News on industry developments and transportation projects from the Transportation and Logistics Law Group at Dean & Fulkerson

Transportation and Logistics Law Group

Contracts, Freight Claims, Rates and Regulation
John Bryant (248) 273-2162
Neill Riddell (248) 273-2189

Hazardous Materials/Environmental
Jim O'Brien (248) 273-2187

Labor and Employment
Read Cone (248) 273-2166
Ian Hunter (248) 273-2179
Janet Lanyon (248) 273-2181
Neill Riddell (248) 273-2189
Peter Sudnick (248) 273-2185
Ken Zatkoff (248) 273-2194

Minority Certification
Neill Riddell (248) 273-2189

NAFTA/Cross Border
John Bryant (248) 273-2162
Neill Riddell (248) 273-2189

Overweight/Overdimension
Neill Riddell (248) 273-2189

Pensions/Benefits/Withdrawal
Ian Hunter (248) 273-2179
Janet Lanyon (248) 273-2181

Real Estate
Jim O'Brien (248) 273-2187

Safety
Neill Riddell (248) 273-2189
Jerry Swift (248) 273-2191
John Bryant (248) 273-2162

Tax and Corporate
Keith Aretha (248) 273-2160

Trucking Accident Defense
Jerry Swift (248) 273-2191
Neill Riddell (248) 273-2189

Workers' Compensation Defense
Neill Riddell (248) 273-2189
Jerry Swift (248) 273-2191

801 West Big Beaver Road, Fifth Floor
Troy, Michigan 48084
(248) 362-1300 ◆ Fax (248) 362-1358
Web Site: www.DFLaw.com
Email: translaw@DFLaw.com

ROAD REPORT

■ **HOPEFUL WITHDRAWAL LIABILITY THEORY FLOPS** A U.S. district court has reversed a lower court decision and held that the "trucking industry" exception to withdrawal liability to the Central States Pension Fund does not apply unless the withdrawing employer proves that at least 85% of contributions to the Fund come from employers primarily engaged in trucking. Central States claims that the figure is as low as 50%. *U.S. Truck Company Holdings*, E.D. Mich. 2006

■ **CARRIER FOLLOWS SHIPPER INSTRUCTIONS, GETS SUED ANYWAY** After declining a carrier's recommendation to use a van to avoid potential wind and water damage, a shipper sued the carrier for water damage which resulted from the carrier's use of the flatbed trailer the shipper had requested. The court said carrier had an independent duty to protect the shipment from damage. Following the shipper's instructions did not relieve carrier of that duty. *Mann Rowland v Kreitz*, 5th Cir. 2006

■ **OUT OF STATE PLATING CAN'T EXCUSE PIP DEFECT** A Michigan resident truck owner who plated his unit in Oklahoma and carried only bobtail coverage was barred from recovering PIP benefits for a truck accident because there was no coverage for accidents while under dispatch. The driver's Michigan residence made him subject to requirements that he carry PIP and no-fault coverage on the truck and plating the truck out of state did not make him a "non-resident". *Guraj v. Connecticut Indemnity*, Michigan Court of Appeals, 2006

■ **BRAKES AT DOCK NOT ENOUGH?** When a carrier's tractor trailer rolled away from a loading dock, injuring a forklift driver, the jury was allowed to decide whether the carrier should have done more than lock its brakes and the forklift driver was not required

ON THE DOCK

■ **NATIONAL RECOGNITION** Jerry Swift was featured in "Leader Spotlight" of ***The Voice of the Defense Bar,*** a publication by the Defense Research Institute, for his contributions to the trucking industry. Jerry chaired a panel at the Defense Research Institute's 2006 Trucking Law Seminar on data produced by trucking industry technology and the consequences of failure to preserve that data when it may be relevant to pending or threatened accident litigation.

■ **LEASE REGS HELP CLIENT** A vigorous defense based upon the FMCSA's "Truth-In-Leasing" regulations enabled a D&F client leasing trucks and drivers to a regulated carrier to force a substantially discounted settlement of litigation seeking collection of charge back items (including fuel charges). The carrier had failed to comply with significant elements of the regulations mandating the existence and content of written leases.
D&F Attorney: Neill Riddell

■ **NEW U.S. OPERATIONS** D&F attorneys are assisting two Canadian based trucking companies in setting up domestic U.S. operations, including forming U.S. subsidiaries, obtaining tax qualifications, securing customs approvals for equipment transfers, and securing operating licenses.
D&F Attorneys: Keith Aretha, John Bryant

FEATURE:
SNAFU IN MICHIGAN LEGISLATION THREATENS MICHIGAN MOTOR CARRIERS WITH LOSS OF OVERTIME EXEMPTION

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FEATURE ARTICLE

Snafu in Michigan Legislation Threatens Michigan Motor Carriers with Loss of Overtime Exemption

By Ian Hunter

Recent developments involving the Michigan legislature and Governor Jennifer Granholm confront Michigan employers, including motor carriers, with the distinct possibility that overtime obligations will be expanded to a substantial group of employees previously exempt from overtime payment.

On March 15, 2006, the Michigan Senate amended the Michigan Minimum Wage Act to provide for substantial increases in the Michigan minimum wage. As a result, the state minimum wage, presently $5.15, the same as the Federal minimum wage, will increase to $6.95 effective October 1, 2006, $7.15 effective July 1, 2007, and $7.40 effective July 1, 2008.

Thereafter, a concern was expressed in the employer community that the amendment had mistakenly eliminated certain overtime exemptions provided in the Michigan Minimum Wage Act including some specified in the Fair Labor Standards Act ("FLSA"). This concern arose because the language in the Michigan Minimum Wage Act arguably conditions the application of certain overtime exemptions, including the motor carrier exemption, to the level of the Federal minimum wage in comparison with the Michigan minimum wage rate. Therefore, because the Michigan minimum wage rate would be greater than the Federal minimum wage rate, the overtime exemptions would no longer apply to Michigan employers.

In June 2006, the Michigan legislature passed additional legislation to correct this situation and to retain the overtime exceptions including the motor carrier exemption. Governor Granholm, however, threatened to veto this corrective action. It also became evident that the legislation as enacted would not be effective until April 1, 2007, six months after the increase in the Michigan minimum wage rate. Thus, the legislation was sent back to the Senate.

For these reasons, many Michigan employers, including motor carriers, must recognize that it is possible that effective October 1, 2006, they may be required to pay overtime to a substantial group of employees previously not covered by the overtime obligation.

The Michigan Chamber of Commerce estimates that 15,000 Michigan employers could face an obligation to pay overtime previously not required, thus encompassing approximately 370,000 employees previously exempt from the overtime payment, specifically including those presently covered by the motor carrier exemption.

For motor carriers, employees currently subject to the motor carrier overtime exemption include drivers subject to being dispatched to handle interstate freight and employees such as mechanics, loaders or yard personnel whose duties affect the safety of operation of motor vehicles in interstate commerce. Even for unionized carriers, contracts often do not require overtime for employees such as road drivers. Loss of the exemption would require overtime for these employees as well.

Michigan currently has no rules on how to calculate overtime for such employees. Major questions also exist on such issues as how overtime would be applied to drivers operating partly in Michigan and partly in other states or provinces.

While a legislative solution would be the most effective way of averting this troublesome possibility, the industry may soon face the prospect of needing to initiate court litigation to determine whether the legislature's unintended actions can have the effect of undoing nearly 70 years of a uniform federal policy excluding interstate motor carriers from overtime requirements.

ROAD REPORT

to confirm that the trailer wheels had been blocked.
Gesch v EMCEA Transport, E.D. Mich. 2006

■ **CARRIER PIRATES BUREAU TARIFF, SHIPPER CAN'T COMPLAIN** Even though a carrier drops out of a rate bureau but continues to reference the bureau's class rates in its own tariffs, the shipper still is required to pay charges based on the class rates even though the carrier's use of them may be unauthorized. *Fulfillment Services v UPS*, D. Arizona, 2005

■ **THIRD TIME STILL NO CHARM** The Michigan Court of Appeals has issued its third opinion barring a state court lawsuit against trustees of the Central States Pension Fund for alleged improper communications with independent contractors of a defunct employer. The two prior opinions were reversed by the Mich. Supreme Court.
C.C. Midwest, Inc. v McDougall, Michigan Court of Appeals 2006

ON THE DOCK

■ **WORKERS COMP DISMISSAL** D&F recently appeared before the U.S. Court of Appeals for the Sixth Circuit to defend against a suit by former employees of a D&F transportation industry client. The suit claimed that the employer violated the Racketeer Influenced and Corrupt Organizations Act (RICO) by allegedly conspiring with a claims administrator and an examining physician to deny the former employees' workers compensation claims. The employees' complaint was dismissed by a U.S. District Court; a decision by the Court of Appeals is anticipated within the next several months.
D&F Attorney: Janet Lanyon

■ **FREIGHT CLAIM ARBITRATION** When a D&F client was sued for steel allegedly damaged in transit, D&F identified an arbitration clause in the shipping contract, forced dismissal of the suit, and arranged for resolution through low-cost arbitration.
D&F Attorney: John Bryant