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To Hire or Not to Hire: A Difficult Question Made Easier to Answer Courtesy of the Eighth Circuit's Ruling in CRST v. Swift

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The trucking industry is experiencing an unprecedented driver shortage. The American Trucking Associations estimates that the industry is short a record 80,000 drivers, a figure that is currently projected to double by 2030. Competition for drivers is fierce, often forcing carriers into difficult recruiting and hiring decisions, particularly with drivers who apply while "under contract" with another carrier. Recent divergent court rulings further complicated these already difficult decisions, as they suggested carriers could be subject to multimillion-dollar liability for hiring "under contract" applicants and simultaneously subject to multimillion-dollar liability for refusing to hire them. The U.S. Court of Appeals for the Eighth Circuit's newly issued ruling in *CRST Expedited, Inc. v. Swift Transportation Company of Arizona, LLC*, however, has supplied some much-needed guidance for carriers when confronted with what was previously a "no win" situation.

Overview of "Under Contract" Notices in the Trucking Industry

For many prospective drivers, the cost of obtaining a commercial driver's license ("CDL") is a significant, and often insurmountable, barrier to entering the trucking industry. As a result, many carriers operate training schools that allow prospective drivers to obtain their CDL without any out-of-pocket cost to the driver. In return for the free schooling, the driver typically signs an employment contract agreeing to drive for the carrier for a set period of time and initially receive a lower ("apprentice-level") rate of pay.

This lower initial rate of pay, coupled with immense industry demand, often incentivizes drivers to seek employment with higher-paying carriers before completing their contracts. When a new carrier seeking to hire the driver verifies prior employment with the carrier that paid for his CDL, that carrier typically responds with a notice that the driver is "under contract"—i.e., has not completed the exclusive employment term. Upon receipt of this notice, the hiring carrier "must then affirmatively choose" whether to: (a) honor the contract, or (b) hire the driver and possibly cause him to breach his employment agreement.

Divergent District Court Decisions Concerning CRST's "Under Contract" Drivers

This difficult choice was exacerbated by federal district court rulings out of the U.S. District Courts for the Northern District of Iowa and Central District of California involving CRST's "under contract" drivers. In the Iowa case, *CRST Expedited, Inc. v. Swift Transportation Company of Arizona, LLC*, CRST argued that Swift targeted its "under contract" drivers and hired them knowing it would cause the drivers to breach their employment contracts with CRST. After a six-day trial, a jury returned a $15.5 million verdict in favor of CRST

on its claims for intentional interference and unjust enrichment. Both sides then filed post-judgment motions and appealed.

Around the same time, in an unrelated case where we were engaged as counsel, five former "under contract" drivers filed suit in California against CRST and certain other carriers. The plaintiffs alleged that honoring the noncompete term in driver employment contracts is a per se unlawful restraint of trade that violates state and federal antitrust laws. The plaintiffs seek damages in excess of $100 million, together with mandatory trebling, fees, and costs. While this California case remains pending, the district court twice found the plaintiffs' allegations sufficient to withstand motions to dismiss. So, when considered in combination, the two rulings suggest that carriers could be exposed to potentially massive liability for both hiring and refusing to hire "under contract" drivers.

Eighth Circuit's Ruling in Favor of Swift

In August 2021, the Eighth Circuit issued a ruling that appears to have provided some much-needed guidance on the dichotomy between these two rulings. Following the Restatement of Torts, it reversed the Iowa trial court's judgment in favor of CRST and remanded with instructions to enter judgment in favor of Swift.

In determining that Swift had not improperly interfered with CRST's employment contracts, the court observed that CRST's contracts allowed drivers to be released from the noncompete by either driving exclusively for CRST for a period of time or reimbursing the cost of their CDL training. The court found that CRST failed to meet its evidentiary burden to show that the "under contract" drivers actually drove for Swift and did not avail themselves of the reimbursement option. It also found that the drivers who moved from CRST to Swift were at-will employees, despite the noncompete term. So Swift's recruitment, and ultimate hiring, of these drivers via generally applicable advertising and recruiting efforts did not impermissibly interfere with their employment contracts. CRST's cause of action, if any, should be against the specific drivers who failed to perform their contracts, not Swift.

CRST's unjust enrichment claim fared no better. The panel found no proof that the drivers failed to reimburse CRST for the training costs or that Swift tortiously caused any breach. So "all we have is a claim that an employer who lawfully employs a worker who has been trained by a prior employer is unjustly enriched by the benefit of the employee's services." The court found there is "no authority for that proposition," and a ruling for CRST on that theory "would substantially deter worker mobility that strengthens our economy and enhances the ability of all workers to succeed."

Prospective Impact on Carriers Hiring "Under Contract" Applicants

The Eighth Circuit's ruling provides a helpful roadmap for reducing the risk of liability with respect to hiring "under contract" applicants. In many states, noncompete agreements are unenforceable as a matter of public policy. The Eighth Circuit's ruling suggests that the likelihood of a successful tortious interference lawsuit in these states is very low. Similarly, hiring "under contract" drivers who apply in connection with a generally applicable recruitment campaign—without specifically targeting any particular carrier's drivers—appears relatively low risk in states that have adopted the Restatement of Torts.

Further decreasing risk, this ruling suggests that the hiring carrier should encourage "under contract" applicants to take advantage of the option to buy out their existing contracts, and even offer tuition bonuses and reimbursement (as many carriers do already) to help facilitate this choice.

Nevertheless, this guidance unfortunately is not one-size-fits-all, as much of the Eighth Circuit's reasoning focused on facts that were specific to the record in that case—most notably the terms of CRST's driver contract. It may still be possible to pursue interference with contract claims via creatively rewording driver employment contracts and presenting the specific evidence the Eighth Circuit found absent from the record in *Swift*.

The Central District of California, and perhaps ultimately the Ninth Circuit, may provide further clarity (or renewed uncertainty) via future rulings in the antitrust case. But thanks to the Eighth Circuit's recent ruling, carriers now at least have better guidance as to how to treat "under contract" applicants and are no longer left to "pick their poison" between competing avenues that both could lead to multimillion-dollar liability.

ATTORNEYS MENTIONED

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