

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

DAVID HAYS, JERRY WEBB, DAVID RUSH, VALARIE HELTON, JOHN NUNN, SR., ROY SPARKS, OLIN SPARKS, PAUL HAWKINS, and FRANK CARTER, individually, and on behalf of all others similarly situated,

Claimants,

vs.

M.S. CARRIERS, INC.,

Respondent.

Case No.

**DEMAND FOR
CLASS ACTION ARBITRATION**

David Hayes, Jerry Webb, David Rush, Valarie Helton, John Nunn, Sr., Roy Sparks, Olin Sparks, Paul Hawkins, and Frank Carter, and all others similarly situated (collectively "Owner-Operator Claimants"), having suffered economic loss as the result of Respondent's substantial and material failure to comply with federal regulations, bring this class-wide arbitration seeking relief against Respondent M.S. Carriers, Inc.

ARBITRATION PANEL

Pursuant to R-15 of the Commercial Arbitration Rules of the American Arbitration Association, Claimants request that this matter be determined by a panel of three arbitrators.

NATURE OF THE ACTION

1. Respondent M.S. Carriers is a regulated motor carrier that provides transportation of property in interstate commerce under authority issued by the U.S. Department of Transportation (“DOT”). Respondent transported property in equipment leased from independent truckers (known as “owner-operators”). Under federal law and regulation, “authorized motor carriers” such as Respondent may perform authorized transportation in equipment it does not own only if the equipment is covered by a written lease that meets the requirements set forth in 49 C.F.R. Part 376 (the “Truth-In-Leasing” regulations). *See* 49 C.F.R. § 376.11(a). Authorized motor carriers are required by regulation to adhere to and perform in accordance with the required lease provisions and regulations. 49 C.F.R. § 376.12. Violations of the federal regulations are privately actionable under 49 U.S.C. § 14704(a)(1) and (2).

2. Respondent has substantially and materially failed to comply with the Truth-In-Leasing regulations and has engaged in conduct towards Claimants in such a manner as to injure Claimants. Respondent’s lease agreements substantially and materially violate the Truth-In-Leasing regulations and Respondent’s business practices substantially and materially violate the practices proscribed by Congress and the DOT under the Truth-In-Leasing regulations.

ARBITRATION PROVISION

3. This matter is appropriate for class wide arbitration under the AAA

Supplementary Rules for Class Arbitrations. The Contract Hauling Agreement between Respondent and each of the Owner-Operator Claimants provides that disputes arising out of the parties' agreements shall be resolved by arbitration in accordance with AAA Rules, and is silent with respect to class claims, consolidation or joinder of claims. The Contract Hauling Agreement provides in relevant part:

Any disagreement or litigation arising under this Contract shall be referred to mandatory arbitration and decided under the rules of the American Arbitration Association and the laws of the State of Tennessee.

4. The claims in this arbitration demand were originally brought in a lawsuit filed in the U. S. District Court for the District of Arizona, Case No. CV 02-1059-PHX-PGR. By Order dated September 26, 2003, the District Court granted Respondent M.S. Carrier, Inc.'s Motion to Compel Arbitration. The District Court found that the arbitration provision in Respondent's Contract Hauling Agreement, quoted above, covers the federal statutory claims brought originally in the District Court action, and now included in this arbitration demand. The District Court ordered that the claims against M.S. Carriers be referred to arbitration pursuant to 9 U.S.C. §4 and that the claims in — District Court action be stayed pending the outcome of the arbitration proceedings pursuant to 9 U.S.C. §3. A copy of the September 26, 2003 Order is attached at Tab XXX.

5. By Order dated July 28, 2004, the District Court denied Claimants' request that the Court certify the September 26, 2003 Order compelling arbitration for

interlocutory appeal under 28 U.S.C. §1292(b). The Court further denied the request to dismiss the claims against M.S. Carriers, confirming its decision to stay the claims in District Court pending completion of the arbitration proceedings. A copy of the July 28, 2004 Order is attached at Tab XXX.

PARTIES TO THE ACTION

6. The individual Owner-Operator Claimants are small business men and women who own or control truck tractors, and sometimes truck trailers, used to transport property over the nation's highways. Owner-operators engage in the transportation of commodities exempt from DOT regulations, or, acting as independent contractors, they lease or otherwise provide their equipment and services to motor carriers who are engaged in the enterprise of providing transportation services to the shipping public under authority granted by the DOT. The relationship between independent truck owner-operators and regulated carriers is set forth in an agreement between the parties which is regulated by the DOT under, *inter alia*, 49 U.S.C. § 14102, *et seq.* and under 49 C.F.R. Part 376, *et seq.*

7. Claimant David Hayes is an owner-operator who entered into a Contract Hauling Agreement with Respondent dated March 7, 2001. Hayes resides at 55 West 51st Street, Long Beach, CA 90805.

8. Claimant Jerry Webb is an owner-operator who entered into a Contract Hauling Agreement with Respondent dated August 30, 2000. Webb may be contacted at

Computer Unlimited, 260 East Church Street, Lexington, TN 38351.

9. Claimant David Rush is an owner-operator who entered into a Contract Hauling Agreement with Respondent dated April 26, 1999. Rush resides at 105 Flintfield Drive, Winston Salem, S.C. 27103.

10. Claimant Valarie Helton is an owner-operator who entered into a Contract Hauling Agreement with Respondent dated April 25, 2001. Helton resides at 619 Huntington, Apt. B, Jones Boro, AR 72401.

11. Claimant John Nunn is an owner-operator who entered into a Contract Hauling Agreement with Respondent dated October 5, 1998. Nunn resides at 602 Riley Ct., Apt. B, Joppa, MD, 21085-4676.

12. Claimant Roy Sparks is an owner-operator who entered into a Contract Hauling Agreement with Respondent dated January 1, 2001. Roy Sparks resides at 309 3rd Street, Altamont, MO 64620.

13. Claimant Olin Sparks is an owner-operator who entered into a Contract Hauling Agreement with Respondent dated August 23, 2000. Olin Sparks resides at 1912 West Olive Street, Rogers, AR 72756.

14. Claimant Paul Hawkins is an owner-operator who entered into a Contract Hauling Agreement with Respondent dated January 1, 2000. Hawkins resides at 1646 Scott Road, Frankfurt, Ohio 45628.

15. Claimant Frank Carter is an owner-operator who entered into a Contract

Hauling Agreement with Respondent dated November 2, 1998. Carter resides at 615 North Beech Street, Picayune, MS 39466.

16. Plaintiffs Hayes, Webb, Rush, Helton, Nunn, Roy Sparks, Olin Sparks, Hawkins, and Carter during all times relevant to this Complaint, were “owners” within the meaning of 49 C.F.R. § 376.2(d), and have been, “lessors” within the meaning of 49 C.F.R. § 376.2(f).

17. Respondent M.S. Carriers is a Tennessee corporation located at 3171 Director’s Row, Memphis, Tennessee 38116. Respondent is a regulated motor carrier primarily engaged in the enterprise of providing transportation services to the shipping public on a nationwide basis under authority granted by DOT and formerly the ICC (DOT permit 160095). During all times material to this case, Respondent was an “authorized carrier” within the meaning of 49 C.F.R. § 376.2(a) and is subject to the requirements of the Truth-In-Leasing regulations. In or about June 2001, M. S. Carriers merged its freight and transportation operations with that of Swift Transportation Services, Inc., an Arizona corporation located in Phoenix, Arizona. In exchange for certain shares of the stock of Swift Transportation Co., Inc., M.S. Carriers became a wholly owned subsidiary of Swift Transportation Co., Inc., a Nevada corporation which is a holding company for various operating corporations including Swift Transportation Services (Arizona) and M.S. Carriers. In or about January 2002, M.S. Carriers operations were completely merged with that of Swift Transportation Services. Upon information and belief, in or about

January 2002, all M.S. Carriers' Contract Hauling Agreements with owner-operators were terminated.

CLASS WIDE ALLEGATIONS

18. This Arbitration is brought by Claimants on their own behalf and on behalf of all others similarly situated pursuant to the AAA Supplementary Rules for Class Arbitrations. As required by the AAA Rules for Class Arbitrations, Respondents' Contract Hauling Agreements specify that disputes arising out of the agreement shall be resolved by arbitration and the agreement is silent with respect to class claims.

19. **Class Description.** Claimants seek to represent a class of drivers consisting of all owner-operators in the United States who were under contract to Respondent on or after October 6, 1998 pursuant to a lease agreement with Respondent subject to federal regulations contained in Part 376, Code of Federal Regulations.

20. **Impracticability of Joinder.** On information and belief, there are more than 1,000 individual owner-operators who are members of the Class. These individual owner-operators are residents of various states, travel continuously, and are widely dispersed geographically. On average, an owner-operator drives more than 100,000 miles per year and spends more than 300 nights per year on the road. Owner-operators follow irregular routes in their work, such that virtually all owner-operators must purchase state permits from all states in order to operate in the 48 contiguous states. This geographical dispersion presents a great difficulty to owner-operators in their pursuit of claims against

motor carriers for relatively small sums of money. Thus, joinder of all potential Class Members would be impracticable.

21. **Commonality**. By entering into materially identical lease agreements which do not comply with the Truth-In-Leasing regulations, and engaging in conduct that violates the Truth-In-Leasing regulations, Respondent has failed to act and has acted with regard to Claimants in a way that affects members of the class similarly and, accordingly, any questions of law and fact are common to the Class as a whole.

22. **Typicality**. The claims of the Claimants are typical of the class identified. The material terms and conditions of Respondent's lease agreements are typical of Respondent's lease agreements with members of the Class and all violate the requirements of the Truth-in-Leasing regulations as alleged in this arbitration demand. Respondent's business practices which violate the Truth-In-Leasing regulations are typical of Respondent's business practices with respect to other members the Class.

23. **Fair and Adequate Representation**. Claimants are capable of fairly and adequately protecting the interests of the Class and do not have interests that are adverse to other members of the class. Attorneys of The Cullen Law Firm, PLLC have been appointed Class Counsel in similar class actions throughout the country.

24. **Class Certification Appropriate Under Rule 23(b)(3)**. The questions of law and fact enumerated in the counts below are common to all potential class members and predominate over any questions affecting only individual members which are

essentially limited to the amounts due each member.

25. Classwide arbitration is superior to other available methods for the fair and efficient adjudication of the claims brought in this proceeding for these additional reasons:

- (A) Because of the complexity of the issues and the cost of prosecuting individual claims, owner-operators are unable to prosecute individual actions against motor carriers for relatively small, although significant, damages suffered by each member of the class;
- (B) Absent the class arbitration, the class members will continue to suffer damage without an effective remedy;
- (C) This action will result in an orderly and expeditious administration of class claims, fostering economies of time, effort and expense, and ensuring uniform decisions of issues common to all class members;
- (D) This action should present no difficulty which would impede its management by the arbitration panel and is the best available means by which the Claimant and class members can seek redress for the harm M.S. Carriers caused them.

ALLEGATIONS COMMON TO ALL COUNTS

26. Each lease agreement entered between Respondent and Claimants constitute a “lease” within the meaning of 49 C.F.R. § 376.2(e). A genuine copy of a M.S. Carriers

“Contract Hauling Agreement” executed on March 7, 2001 between David B. Hayes and M.S. Carriers (the “M.S. Contract Hauling Agreement”) is attached at Tab XXX. A genuine copy of a Contract Hauling Agreement executed on December 7, 1998 between Frank S. Carter and M.S. Carriers (the “Carter Contract Hauling Agreement”) is attached at Tab XXX. On information and belief, these lease agreements are identical in all material respects to lease agreements entered with the entire potential class.

27. The vehicles Claimants provided to Respondent are “equipment” within the meaning of 49 C.F.R. § 376.2(b).

28. Under federal law, an “authorized carrier may perform authorized transportation in equipment it does not own only under the following conditions: . . . [t]here shall be a written lease granting the use of the equipment and meeting the requirements contained in 49 C.F.R. § 376.12.” Respondent engaged in the unlawful provision of transportation services in equipment that they do not own because the leases governing their use of such equipment fail to conform to 49 C.F.R. Part 376.

29. Pursuant to 49 C.F.R. §376.12, an authorized carrier must adhere to and perform under the required written lease as specified in the Truth-in-Leasing regulations. Respondent has violated the Truth-in-Leasing regulations because its business practices do not conform to the requirements specified in the regulations.

COUNT I

Unlawful Chargebacks in Violation of 49 C.F.R. §376.12(h)

30. Claimants re-allege and incorporate the allegations of paragraphs 1 through 29 above.

31. 49 C.F.R. § 376.12(h) requires that “[t]he lease . . . clearly specify all items that may be initially paid for by the authorized carrier, but ultimately deducted from the lessor's compensation at the time of payment or settlement.”.

32. Paragraph 4 of the M.S. Carriers Contract Hauling Agreement violates this provision by authorizing deductions of “any” amount allegedly owed by the owner-operator without the explanation and documentation required by 49 C.F.R. §376.12(h). The lease agreements do not adequately specify the charge-backs, do not recite how items deducted from owner-operator’s compensation are to be computed, and do not disclose the cost incurred for items charged back against the compensation of owner-operators.

33. Schedule II, paragraph J of the M.S. Carriers Contract Hauling Agreement violates this provision by authorizing deductions for the specified items without the explanation and documentation required by 49 C.F.R. §376.12(h). The lease agreements do not recite how items deducted from owner-operator’s compensation are to be computed, and do not disclose the cost incurred for items charged back against the compensation of owner-operators.

34. Schedule II, paragraph M of the M.S. Carriers Contract Hauling Agreement violates this provision by authorizing deductions for the premiums and service fees for

various insurance products without the explanation and documentation required by 49 C.F.R. §376.12(h). The lease agreements do not recite how items deducted from owner-operator's compensation are to be computed, and do not disclose the cost incurred for items charged back against the compensation of owner-operators.

35. Schedule II, paragraph N of the M.S. Carriers Contract Hauling Agreement violates this provision by authorizing deductions for the specified items without the explanation and documentation required by 49 C.F.R. §376.12(h). The lease agreements do not recite how items deducted from owner-operator's compensation are to be computed.

36. As a direct and proximate result of these substantial and material violations of federal law, the rights of Claimants have been violated and Claimants have suffered economic damages.

COUNT II

Unlawful Forced Purchase in Violation of 49 C.F.R. §376.12(i)

37. Claimants re-allege and incorporate the allegations of paragraphs 1 through 36 above.

38. 49 C.F.R. § 376.12(i) requires that "[t]he lease shall specify that the lessor is not required to purchase or rent any products, equipment, or services from the authorized carrier as a condition of entering into the lease arrangement."

39. In violation of 49 C.F.R. § 376.12(i), the M.S. Carrier Contract Hauling

Agreement, Schedule II paragraph N requires payment for certain goods and services, including, without limitation, \$25.00 per week for settlement processing, \$15 per month per truck for TripPack services, varying amounts for “mail box charges” and \$500 for the installation of a required Qualcomm (surface communication equipment) unit.

40. As a direct and proximate result of these substantial and material violations of federal law, the rights of Claimants have been violated and Claimants have suffered economic damages.

COUNT III
Unlawful Collection and Administration of Escrow Funds in
Violation of 49 C.F.R. §376.12(k)

41. Claimants re-allege and incorporate the allegations of paragraphs 1 through 40 above.

42. Schedule II to the M.S. Carriers Contract Hauling Agreement requires a Security Reserve Account to be funded from deductions from owner-operator compensation for the purpose of satisfying “any liability” owed by the owner-operator to M.S. Carriers. The Security Reserve Account is an “escrow fund” within the meaning of 49 C.F.R. §376.2(l).

43. Schedule II to the M.S. Carriers Contract Hauling Agreement requires an Excess Milage Reserve Account to be funded from deductions from owner-operator compensation based upon an “excess milage formula”. The Excess Milage Reserve Account may be used for the purpose of satisfying “any liability” owed by the owner-

operator to M.S. Carriers. The Excess Milage Reserve Account is an “escrow fund” within the meaning of 49 C.F.R. §376.2(l).

44. 49 C.F.R. §376.12(k)(2) requires that the lease specify the items to which the escrow fund can be applied. By specifying “all” liabilities of the owner-operator, the lease agreements of Respondent fail to disclose how the escrows are to be used in violation of 49 C.F.R. § 376.12(k)(2).

45. 49 C.F.R. §376.12(k)(3) and (4) require that the lease specify and that the carrier provide monthly accountings to owner-operators and that accountings of all transactions relating to the escrow accounts be available on demand of the owner operator. The lease agreements of Respondent fail to provide for such accountings to the owner-operator of the transactions involving the funds in violation of 49 C.F.R. § 376.12(k)(3)and (4).

46. 49 C.F.R. §376.12(k)(5) requires that the lease state and that the carrier must pay interest on escrow accounts while the funds are under the control of the carrier. The lease agreements of Respondent do not recite any interest rate as being applicable to escrow funds, and Respondent failed to pay interest on owner-operator escrow funds while under its control in violation of 49 C.F.R. § 376.12(k)(5).

47. In or about January 2002, M.S. Carriers ceased its operations. Upon information and belief, in or about January 2002, all Contract Hauling Agreements with owner-operators were terminated unilaterally by M. S. Carriers.

48. 49 C.F.R. §376.12(k)(6) requires that the lease specify the conditions for return of escrow funds; that at the termination of the lease, the carrier may only deduct amounts from escrow as previously specified in the lease; and that a final accounting be provided reporting all deductions from the escrow account. Respondent's lease agreements fail to specify the information required by the regulations; and upon termination of its Contract hauling Agreements, Respondent has failed to provide final accountings of deductions from escrow accounts; and has made deductions from escrow accounts for purposes other than that for which the escrow was collected, all in violation of 49 C.F.R. §376.12(k)(6).

49. 49 C.F.R. §376.12(k)(6) requires that the lease specify that escrow funds must be returned to the owner-operator within 45 days of termination of the lease. Respondent's lease agreements do not state that escrows must be returned within 45 days of termination of the lease and upon termination of its Contract hauling Agreements, Respondent failed to return escrow funds within 45 days from termination or ever, in violation of 49 C.F.R. §376.12(k)(6).

50. As a direct and proximate result of these substantial and material violations of federal law, the rights of Claimants have been violated and Claimants have suffered economic damages.

PRAYERS FOR RELIEF

Wherefore, Claimants individually and on behalf of all others similarly situated, respectfully request that this Panel:

1. Declare that the terms and conditions of Respondent M.S. Carriers lease agreements substantially and materially violate the terms and conditions mandated by federal law and found at 49 C.F.R. § 376.
2. Declare that Respondent's business practices substantially and materially violate the practices required by the Truth-In-Leasing regulations.
3. Certify a class consisting of all owner-operators in the United States who were under contract to Respondent on or after October 6, 1998 pursuant to a lease agreement with Respondent M.S. Carriers that is subject to federal regulations contained in Part 376, Code of Federal Regulations.
4. Order an immediate accounting of escrow and other funds deposited with Respondent by class members;
5. Order Respondent to return all the monies deducted from Claimants' compensation in violation of the Truth-In-Leasing regulations.
6. Orders Respondent to return any escrow funds collected from Claimants and individual Class members and wrongfully withheld by Defendants at lease termination.
7. Order Respondent to pay all interest that should have been paid on escrow accounts;

8. Order Respondent to pay interest owed on monies wrongfully deducted from Claimants' compensation and escrow accounts.
9. Order Respondent to pay damages to Claimants and individual class members pursuant to 49 U.S.C. § 14704(a)(2), including pre- and post-judgment interest, as allowed by law.
10. Create a common fund for the benefit of the Class as a whole for all sums awarded as a result of the claims embodied in this Demand;
11. Award Class counsel reasonable attorneys' fees and expenses incurred in the prosecution of this action to be paid out of the common fund.
12. Award Class counsel reasonable attorneys' fees and expenses pursuant to 49 U.S.C. § 14704(e).
13. Award such other relief as the arbitrator may deem just and proper.

Respectfully submitted,

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