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

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ROAD REPORT

■ **$1 MILLION DRIVER CLAIM REVERSED** The Sixth Circuit Court of Appeals has reversed a jury verdict in favor of a driver of a D&F client who claimed he was not fairly represented in the labor contract grievance process. Based on briefs and argument by D&F attorneys Bob Mercado and Pat Morrow, the appeals court ruled that the employee needed to show that his union representative acted "wholly irrationally" in order to justify setting aside the results of the grievance process. The driver received nothing and faces payment of $70,000 in court costs to the employer.

Garrison v Cassens Transport, Sixth Circuit, 2003

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■ **YELLOW, SCHNEIDER, WIN AGAIN** The Michigan Court of Appeals has rejected contentions that Yellow Transportation and Schneider National can be barred from recoveries of back Michigan registration fees because of issues which were not before the United States Supreme Court in the recent case of *Yellow* v *Michigan*. D&F attorney John Bryant continues to represent Yellow and Schneider in these cases.

Yellow Transportation v Michigan; Schneider National v Michigan, Michigan Court of Appeals, 2003

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■ **FULL VALUE STILL REQUIRED** The 11th Circuit has disagreed with other circuits and held that common carriers are still required to offer shippers the option of requesting "full value" protection from loss or damage to goods. Carriers can still limit their li-

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ON THE DOCK

■ **NATIONAL LABOR AGREEMENT** Unionized employees of the 18 members of the National Automobile Transporters Labor Division recently ratified a five year labor agreement negotiated on their behalf by D&F. The agreement provides the carriers with a two year wage freeze, enhanced ability to recall employees, and relaxation of weekend work restrictions. All remaining unionized vehicle haulers also signed the same agreement following its negotiation by D&F.
D&F Attorneys: Bob Mercado, Ken Zatkoff

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■ **OVERTIME EXEMPTION** Two D&F clients have been able to change their pay structures by eliminating driver overtime pay following a D&F audit of their operations. In both instances, D&F concluded that the companies were exempt from the normal overtime requirements of the Fair Labor Standards Act because drivers were subject to being indiscriminately assigned to interstate moves during the course of an operating week. One client eliminated overtime pay entirely; the other restructured into overtime and non-overtime divisions.

D&F Attorney: Ian Hunter

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■ **CANADIAN TRASH HAULS** D&F is defending contract waste haulers and the City of Toronto from the numerous legal challenges by local and state officials to movements of municipal waste from Canada to Michigan landfills. D&F has successfully defended customs penalty proceedings involving trucks triggering low-level radioactivity meters at border crossings and a federal judge has enjoined enforcement of a Wayne County ordinance that would have effectively terminated the entire program.

D&F Attorneys: Neill Riddell, Jim O'Brien, John Bryant

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■ **TIDA PRESENTATION** D&F attorney Jerry Swift and D&F paralegal Rhonda Buterakos were participants in a recent three day seminar on truck accident litigation for

FEATURE ARTICLE

Lease Review — Now's the Time

By Neill Riddell

The Lease. You've seen it. We all have. You may even have one, or one of its inumerable variations, in your desk drawer right now.

Likely drafted sometime in Reagan's first term, the identity of its author is one of history's mysteries. Years of copying and re-recopying have resulted in a document whose print is now fuzzy, running across the page in a sort of cockeyed manner.

But, it is *The Lease*. The *standard* owner-operator contract.

And for many years it worked just fine. One of the reasons for this, of course, is that little attention was paid to *The Lease*. Sure, there were ICC regulations which talked about what the document should and should not contain. There was infrequent regulatory review, however, and even less actual enforcement, whether with respect to the content of *The Lease* or actual compliance with its provisions.

Things started to change in 1996. The ICC, along with its *laissez faire* approach to the leasing regulations, was legislated out of its role in the industry, replaced by the FHWA and then the FMCSA. It was not the transfer of responsibility that worked the most notable change relative to *The Lease*, however. Rather, it was the inclusion of a provision in the ICC Termination Act establishing a private cause of action for persons alleging injury arising from a carrier's alleged failure to comply with the Act and its implementing rules.

Since that time motor carriers have seen the growth of a cottage industry built on class action law suits on behalf of owner-operators against carriers alleged either to have used leases failing to meet the requirements of the so-called *Truth-In-Leasing* regulations or to have failed to have conducted the carrier/owner-operator relationship in a manner consistent with lease provisions facially complying with the regulations.

To date, such actions have targeted larger carriers, such as Swift, Prime, Heartland Express, Mayflower and, most recently, Allied. The reason for this is obvious. Litigation with these carriers is more likely to generate the "pot" attractive to class-action plaintiff counsel.

It would be ill advised, however, to find comfort in the notion that smaller carriers are not being currently targeted. As larger targets dwindle, targets of secondary opportunity are sure to come to the forefront.

Although "victories" are being reported by some carrier parties, as well as by owner-operator interests, it is important to note that these tend not to be total victories. Instead, they more often than not relate to procedural issues, such as statutes of limitation, failure to exhaust arbitration procedures, and like, rather than the more substantive issues raised in litigation. More important is the fact that the underlying, fundamental exposure of carriers to the private actions of owner-operators is now well recognized.

The bulk of the lease-related litigation currently revolves around "escrows" and owner-operator "charge-backs." The leasing regulations cover a wider range of issues, however, and any one of them could serve as a possible litigation trap.

Because of this, it is advisable for all carriers now leasing equipment and drivers to undertake a review of their lease documents and practices. It may very well be time to update, or maybe even replace, *The Lease*.

ROAD REPORT

ability through specific contracts with shippers.

Sassy Doll Creations v Watkins Motor Lines, 11th Circuit, 2003

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■ **BREAD TRAYS NIX OVERTIME** A federal court has ruled that the entire driver fleet of a Chicago area baked goods distributor had no right to be paid overtime under the federal Fair Labor Standards Act because the drivers pick up empty bread trays which eventually are moved out of state for cleaning, even though the drivers themselves never leave Illinois.

Jones v Centurion, E.D. Illinois, 2003

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■ **BREAKAWAY AGENT CAN'T COMPETE** When a trucking company commission agent terminated his agency and started his own business handling the same freight, a federal court barred the new operation because the agent falsely stated that his relationship with the company was continuing. The court stated, however, that the company's rates, driver names, and shipper lists were not protected trade secrets because the company had taken no precautions to keep that information confidential.

Hoover Transportation v Frye, Sixth Circuit, 2003

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■ **CARRIER REPORTS ENDING?** USDOT has opened a proceeding to consider whether to exempt all motor carriers from the currently required filings of financial reports. DOT has made no use of the reports since 1980.

USDOT Docket No. OST-2003-15794

ON THE DOCK

members of the Trucking Industry Defense Association. TIDA is considered the trucking industry's premier truck accident defense group and its seminar is well attended by representatives of national trucking companies, insurance and claims professionals, third party administrators, and attorneys specializing in truck accident and insurance issues.

D&F Attorney: Jerry Swift

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■ **LEASED DRIVER CLAIM REJECTED** The EEOC closed its file on an employment termination discrimination claim against a D&F client by a driver obtained from a driver leasing company. EEOC stated that it was unable to conclude that there was a violation of statute following receipt of a D&F position statement denying the existence of any employment relationship.

D&F Attorney: Neill Riddell

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■ **HAZMAT ISSUES** Requirements for hazardous materials security plans continue to be refined, and deadlines for employee background checks are constantly being revised. D&F is monitoring the changes and assisting several clients in keeping up with new security developments.

D&F Attorney: Jim O'Brien

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■ **FREIGHT BILL FACTORING** A small D&F client recently sought D&F's help in escaping from a factoring agreement in which the factor made no effort to pursue slow-pay accounts and then used lack of payment as a reason for withholding payments on good accounts. D&F arranged for cancellation of the factoring agreement.

D&F Attorney: John Bryant