

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE**

**FREDRICK BLODGETT, d/b/a BIG FS
LLC, on behalf of himself and all others
similarly situated,**

Plaintiff,

v.

**FAF, INC., d/b/a FORWARD AIR
TRANSPORTATION SERVICES, INC.,
and DOES 1-25**

Defendants.

Civil Action No. 2:18-cv-00015

**FIRST AMENDED COMPLAINT
AND DEMAND FOR JURY TRIAL**

Fredrick Blodgett, at times doing business as Big FS LLC, (“Plaintiff”), on behalf of himself and those similarly situated, by and through his undersigned attorneys, hereby makes the following allegations against Defendant FAF, Inc., d/b/a Forward Air Transportation Services Inc., and Does 1 through 25 (collectively “Forward Air” or “Defendant”) concerning its acts and status upon actual knowledge and concerning all other matters upon information, belief, and the investigation of their counsel:

NATURE OF ACTION

1. Defendant Forward Air has engaged in a pattern and practice of taking advantage of its truck drivers by misclassifying them as independent contractors. In doing so, Forward Air improperly shifts the costs of doing business to its truck drivers, while completely controlling the means and manner by which the truck drivers perform their job duties. Plaintiff brings this action under the Fair Labor Standards Act, 28 U.S.C. §§ 201, *et seq.*, (the “FLSA”) on behalf of all persons in the United States who entered into Independent Contractor Operating Agreements

with Forward Air and truck lease agreements (collectively “Agreements”) at any time during the period from three years prior to filing of the complaint to the present (the “Collective”).

2. Defendant has, at all times relevant herein, misclassified Plaintiff and members of the nationwide Collective as independent contractors, and refused and failed to pay them at least the federal minimum wage for all hours worked. Specifically, Defendant has intentionally required that Plaintiff and members of the Collective cover the costs of operating Defendant’s business, (including but not limited to the costs of fuel and truck maintenance), willfully reducing the wages of Plaintiff and members of the Collective to a rate below the federally mandated minimum wage.

JURISDICTION AND VENUE

3. This Court has jurisdiction over Plaintiff’s FLSA claims pursuant to 28 U.S.C. § 1331 because this civil action arises under federal law of the United States, 29 U.S.C. § 201 *et seq.*

4. This Court may properly maintain personal jurisdiction over Defendant because Defendant’s contacts with this state and this judicial district are sufficient for the exercise of jurisdiction over Defendant to comply with traditional norms of fair play and substantial justice.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because Defendant is domiciled in this District.

PARTIES

6. Plaintiff Fredrick Blodgett is an adult individual residing at 2592 French Camp Rd., Manteca, California 95336.

7. Defendant FAF, Inc. d/b/a Forward Air Transportation Services, Inc., is a truckload carrier formed in the State of Tennessee with its principal place of business at 1915

Snapps Ferry Rd., Building N, Greeneville, Tennessee 37745. Defendant Forward Air primarily serves the air cargo industry by receiving air cargo and transporting it to the terminal closest to the destination. Defendant Forward Air operates throughout the United States.

8. Defendants DOES 1 through 25 are presently unknown persons and/or entities who had control over the wages, hours, and payroll of Plaintiff and similarly situated individuals.

9. At all times relevant herein, Defendants acted by and through their agents and employees, each of whom acted in the course and scope of their employment with Defendants.

FLSA COLLECTIVE ACTION ALLEGATIONS

10. Each of the preceding paragraphs is incorporated by reference as though fully set forth herein.

11. Plaintiff brings this action for violations of the FLSA as both an individual and collective action on behalf of Plaintiff and all persons who performed work as truck drivers designated as “independent contractors” by Forward Air who also signed truck lease agreements at any time during the period from three years prior to filing of the complaint to the present (“collective members”). Plaintiff brings this action pursuant to section 216(b) of the FLSA, 29 U.S.C. § 216(b).

12. Plaintiff and the members of the Collective are “similarly situated” as that term is used in 29 U.S.C. § 216(b), because, *inter alia*, all such individuals worked pursuant to the terms of the Agreements entered into and as a result of the terms of the Agreements, together with Forward Air’s common business policies and practices, were not always paid at least the minimum wage. Resolution of this action requires inquiry into common facts, including, *inter alia*, Defendants’ common compensation practices and common practices used to manage Plaintiff and other members of the Collective.

13. Forward Air's primary business is the transport of air goods/cargo by truck from terminal to terminal across the United States.

14. Forward Air is a motor carrier as defined by the Motor Carrier Act.

15. Plaintiff and collective members worked and/or work for Forward Air as commercial truck drivers during the relevant time periods.

16. During all times relevant herein, Plaintiff and collective members were subjected to an unlawful compensation system put in place by Forward Air.

17. During the relevant time period, Defendant has employed Plaintiff and collective members as "independent contractors," "lease-purchasers," and/or "owner-operators" (collectively "Contractors") and misclassified them as independent contractors.

18. Forward Air has continued to misclassify its Contractors during all relevant times through the present.

19. Contractors have been misclassified by Forward Air as independent contractors during the covered period, and are/were in fact Forward Air's employees under federal law.

20. Contractors are similarly situated. During the relevant time period, they held similar job titles; performed similar job duties; been paid under similar pay provisions; and are all subject to Defendant's unlawful policies and practices as described herein.

21. Contractors are numerous. Contractors are estimated to number in hundreds, if not thousands. Upon information and belief Forward Air has entered into the Agreements with thousands of persons who thereafter worked for Forward Air as Contractors.

22. Contractors work for Forward Air pursuant to substantially similar provisions of the Agreements. As such, the contractual relationship with Forward Air, the job duties, and compensation arrangements of individual Contractors were all essentially the same.

23. The Independent Contractor Operating Agreements all included provisions:
 - a. requiring the Contractor to maintain detailed service records;
 - b. providing the calculation of compensation;
 - c. identifying expenses which the Contractor agrees to pay, including those for licenses; permits; weight taxes; highway use taxes; fuel taxes; tolls; maintenance of equipment; inspections; lubricants; fuel; tires; and required satellite and communications equipment;
 - d. requiring the Contractor to affix Forward Air decals to his/her truck;
 - e. specifying the terms of payment;
 - f. specifying deductions to be made from settlements;
 - g. describing required communications and satellite equipment;
 - h. requiring payments to be made into a maintenance escrow account;
 - i. subleasing the truck to Forward Air;
 - j. identifying chargeback options; and
 - k. mandating the Contractor's insurance obligations.

24. The Truck Lease Agreements all included an option to purchase the truck and provisions requiring the Contractor to, among other things:
 - a. Provide services only for Forward Air, the carrier defined therein;
 - b. Enroll in a settlement deduction program; and
 - c. Procure and keep insurance including collision and comprehensive physical damage coverage.

25. The similarly situated employees are known to Defendant, are readily identifiable, and can be located through Defendant's records. Defendant employees hundreds of drivers

throughout the United States who work for it as Contractors and are compensated pursuant to the Agreements. These similarly situated employees may be readily notified of this action through direct U.S. mail and/or other means, and allowed to opt into the action pursuant to U.S.C. § 216(b), for the purpose of collectively adjudicating their claims for minimum wage, liquidated damages, and attorneys' fees and costs under the FLSA.

26. Therefore, Plaintiff should be permitted to bring this action as a collective action on behalf of themselves and all other individuals similarly situated pursuant to the "opt-in" provisions of the FLSA.

FACTUAL ALLEGATIONS

A. Forward Air Misclassifies Plaintiff and Other Collective Members as Independent Contractors as a Matter of Course.

27. Each of the preceding paragraphs is incorporated by reference as though fully set forth herein.

28. During the relevant time period, Forward Air engaged in a policy and practice of employing truck drivers and misclassifying them as independent contractors when they were in fact Forward Air's employees under the law.

29. Forward Air utilizes the lease-operator management model for over-the-road truckload carriers. That labor management model is fundamentally incompatible with the exercise of meaningful control by Contractors in choosing the work they do.

30. During all relevant times herein, Defendant has controlled and directed Contractors in the performance of their job duties.

31. During all relevant times herein, Defendant has controlled the meaningful aspects of the business including customer flow and rates, effectively eliminating Contractors' ability to function as independent economic entities.

32. Forward Air retains and exercises the ability to control work performed by its Contractors.

33. Forward Air actively manages its Contractors as if they were employees, regularly monitoring their activity in real time.

34. Contractors do not and cannot independently perform most of the essential tasks required to provide trucking services to customers. In other words, Contractors could not move freight without Forward Air. They do not find loads, engage with customers, negotiate prices for their services, provide meaningful capital investments, or do a wide range of other kinds of work that is required for participation in the business of trucking.

35. The decisions made by Contractors, other than the decision about how many days to stay on the road at a time, have only a marginal impact on their earnings. The decisions available to Contractors about how to perform their work do not differ in any meaningful way from the decisions available to employees.

36. Contractors are compensated based on a number of factors unilaterally determined by Forward Air, including but not limited to the distance a load must be hauled, the size and/or weight of the cargo, and the type of cargo.

37. Forward Air determines all the important terms of employment, including carrying out all interactions to solicit freight and price services with customers, whether to pay rates per mile or by percentage load, what fuel charges will be based on, and any pay for unloading trailers.

38. Contractors do not in actuality run their own trucking businesses. These workers do little more than pick up freight with a truck at a particular location and drive it to another location within a specified time period, at Forward Air's direction.

1. The Lease Purchase Agreements and Independent Contractor Operating Agreements Bind Contractors to Their Employment with Forward Air.

39. Each of the preceding paragraphs is incorporated by reference as though fully set forth herein.

40. Because Contractors are not, in fact, independent owner-operators, they do not actually own their own truck and trailer. Contractors must thus obtain "their" trucks from leasing companies they are directed to by Forward Air.

41. Contractors enter into substantially uniform lease agreements whereby the Contractor makes large regular payments in return for the use of one of a truck provided by companies recommended by Defendant, such as Quality Companies. Defendant automatically deducts these lease payments from Contractors' wages.

42. During all relevant times herein, Contractors have entered into lease agreements with companies which regularly contract with Forward Air that require Contractors to allow for large weekly deductions from their settlements to cover lease payments in return for the use of one of their trucks. Trucks provided are in poor shape, at times lasting approximately one year before needing to be replaced. Leases extend for periods such as two to three years, at the end of which Contractors may purchase the truck for a small amount such as \$1.00.

43. During the term of the lease, Contractors gain no equity in the trucks: if a Contractor stops working for Forward Air before the term of the lease is completed, the Contractor receives nothing in return for the lease payments already made.

44. Until Contractor reaches the end of the lease term and completes purchase of the truck, the Contractor is essentially paying exorbitant fees to borrow equipment.

45. The Lease Agreements effectively restrict Contractors to driving only for a specified carrier—here, Forward Air.

46. The Lease Agreements automatically terminate or go into default upon a Contractor's termination of employment with Forward Air, at which point Contractors must return the truck.

2. Forward Air Unilaterally Controls Payment of Contractors.

47. Each of the preceding paragraphs is incorporated by reference as though fully set forth herein.

48. Contractors are compensated based on a number of factors unilaterally determined by Forward Air, including but not limited to the distance a load must be hauled and the size and/or weight of the cargo.

49. Contractors are not permitted or able to carry loads for independent companies that are/were not assigned by and/or through Forward Air, even on days that Contractors have no assigned work from Forward Air.

50. Contractors can only accept loads that have been assigned to them by Forward Air.

51. Forward Air requires Contractors to have and maintain onboard communications and tracing technology, such as Qualcomm systems. Payment for the required technology is deducted from Contractors' wages or escrow accounts.

52. The onboard communications and tracing technology enables Forward Air to locate and track the trucks Contractors drive at all times, and to better control Contractors' schedules and loads.

53. Forward Air assigns loads to Contractors through its communications and dispatch system.

54. Contractors have little to no ability to refuse assigned loads.

55. When Contractors refuse loads, Forward Air can and has required Contractors to sit and wait extra time for another load, substantially decreasing the amount of money they are able to earn and endangering their ability to meet their lease payment obligations.

56. Because the terms of the Lease Agreements they are required to sign specifically prohibit Contractors from accepting loads or jobs from anyone other than Forward Air, the specified carrier, Contractors have no meaningful opportunity to increase their business outside of what is offered by Forward Air.

57. Additionally, as part of the Independent Contractor Operating Agreement, Forward Air requires Contractors to sublease the trucks to it for periods such as two years, granting Forward Air exclusive possession, control and use of the truck for the duration of the lease.

58. Because Forward Air controls the rates paid and the available loads, Contractors can do little to increase their profits other than attempt to improve their efficiency within the bounds of the Motor Carrier Act.

3. Forward Air's Contractors are Properly Classified as Employees.

59. Each of the preceding paragraphs is incorporated by reference as though fully set forth herein.

60. As described in the above allegations, Forward Air controls and directs Contractors in the performance of their job duties, and Contractors are economically dependent on Forward Air.

61. During all relevant times herein, Forward Air has controlled the meaningful aspects of the business including customer flow and rates, effectively eliminating Contractors' ability to function as independent economic entities.

62. Because Forward Air controls the rates paid and the available loads, Contractors can do little to increase their profits other than attempt to improve their efficiency within the bounds of the Motor Carrier Act.

63. During all relevant times herein, Forward Air has controlled and directed Contractors in the performance of their job duties.

64. During all relevant times herein, Contractors are/were economically dependent on Defendant.

65. During all relevant times herein, Defendant directed, provided, and supervised the work performed by Contractors on Defendant's behalf.

66. Although Contractors are required by law to hold commercial driving licenses, they are not required to have special skills uncommon to the over-the-road trucking industry.

67. Upon information and belief, Contractors perform the same or substantially similar duties as are performed by company drivers employed directly by Forward Air.

68. Contractors, including Plaintiff and members of the Collective, are properly classified as "employees" as that term is used and defined in the FLSA and the regulations promulgated thereunder.

B. Forward Air Fails to Pay its Contractors Minimum Wages for All Hours Worked.

69. Each of the preceding paragraphs is incorporated by reference as though fully set forth herein.

70. Defendant's pay structure regularly causes Contractors to make less than the minimum wage as set forth by Section 206 of the FLSA, 29 U.S.C. § 206.

71. Defendant has a policy and practice of making regular deductions from the paychecks of Contractors for items including but not limited to: lease payments, satellite and communications equipment, insurance and for an escrow account set aside to cover maintenance of the truck.

72. Defendant does not reimburse Contractors for necessary and reasonable business expenses including but not limited to costs of fuel, licenses, tires, plates, hotels, and insurance.

73. Defendant also does not pay Contractors for all required compensable time, such as time waiting for trucks to be loaded or unloaded, time spent performing administrative tasks like filling out paperwork, time sleeping while on the road, or rest time required by Department of Transportation regulations.

74. Defendant's pay structure, including both deductions made and its failure to reimburse for all necessary and reasonable business expenses, regularly causes Contractors to make wages amounting to less than the federal minimum wage of \$7.25 per hour for all hours worked during a workweek.

C. Forward Air Misclassified Plaintiff as an Independent Contractor.

75. Each of the preceding paragraphs is incorporated by reference as though fully set forth herein.

76. Plaintiff Fredrick Blodgett worked for Defendant as a Contractor from approximately July 2015 to October 2017 and was classified by Defendant as an independent contractor.

77. By approximately six months into his employment, Plaintiff was required to create and do business as Big FS, LLC.

78. Blodgett did not own his own truck and trailer before becoming a Contractor with Forward Air, and signed the Lease/Purchase Agreement and the first Independent Contractor Operating Agreement on or about the same date.

79. Blodgett did not interact with customers, solicit loads, or price his services with customers, nor did he independently determine the customers for whom he would drive loads.

80. Blodgett did not drive any loads that were not assigned to him by Forward Air, nor did he feel that he could freely refuse to carry a load assigned to him by Forward Air.

81. As described above, as a Contractor, Blodgett was utterly economically dependent on Forward Air and was an “independent contractor” in name only.

D. Forward Air Failed to Pay Plaintiff Minimum Wages for All Hours Worked.

82. During the term of his employment, Forward Air charged various deductions from Blodgett’s compensation, including regular charges for truck lease payments, communications systems rentals, maintenance, liability insurance for physical damage, and fuel. As a result of these substantial deductions, Blodgett was often paid less than the minimum wage.

83. For example, for the one-week period covered by Blodgett’s December 8, 2015 deposit, Blodgett drove three trips for a total of 1,608 loaded miles. He was paid a total of \$1,640.16 for these trips. He also received additional pay such as fuel surcharges and layover payments, bringing his total pay for the week to \$2,844.86.

84. During that same time period, the charges imposed on Blodgett amounted to a total of \$2,569.45, all of which were deducted directly from his wages. These charges included but were not limited to: \$425.00 deducted for the lease of the truck; \$100.00 deducted for a maintenance reserve fund; \$33.00 deducted for plates; \$21.00 deducted for the use of required satellite communication and tracking system; \$325.08 deducted for insurance; and \$963.66 deducted for fuel.

85. Consequently, and after all deductions were made by Forward Air, Blodgett's net pay for this time period was \$275.41. Assuming an average rate of speed of 40 mph,¹ Blodgett drove his truck no less than 40.2 hours, meaning he was paid \$6.85 per hour, significantly below the federal minimum wage of \$7.25 per hour.

86. Expert analysis demonstrates that drivers spend an estimate of 9 hours on administrative tasks per week when driving the average number of weekly miles. If these hours are added to 40.2, the total hours worked by Blodgett for this time period would be 49.2 hours, reducing his hourly wage to \$5.60.

87. As the above estimates do not include sleep time, which is compensable pursuant to FLSA regulations, they are conservative and understate the hours worked as defined by the FLSA regulations.²

88. During the term of his employment, Forward Air charged various weekly deductions from Blodgett's compensation, including regular charges for truck lease payments, communications systems rentals, maintenance, liability insurance for physical damage, and fuel.

¹ The accepted average speed of truck drivers for all time spent driving—including all time spent behind the wheel of a truck with the motor running, including time moving on the highway as well as slow driving time off the highway, backing and parking time in truck stops, and time waiting in line to enter yards or truck stops, or waiting at lights or for parking spaces—is 40 mph.

² Pursuant to Department of Labor Field Operations Handbook Section 31b09 and 29 C.F.R. § 785.22, a work day for truck drivers is 24 hours, less bona fide meal times, unless the driver and the employer have agreed to exclude sleep time.

As a result of those substantial regular weekly deductions, Blodgett was often paid less than the minimum wage.

COUNT I

Violation of the Fair Labor Standards Act (“FLSA”)

Failure to Pay Minimum Wages

89. Each of the preceding paragraphs is incorporated by reference as though fully set forth herein.

90. At all times relevant herein, Defendant was and continues to be an “employer” of Plaintiff and collective members within the meaning of the FLSA.

91. At all times relevant herein, Plaintiff and collective members were/are “employees” within the meaning of the FLSA.

92. At all times relevant herein, Defendant, as well as Plaintiff and collective members, have been engaged in “commerce” within the meaning of the FLSA, 29 U.S.C. §203.

93. Section 201 of the FLSA, 29 U.S.C. §206, requires employers to minimally compensate employees such as Plaintiff and collective members at the federal minimum wage rate for all hours worked.

94. Defendant has violated and continues to violate the FLSA by willfully failing to compensate Plaintiff and collective members at least the federal minimum wage.

95. As a result of Defendant’s company-wide policy and practice of not paying Plaintiff and collective members at least the federally mandated minimum wage for all hours worked, Plaintiff and collective members have been harmed.

JURY DEMAND

96. Plaintiff hereby demands a trial by jury in the above captioned matter.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and collective members, respectfully seeks the following relief:

- a. Judgment against Defendant;
- b. All unpaid minimum wages;
- c. Liquidated damages;
- d. Litigation costs, expenses, and attorneys' fees; and
- e. Such other and further relief as this Court deems just and proper.

Respectfully submitted,

Dated: March 29, 2018

/s/ Danielle L. Perry

Gary E. Mason (admitted *pro hac vice*)
Danielle L. Perry (admitted *pro hac vice*)
WHITFIELD BRYSON & MASON, LLP
5101 Wisconsin Ave NW, Ste. 305
Washington, D.C. 20016
T: (202) 429-2290
F: (202) 429-2294
Email: gmason@wbmlp.com
Email: dperry@wbmlp.com

Gregory F. Coleman (TN BPR No. 014092)
Lisa A. White (TN BPR No. 026658)
Mark E. Silvey (TN BPR No. 13415)
GREG COLEMAN LAW PC
800 S. Gay Street, Suite 1100
Knoxville, TN 37929
T: 865-247-0080
F: 865-522-0049
Email: greg@gregcolemanlaw.com
Email: lisa@gregcolemanlaw.com
Email: mark@gregcolemanlaw.com