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

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ROAD REPORT

■ **ADR PROVISION UNDONE.** Because the carrier expressly reserved to itself the right to revoke or modify employee arbitration agreements any time without notice, the court concluded that those agreements were "illusory," and not enforceable by the carrier.
Zamora v Swift Transportation (5th Cir 2009)

■ **FAAA PREEMPTION.** Reversing a trial court's denial of ATA's motion for preliminary injunction, the court held that, given FAAA Act preemption of state laws relating to a price, route or service of a motor carrier, adequate evidence of likelihood of success had been presented to enjoin operation of a Los Angeles order compelling carriers serving the city's port area to, among other things, discontinue use of independent contractors and pay initial and annual per truck fees to perform port services.
ATA v City of Los Angeles (9th Cir 2009)

■ **MORE FAAA PREEMPTION.** After removal from state court, the federal court held that a shipper's claims of fraud and negligent misrepresentation in attack upon a carrier's assessment and collection of certain "rebilling" charges did not arise from the "four corners" of the parties' agreement but, instead, depended upon state law, and therefore were within the FAAA's preemption of state regulation of carrier prices, routes or services.
Data Manufacturing v UPS (8th Cir2009)

■ **LOGISTICS COMPANY NOT CARRIER.** The court affirmed dismissal of claims of a truck driver injured by an

ON THE DOCK

■ **SHIPPER BANKRUPTCIES** – In recent weeks, many carriers seeking to cope with either the threat or the reality of shipper bankruptcies have called upon D&F to provide guidance on both the legal and practical ramifications for transportation vendors.
D&F Attorneys: John Bryant & Keith Aretha

■ **WHISTLEBLOWER DEFENSE** – D&F is providing defense for a carrier sued by a disgruntled former driver falsely alleging his employment was terminated due to safety-related complaints by him to the State Police Motor Carrier Division.
D&F Attorney: Neill Riddell

■ **CUSTOMS PENALTIES MITIGATED** An importer and logistics firm facing penalties assessed by U.S. Customs in connection with an innocent attempted importation of certain prohibited goods were assisted by D&F in securing mitigation of the proposed penalties to near de minimus levels. *D&F Attorney: Jim O'Brien*

■ **SLEEP APNEA DISQUALIFICATION** A carrier confronted with a physician's statement that a driver was physically qualified notwithstanding suf-

FEATURE:

AUTOMOTIVE BANKRUPTCY AND TRUCKING COMPANIES — THE EMERGING PATTERN

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FEATURE ARTICLE

Automotive Bankruptcy and Trucking Companies – The Emerging Pattern

By John Bryant

With a month gone by in the Chrysler bankruptcy and a GM bankruptcy possibly in process, trucking companies serving GM and Chrysler need to stay current on how to deal with these restructurings.

After initial uncertainty, the Chrysler proceeding has been well organized and holds the promise of allowing many carriers to avoid losses that normally apply to creditors in a bankruptcy. Given the heavy governmental involvement in both situations, procedures for GM may well follow a similar model.

The Chrysler bankruptcy filing on April 30 began with the Bankruptcy Court issuing many so-called "First Day" orders including an "Essential Supplier" order and a "Lienholder" order. Both orders provided a basis for Chrysler to make payments of amounts owing to carriers as of April 30 if those carriers were found to be qualified Essential Suppliers or qualifying Lienholders. The Court also issued an order confirming that Chrysler was authorized to make payments for services provided after the April 30 bankruptcy filing date.

In mid-May, Chrysler began issuing notices that agreements with certain carriers had been selected to be "assumed" for continuing operations by both Chrysler and the proposed purchaser of the Chrysler assets (presumably, the Fiat group) after the proposed transfer of those assets in mid-June. The notices also indicated that as a part of the assumption of these agreements, the amounts owing to the selected carriers as of the bankruptcy date would be paid to "cure" Chrysler's breach of its obligations under those agreements.

Each carrier whose contract was selected to be assumed and cured was listed on an annex to the notice along with the specific cure amount. If the carrier disagreed with the amount or the proposed assumption, it was required to file objections with the Bankruptcy Court within ten days.

The assumption notices stated that the cure amount would be paid ten days following the closing date of the proposed asset transfer. Certain carriers, however, also received separate notices from Chrysler proposing additional arrangements. These notices indicated that Chrysler itself would begin paying a portion of the total cure payment to the carrier immediately if the carrier agreed to the arrangements proposed by Chrysler.

Many carriers have been successful in negotiating with Chrysler to correct errors in the cure amounts or to have themselves added to the cure lists. When carriers file objections in the Bankruptcy Court to cure details, Chrysler's attorneys ask the carriers to work directly with their Chrysler contacts. Some negotiations have been informal, without the filing of objections, although such informal agreements would not be enforceable if challenged at a later point in the bankruptcy proceeding.

If the Chrysler bankruptcy is any indication, the most important factor for carriers in these reorganization proceedings is their relationship with their customer. Chrysler (and presumably GM) is under no obligation to treat any carrier as an Essential Supplier.

The consequence of being left out of the Essential Supplier group probably will be complete non-payment of any amounts owed to the carrier as of the date of bankruptcy. Carriers who are concerned about these issues should be talking with all of their Chrysler and GM contacts to do whatever is necessary to make sure that their names are taken into account in deciding who should be designated as Essential Suppliers.

The Dean & Fulkerson Transportation Law Group is maintaining an archive of the various Bankruptcy Court orders if affected parties need additional information. To be included on our distribution list of more frequent updates on these developments, please call or email any Transportation Group attorney.

ROAD REPORT

unsecured pallet holding that the defendant, acting as a property broker, was not a carrier and, therefore, not subject to the standards arising under the Federal Motor Carrier Safety Regulations.

Camp v TNT Logistics (7th Cir 2009)

■ **ANTI-IDLING FINE CHALLENGE NOT RIPE.** A carrier's pre-trial challenge that a possible $32,000 in fines under Massachusetts' Anti-Idling statute violated the 8th Amendment prohibition on "excessive fines" was dismissed as being premature where specific fines had yet to be assessed against the carrier.

U.S. v Paul Revere Transportation (DC ED Mass 2009)

ON THE DOCK

fering from untreated sleep apnea enlisted D&F's aid in supporting the carrier's independent assessment of the driver's condition, and the driver's ultimate disqualification, through proper application of the FMCSRs. *D&F Attorney: Ian Hunter*

■ **LOADER'S CLAIM DEFEATED –** D&F successfully defended a rail carrier against claims of a non-employee injured while loading a rail car when it convinced the court that the injured plaintiff failed to produce evidence supporting a conclusion that it was more likely than not that the chock over which plaintiff tripped was under the control of the rail carrier as opposed to the loading company employing plaintiff.

D&F Attorney: Jerry Swift

■ **CONTRACT SUPPORTS RETALIATION CLAIM REMOVAL –** D&F attorneys relied on their carrier client's labor contract as the source of federal jurisdiction in the successful removal of a driver's worker comp retaliation claim from a state court to a more favorable U.S. Federal District Court.

D&F Attorneys: Ken Zatkoff & Ian Hunter