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

■ **HOS RULES FLUNK COURT TEST AGAIN** After three years of FMCSA effort to patch up court objections to the revised Hours of Service rules, the D.C. Circuit Court of Appeals has told FMCSA to go back and try again. The court threw out the 34 hour restart rule and the expansion of driving hours from 10 to 11. The court's ruling is not yet effective – expect FMCSA and ATA to seek another stay of the current rules while they try again to meet the court's objections.

OOIDA v FMCSA, D.C.Circuit, 2007

■ **MICHIGAN MOTOR CARRIER ACT AMENDED** Recent amendments to the Michigan Motor Carrier Act end household goods carriers' longstanding licensing exemption for intrastate commercial zone operations, establish a new exemption from tariff filing requirements for "local moves" (40 miles or less) and permit all carriers, *including non-household carriers*, to adopt rules requiring shipper claims to be filed within 3 months.

P.A. No. 33, effective July 10, 2007

■ **MICHIGAN CARRIERS WIN BIG TIME UNDER NEW UCR FEES** For-hire Michigan intrastate carriers that also hold interstate authorities stand to be the biggest winners under the proposed UCR fee structure announced last month by FMCSA. The new fees replace the former per-truck SSRS and MPSC decal fees with per carrier fees ranging between $39 for a two unit operator and $37,500 for a 1,000+ unit operator. Under the new fees, a Michigan intra carrier with 60 units that would have paid $6,000 under the prior system will only pay $806. Effective in 2007.

ON THE DOCK

■ **TERMINAL CLOSURE** D&F attorneys recently assisted a unionized carrier that was forced to close a terminal because of lost business. Issues: Avoiding withdrawal liability, required notice to the union, and contract risks of future service in area.
D&F Attorneys: Ian Hunter, Janet Lanyon

■ **FREIGHT CLAIM ARBITRATION** D&F recently defended a carrier from a questionable damage claim in which a broker-intermediary paid 100% to the shipper and then argued that the carrier also was 100% liable based on an indemnification clause. Argument: Broker acted at its own risk in paying claim directly without carrier approval. Result: Successful settlement at hearing.

D&F Attorney: John Bryant

■ **APPELLATE VICTORY** D&F successfully defended an appeal from a trial court's ruling dismissing a wrongful death case arising when an employee was run over by a piece of equipment being operated by a co-employee. Both the trial and appeal courts agreed that no evidence had been presented sufficient to establish any exception to application of the Worker Comp Act's exclusive remedy provisions barring civil actions against the employer or co-employee.

D&F Attorney: Neill Riddell

FEATURE:
NAILED AT YOUR FMCSA SAFETY AUDIT – NOW WHAT?

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FEATURE ARTICLE

NAILED AT YOUR FMCSA SAFETY AUDIT — NOW WHAT?

By John Bryant

On a bad day for your company, a Special Agent from the Federal Motor Carrier Safety Administration has arrived at your facility and spent six hours going through your records. At the end of the day he has given you a Safety Compliance Report listing scores of violations in 16 separate safety categories, three of them highlighted as "critical".

The Report warns that you will be given a proposed safety rating of "Conditional". It states that you may prepare a "Corrective Action Letter" which must be submitted to FMCSA within 15 days.

You sign a receipt for the Report and the Agent leaves. Now what should you do?

By all means, act immediately. Operating with a Conditional safety rating can drive up insurance costs and freeze you out with particular shippers. A Compliance Report of this type also will likely be followed by an FMCSA Claim assessing a substantial fine. Significant options are available to reduce the impact of a bad Compliance Report.

Corrective Action Letter

Take advantage of submitting a Corrective Action Letter. The letter only needs to state generally how you intend to reduce each of the types of violations described in the Compliance Review. A Corrective Action Letter serves mainly to place a document in FMCSA's files which shows that the carrier is concerned about safety. Be brief, but get something on file.

Safety Rating

FMCSA follows specific guidelines in deciding whether a safety rating should be downgraded. The regulations break safety violations into six categories and assign points for violations of each category. For all but the most serious violations, a violation rate of greater than 10% of all records surveyed is required in order to establish a category violation.

You have 90 days following the effective date of your proposed new rating to file a written challenge. Review each of the individual claimed violations carefully and decide if they can be challenged on their facts. If enough violations can be challenged to move the violation percentage in one category below 10%, you may be able to cancel the new rating.

Penalty

A bad Compliance Review usually will also result in a Claim Notice from FMCSA seeking a civil fine. The Claim Notice will list the specific violations charged and state a proposed penalty amount.

It is very important that you respond to the Claim within the time periods stated in the Notice. You essentially have 30 days or less to decide between paying the Claim in full, requesting a hearing, or requesting binding arbitration.

Paying the claim in full may not be necessary. FMCSA may be willing to suspend part of a proposed penalty, particularly if a hearing is requested. Arbitration is another option that may allow the penalty to be reduced further.

Do not fail to file some form of timely response in writing. Failure to respond will cause FMCSA to issue a default. Payment of the entire proposed penalty will be required within 90 days in that event. Failure to make payment within that time period will result in suspension of your FMCSA operating authority and penalties of up to $11,000 per day.

ROAD REPORT

■ **TIME BARRED FREIGHT CHARGE NOT SAVED BY STATE LAW CHARACTERIZATION** Acknowledging that actions for collection of freight charges on interstate shipments may be characterized as state rather than federal claims, a U.S. District Court determined this does not avoid application of the ICA's 18-month time bar on interstate carrier collection actions.

Arctic Express, Inc. v Del Monte Fresh Produce, U.S. District Court, Ohio, 2007

■ **ARMORED EMPLOYEE CASHES IN** An armored carrier's "vault attendant" employee was not within the "loader" exemption from FLSA overtime requirements. While the employee prepared pallets for loading, he never physically entered or placed cargo in the employer's trucks and, in the view of the Court, therefore did not engage in activities affecting safety of the operation of motor vehicles operating in interstate commerce subject to the authority of the Secretary of Transportation.

Khan v IBI Armored Services, U.S. District Court, New York, 2007

ON THE DOCK

■ **ENVIRONMENTAL CLEANUP EXPENSE DEFENDED** D&F recently assisted a client whose unit rear-ended 3 others, resulting in environmental cleanup costs of $100,000, in asserting *pro rata* allocation of those costs against insurers of the other involved vehicles without regard to fault by application of property protection provisions of the Michigan No Fault Act.

D&F Attorney: Jerry Swift

■ **CANADIAN TAX REGISTRATION OPPOSED** D&F recently assisted in opposing a Revenue Canada demand for tax registration by a carrier in connection with that carrier's cross-border operations.

D&F Attorney: James O'Brien

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