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

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ROAD REPORT

■ **SUPREME COURT TAKES SECOND MICHIGAN TRUCK TAX CASE** The U.S. Supreme Court has agreed to hear another challenge to Michigan's for-hire carrier truck fees. At issue: $100 per truck fees charged to intrastate and Michigan-based carriers. Decision expected by July 1.

ATA v Michigan; Mid-Con v Michigan, U.S. Supreme Court, 2004

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■ **FEDS TO FIGHT ON HOURS** USDOT has signaled it does not intend to cave in to "public interest" court challenges to its revised hours of service rules. Other than possible changes on sleeper berths, DOT's court-prompted rulemaking announcement shows no indication of plans to revise these rules. DOT also has indicated that it will seek to have the rules enacted directly by Congress to avoid future interference by judges.

FMCSA Docket 2004-19608

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■ **SLOPPY CONTRACT LEAVES TRUCKER IN THE MUCK** When a fleet owner sued a trucking company for breaching an alleged oral promise to tender specific volumes of lake muck for transportation, the trucker argued that the parties had a written contract which contained no such promises. Because the contract did not specifically deny the existence of such promises, however, the court allowed the subcontractor to present his claims to a jury.

GLH Trucking v R&R Heavy Haulers, Michigan Court of Appeals, 2005

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■ **SAFETY RULES DON'T COVER DOCK INJURIES?** When a shipper violated federal safety rules by misloading freight that fell on a driver when he opened a trailer for unloading, a court excused the shipper because the unloading occurred at the consignee's dock. The court ruled that the safety rules were designed to protect against

ON THE DOCK

■ **TRUCK SAFETY EXPO** Plan on attending the Michigan Truck Exposition and Safety Symposium in Lansing, Michigan on February 22-23 sponsored by the Michigan Trucking Association and the Michigan Center for Truck Safety. 24 breakout sessions on truck safety and risk protection plus safety industry exhibitor booths. **Be sure to attend the sessions on hazardous materials, labor and risk management presented by D&F attorneys, and visit our booth for a free CD on safety issues.**

D&F Attorneys: John Bryant, Read Cone, Ian Hunter, Janet Lanyon, Jim O'Brien, Neill Riddell, Jerry Swift

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■ **LABOR ARBITRATION** D&F attorneys Ken Zatkoff and Peter Sudnick recently concluded four multi-day sessions of employee grievance arbitrations of the National, Central, Eastern and Western regions of the National Automobile Transporters Labor Division. Zatkoff and Sudnick serve as the employer-designated arbitrators; D&F is legal counsel to NATLD.

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■ **NATIONAL POST FOR D&F LITIGATOR** D&F truck accident specialist Jerry Swift has been appointed to the 12 member Steering Committee of the Trucking Law section of the Defense Research Institute. DRI is a national organization of defense trial lawyers and corporate counsel which provides numerous educational and informational resources to defense trial lawyers and state and local defense organizations. The Trucking Law Committee is made up of

FEATURE:

PIER DIEM EXPENSES — SPECIAL RULES BENEFIT TRUCKING

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FEATURE ARTICLE

Pier Diem Expenses – Special Rules Benefit Trucking

By Keith Aretha

Good advocacy by the trucking industry has produced special IRS rules to benefit trucking companies when they use flat-rate per diem payments to cover employee travel expenses.

The benefits:

- Nationwide allowance of payments up to $41 per day for meals and incidental expenses, with no requirement of expense amount substantiation.
- 20 percentage point advantage on deductibility ceilings for driver meal expense payments.
- Options for additional reimbursement for lodging with full deductibility.

Truck operators should make sure they are taking full advantage of these rules which are unique to the trucking industry.

Paying drivers through per diems rather than wages benefits everyone. Per diems are tax free to drivers, require no employment tax contributions by drivers or employers, and are not counted as wages in determining employer payments for workers compensation or unemployment.

Travel expense reimbursement in most other industries faces three significant problems:

- A general requirement that employees actually substantiate their travel expenses.
- An alternate per diem system that caps reimbursement at $31 per day unless employees show that expenses were incurred in high-cost localities.
- Deductibility to the employer of only 50% of meal expenses.

Special rules for the trucking and transportation industries, provide significant relief from these provisions.

Beginning in 1998, the IRS began increasing the deductibility percentages on meals for truck drivers performing duties subject to DOT hours of service limitations to levels higher than the standard 50%. The deductibility percentage for 2004 and 2005 is 70%. Percentages will rise to 75% for 2006-07 and 80% beginning in 2008.

The IRS also gives transportation companies a $10 per day increase in expenses that can be paid under a per diem plan without employee expense substantiation. The increase results from allowing employers to use a flat $41 maximum figure nationwide rather than requiring locality by locality evaluations to determine whether amounts in excess of $31 can be paid.

Trucking companies also may add either actual lodging costs or locality-specific lodging rates ranging from $60 to $199 per day without any limitation on deductibility.

Specific rules must be followed in order to qualify for these transportation-specific options. The options are available only for meal, incidental and lodging expenses which occur "away from home". IRS guidelines state that drivers or employees are "away from home" only if they are outside the general area of their base of operations for a period substantially longer than an ordinary day's work and that they have a reasonable need while away to get sleep or rest.

The IRS also requires that employers develop information which generally substantiates that employees typically incur actual travel expenses which approximate the per diem expenses being paid.

Careful advance planning and strict compliance with the per diem expense rules is an absolute necessity. In a recent case, the United States Tax Court ruled that a trucking company's efforts to adapt the per diem standards to match its own internal operating experience had the effect of voiding the entire application of the per diem rule. This left the carrier with no way of qualifying any of its $1 million per year per diem expense payments for a tax deduction.

ROAD REPORT

accidents on the highways, not injuries on private property.

Turner v Goodyear, N.D. Ill. 2004

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■ **BROKER'S ADS, RULES CREATE ACCIDENT LIABILITY** A major nationally-based property broker was found potentially liable for a personal injury accident caused by one of its carriers. Reason: Broker hand-out to shippers stating that broker would cover accident losses in excess of carrier insurance and broker contracts requiring carriers to hold "satisfactory" rating.

Schramm v Foster, D. Md. 2004

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■ **CARRIER SUES FIRST, NIXES CLAIM** Faced with a large claim on a household goods move, the carrier elected to sue first and obtain a declaration that it was not liable. The court allowed the "sue first" strategy and found the carrier not liable.

Mayflower v Troutt, W.D. Texas 2004

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■ **NON-UNION EMPLOYEES CAN'T GET A WITNESS** The NLRB has reversed a Clinton-era decision that even non-union employees are entitled to demand the presence of a witness during an investigatory interview that might lead to discipline. These rights now are applicable only to union represented employees.

Wal Mart Stores, Inc., NLRB, 2004

ON THE DOCK

approximately 750 members and sponsors a semi-annual trucking law seminar.

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■ **FMCSA SHOWDOWN AVERTED** Using previously overlooked records and systems substantiating the existence of reasonable management controls, D&F was able to negotiate a significant reduction in a post-compliance review penalty levied against a D&F client by the FMCSA.

D&F Attorney: Neill Riddell

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■ **SALES REP TERMINATION** When a D&F client terminated a sales representative for failing to cover his territory, the rep claimed that the termination was motivated by a desire to reduce health insurance costs potentially triggered by an illness in the rep's family in violation of ADA and ERISA . D&F successfully blocked the rep's EEOC claim; the case is now pending in federal court.

D&F Attorneys: Janet Lanyon, John Bryant

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■ **DRUGS SQUELCH COMP CLAIM** D&F recently forced a nominal settlement of a workers comp claim by a driver who had been terminated for controlled substance use several days after the date of the alleged injury. Theory: driver's own actions disqualified him from being reassigned to favored work after injury.

D&F Attorney: Jerry Swift