra* New Eng. Energy Inc. v. Keystone Shipping Co., 855 F.2d 1, 3 (1st Cir. 1988) (holding that consolidation is proper if allowed by state law).

117. *See, e.g.*, Stein v. Geonerco, Inc., 17 P.3d 1266, 1271 (Wash. Ct. App. 2001) (enforcing the arbitration agreement as written where the agreement was silent as to class action); Powertel, Inc. v. Bexley, 743 So. 2d 570, 576 (Fla. Dist. Ct. App. 1999) (recognizing that the arbitration agreement prevented class litigation); Med. Ctr. Cars, Inc. v. Smith, 727 So. 2d 9, 20 (Ala. 1998) (concluding that requiring "class-wide arbitration would alter the agreement of the parties . . ..").

118. Keating v. Superior Ct., 645 P.2d 1192, 1209 (Cal. 1982).

119. *Id.* at 613; *see also* Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 356 (S.C. 2002), *vacated*, 539 U.S. 444 (2003); Blue Cross of Cal. v. Superior Ct., 67 Cal. App. 4th 42, 44 (Cal. Ct. App. 1998); Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 865 (Pa. Super. Ct. 1991) (citing Keating v. Superior Ct., 645 P.2d 1192, 1209 (Cal. 1982)); Prestressed Concrete, Inc. v. Adolfson & Peterson, Inc., 240 N.W.2d. 551, 553 (Minn. 1976).

120. *Green Tree*, 539 U.S. at 444.

issue, but left many issues unresolved.[121] In one of the most fragmented decisions in recent years, the Court held that the issue of whether a contract prohibited class-wide arbitration was for the arbitrator, not the Court, to decide.[122] Eight of the nine Justices wrote or concurred in opinions that supported the use of arbitration and all stressed the importance of the choice of the parties in their arbitration agreements.[123] The majority also endorsed arbitration agreement provisions barring class actions,[124] but until the Court actually decides the issue, differences will occur in the courts.

In the meantime, however, courts should recognize that the benefits of class arbitration may, in fact, be available through the arbitrators' ruling on the issue of whether the agreement of the parties in a specific case warrants the use of class arbitration consolidation or collective action.[125] It should also be recognized that the American Arbitration Association ("AAA") has changed its policy concerning class arbitration and has adopted rules providing for class arbitration if "(1) the underlying arbitration agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation, or joinder of claims."[126]

In OOIDA litigation, there have also been some interesting developments in respect to class action arbitration. OOIDA had universally opposed arbitration until mid-2004 when it was announced that the organization was supporting one of its members in a demand for class action against FFE Transportation Services, Inc. for alleged violation of

121. The Court voted 4-3-1-1 to remand the case for further finding by the arbitrator concerning the parties' intention as to class actions as expressed in their arbitration agreement. The plurality opinion was authored by Justice Breyer and joined in by Justices Souter, Ginsburg, and Scalia. Justice Stevens concurred in the judgment of the majority. Justices Rehnquist, O'Conner, and Kennedy dissented and voted to reverse the judgment, but for different reasons. Justice Thomas wrote a separate dissent. *Id.* at 454-60.

122. *Id.* at 451.

123. *See id.* at 451-53.

124. *See id.* at 450-51.

125. *See generally* Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (2000) (providing that collective action is a procedure used in employee claims under the Fair Labor Standards Act with apparent satisfaction); Chapman v. Lehman Bros., Inc., 279 F. Supp. 2d 1286, 1288-90 (S.D. Fla. 2003) (discussing the difference between "class action" and "collective actions").

126. American Arbitration Association, American Arbitration Association Policy on Class Arbitrations (2005), http://www.adr.org/Classarbitrationpolicy (last visited Oct. 15, 2005); *see generally* Justin Scheck, *New ADR Policy Torched*, Corp. Couns., May 2005, at 115 (discussing the decision of one of the country's largest private arbitration services, JAMS, which announced in November 2004 that it adopted a policy not to enforce clauses prohibiting class arbitrations, but in March, 2005, reversed this policy because of arguments that the process involved "agreement" between the parties which should be respected).

the truth-in-leasing regulations.[127] No further information has been found about the disposition of that request. There is no evidence that a lawsuit has been filed and the parties involved have not released any further information which would tend to indicate the dispute may have settled or that it is progressing in the ADR process and receiving one of the benefits of arbitration ? "confidentially." Subsequent to the FFE Transportation action, OOIDA, in the *Swift Transportation* case, filed a class-wide arbitration demand with the AAA relative to the claims in that case, which demand is currently unresolved.[128]

Assuming class arbitration is allowed in some instances at the discretion of an arbitrator or courts, the availability of such arbitration would seemingly eliminate all or a good portion of "hardship" and unconscionability arguments while still affording many of the other benefits associated with arbitration.

VIII. Conclusion

There are no reasons why motor carriers and owner-operators should be precluded from consensual arbitration of disputes under the exclusionary provisions of Section 1 of the FAA or under any state statute which allows such arbitration. This should be assured on a federal basis by statutory amendment of the FAA previously suggested and which appears to be consistent with the apparent statutory intent policy of Congress as expressed in the FAA. It is equally clear the FAA, at best, was only intended to address arbitration as relevant in the context of motor carrier operations between employers and employees and not independent contractors.

While "unconscionability" issues are important, it is equally important that decisions be based on more than speculation and that a strict burden of proof should be imposed upon the moving party to preclude the general policy favoring arbitration from being undermined. Consensual arbitration affords too many advantages to the parties involved, to the public, and as a meaningful alternative to the burdened judicial system to be denied to motor carriers in their relationship to owner-operators who are, in fact and by law, independent contractors and not employees.[129]

127. TruckingInfo.com, OOIDA Seeks Class Action Arbitration with FFE (June 24, 2004), *at* http://www.truckinginfo.com/news/new-detail.asp?news_id=52126 (last visited Oct. 15, 2005).

128. *See Swift Transp.*, 288 F. Supp. 2d at 1040.

129. This should also be true with respect to employees of motor carriers because they, unlike seamen, railroad, and airline employees who have legislative alternative dispute resolution procedures, are precluded from arbitration under federal law except possibly under a collective bargaining agreement or under state law coverage.