

ABF PUBLISHES CALIFORNIA SURCHARGE

By: George Carl Pezold

California means different things to folks - Hollywood, Silicon Valley, the Golden Gate Bridge, great wines. Few realize that agriculture is one of its largest industries, and that it provides most of the fresh fruits, vegetable and nuts that feed the Nation. It also has major problems with air pollution and water supply. Whether truly effective or misguided, efforts to combat air pollution have resulted in the most stringent regulations in the country applicable to motor vehicle emissions of all kinds.

Over the years we have reported on the efforts of the Ports of Long Beach and Los Angeles to impose a ban on older trucks serving the ports, and the regulations of the California Air Resources Board that establish strict performance standards for trucks and trailers equipped with a "Transportation Refrigeration Unit" (TRU). There can be little question that measures such as these have an economic impact on the trucking industry and the public, including capacity shortages and increased costs.

Carriers have long charged more for transporting goods to and from places that are difficult or more expensive to serve. They have published arbitraries or surcharges for large cities to cover congestion, tolls, etc. or have higher rates for certain areas of zip codes. But here is a new one!

Thanks to Bob Walters of Freight Management, the Council recently learned that ABF Freight published a tariff surcharge of \$5.92 per shipment, originally effective March 4th, but now effective April 1st, for all shipments to or from the State of California, and it apparently applies to all shipments regardless of size or weight. ABF's tariff surcharge item provides as follows:

Item 162 – California Compliance Surcharge

Shipments originating from and/or destined to the state of California will be subject to a charge of \$5.92 per shipment due to higher costs, including but not limited to compliance with California state regulations. The charges provided in this item will not apply to shipments moving under a Volume Price Quote, a Timekeeper Price Quote, a TurnKey Price Quote or a U-Pack Quote.

Initially, it was thought that the "emergency increase" was related to the cost of compliance with California's strict emission requirements for motor vehicles. However, Eddie Sorg, Vice President - Yield Management for ABF Freight, states that it is a result of a recent addition to the California Labor Code that "imposes significant new burdens on employers that pay employees on a piece-rate basis".

The legislation, Assembly Bill No. 1513, approved October 10, 2015, and effective January 1, 2016, is titled "Employment: workers compensation and *piece-rate compensation*". The legislative counsel's digest states:

This bill would require the itemized statement provided to employees compensated on a *piece-rate* basis to also separately state the total hours of compensable rest and recovery periods, the rate of compensation, and the gross wages paid for those periods during the pay period, and the total hours of other nonproductive time, as specified, the rate of compensation, and the gross wages paid for that time during the pay period.

The bill would require those employees to be compensated for rest and recovery periods and other nonproductive time at or above specified minimum hourly rates, separately from any piece-rate compensation. The bill would define "other nonproductive

time” for purposes of these provisions to mean time under the employer’s control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis. Because a knowing and intentional violation of these requirements would be a crime, the bill would impose a state-mandated local program.

| Readers may wonder, as I did, how this legislation could possibly apply to truck drivers?

The legislation conspicuously fails to define "piece work", and this terminology would normally be thought to relate to manufacturing jobs such as assembling products, sewing garments, or possibly (in California) picking baskets of fruit. Why then has ABF Freight apparently assumed that it applies at all to truck transportation to or from the State of California?

We would assume that company truck drivers (employees) are usually paid on an hourly basis, and would necessarily be compensated for both driving and non-driving time, such as lunch breaks and for any rest periods, etc. that are mandated by the federal HOS rules.

And, owner-operators would be "independent contractors", not "employees" of ABF Freight, so the legislation should not even apply to them. Also, owner-operators are typically compensated on a point-to-point flat rate or on a mileage rate, but regardless of the formula used, a carrier using owner operators should be entitled to assume that the contract price includes and covers any federally mandated breaks or rest periods.

The ABF surcharge also fails to recognize the difference between less-than-truckload (LTL) and truckload (TL) pricing. Rates for LTL shipments involve the class of the commodity, the value, weight, density, packaging, etc. as well as the distance. On the other hand, shippers, intermediaries like brokers and 3PL's usually negotiate TL rates with carriers that are may be either point-to-point (between areas, zip codes, etc.) or on a mileage basis.

Even assuming, for the sake of argument, that the California law might possibly apply to employee drivers that are compensated on a flat rate or mileage basis for TL shipments, it would seem that the surcharge should not apply to LTL shipments. Also, how did ABF determine that the appropriate surcharge should be \$5.92?

Last, but not least, we note that laws like this one have been challenged pursuant to a federal law that "preempts" certain types of state laws and regulations. This provision, originally included in the Federal Aviation Administration Authorization Act ("FAAAA"), and later in the ICC Termination Act (ICCTA) at 49 U.S.C. § 14501 reads in the relevant part as follows:

[A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

The publication of the ABF Freight surcharge would seem to be proof this new law directly impacts a "a price, route, or service" of motor carrier transportation in the State of California. At this time it remains to be seen whether ABF Freight or the trucking industry intends to challenge the law, and we have heard nothing further from Mr. Sorg at ABF Freight.