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

ROAD REPORT

■ **WHO'S THE BOSS?** A Court has held that a driver leasing arrangement did not give rise to "joint employer" status for a trucking company under ERISA's multi-employer withdrawal liability rules where the Union's contract was with the driver leasing company, not the trucking company.

Transpersonnel v. Roadway Express (7th Cir 2005)

■ **MIND YOUR OWN BUSINESS** Resolving disputed application of the *Fair Labor Standards Act* motor carrier exemption in a driver overtime claim, the court refused to accord deference to an informal U.S. Department of Labor opinion letter, holding, in part, that the Department of Transportation, not the Department of Labor, had the authority to interpret the *Federal Motor Carrier Act*.

Packard v. Pittsburgh Transportation (3rd Cir 2005)

■ **ALL IN THE TIMING** The 9th Circuit became the second circuit (see *New Prime*, 8th Circuit) to bar owner-operators from filing damage suits against carriers arising out of equipment leases executed prior to the ICCTA's Truth-In-Leasing provision's January 1, 1996 effective date.

Rivas v. Rail Delivery Service (9th Cir 2005)

■ **SOMETHING TOO LOOSE?** When a truck's tire came off causing a fatal accident, the court refused to impute negligence to the trucker as "*negligence per se*" because the *Federal Motor Carrier Safety Rules* stating that wheel nuts and bolts must not be

ON THE DOCK

■ **NO DAMAGE LIABILITY** D&F obtained a ruling from a United States District Judge that a heavy machinery rigger that had located a trucking company to haul machinery purchased by its customer was not responsible for damage in transit to the machinery because Michigan law does not recognize claims for negligent hiring of independent contractors such as truckers. The court also ruled that the rigger was not a freight forwarder subject to liability for damage under the Carmack Amendment.

D&F Attorney: Jerry Swift

■ **LOAD SECUREMENT** D&F recently assisted a D&F trucking client in resolving a local ordinance officer's misunderstanding of load securement rules, amicably bringing an apparent end to several months of increasingly aggressive enforcement activity.

D&F Attorney: Neill Riddell

■ **FREIGHT COLLECTION** When faced with two "slow-pay" shippers with significant unpaid freight charge balances, D&F filed suit immediately, asserting gross charge and penalty add-ons in the carrier's tariff. Results: (1) payment in full with attorney fees and (2) payment in full less offset for released value freight claim.

D&F Attorney: John Bryant

■ **HAZ-MAT LICENSING** D&F has recently completed a program of multi-state hazardous materials transportation licensing for a major transporter of hazardous materials and hazardous wastes.

D&F Attorney: Jim O'Brien

FEATURE:

FAST LANES ACROSS THE BORDER — WINDFALL OR MINEFIELD?

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FEATURE ARTICLE

FAST Lanes Across the Border – Windfall or Minefield?

By John Bryant

Following years of statutory enactments, action plans, and border modernization conferences, the era of electronically controlled border crossing for goods moving between Canada and the United States finally has arrived.

As of May, 2005, systems for required electronic pre-notification of inbound truck shipments from Canada to the U.S. were in place at all U.S.-Canada border crossings.

Carriers willing to invest time and resources in these systems will obtain major benefits. There are major risks for these carriers, however, if operating plans go wrong.

A system known as PAPS (Pre-Arrival Processing System) is the current fallback system for carriers crossing the border on a low volume basis. PAPS essentially uses a carrier's ties to customs brokers to create the required electronic pre-notification to the U.S. Bureau of Customs and Border Protection (CBP).

To participate in PAPS, the carrier provides CBP and customs brokers with its SCAC code and prepares bar code labels which contain the SCAC code and a pro number or entry number to be used for individual shipments.

On individual shipments, a manifest is prepared at the point of pickup and faxed to the customs broker. The transmittal includes information on the border crossing that the carrier will be using and the expected time of arrival. The customs broker then transmits this information electronically to CBP. The electronic transmittal must occur at least one hour before the carrier arrives at the border crossing.

For ongoing operations, the system providing the most expedited border crossing option is FAST (Free and Secure Trade System). The FAST system offers expedited clearance at most border crossings and requires only a 30 minute advance notification of an impending shipment. While the carrier continues to carry paper documents to the border and make fax transfers to customs brokers as in the PAPS system, expedited clearance is possible because under FAST the carrier's drivers and customers are also pre-screened.

In order for shipments to qualify for FAST treatment, carriers, shippers, and drivers all must be pre-certified. For carriers and shippers, the pre-certification process consists of receiving approval of an application to participate in the Customs Trade Partnership Against Terrorism (C-TPAT) program. Both C-TPAT carriers and C-TPAT shippers are required to file detailed security plans describing their supply chain facilities and business activities in connection with these applications.

For drivers, the FAST program is administered jointly by U.S. and Canadian customs and immigration authorities. In order to be issued a FAST certification, a driver is required to complete the certification process in both countries. Driver applicants are subject to background checks and are reviewed, photographed, and eventually issued a FAST commercial driver card.

Benefits for fully certificated FAST carriers are significant. Operating through FAST lanes creates considerable time savings. FAST participants also receive more expedited treatment in the custom penalty process.

Significantly greater benefit, however, comes from being one of the relatively small number of carriers which has gone to the effort of obtaining FAST status and hiring FAST-qualified drivers. Substantial portions of traffic moving between Canada and the U.S. are becoming limited to carriers and drivers holding FAST-approved status.

FAST carriers, however, also face substantial risks of having their FAST status revoked for violations which might not cause problems in a normal operating situation. A prime example is illegal drug activity by FAST carrier drivers. Having drivers apprehended for drug offenses at the border may trigger a suspension of FAST privileges.

For carriers which have made substantial equipment investments based on movements for FAST-qualified shippers, suspension of FAST privileges can be disastrous. A substantial investigation may be required before FAST privileges are restored. CPB officials charged with monitoring the FAST program may fly-spec the carrier's security plan and require implementation of special security measures.

Present and potential FAST carriers should be forewarned. While FAST presents many operating and financial benefits, FAST operations must be controlled more strictly than normal operations. The down-side risk to a carrier's business from a serious FAST violation is far too great to do otherwise.

ROAD REPORT

"loose" were, themselves, too loosely drafted. *Omega Contracting v. Torres* (Texas Court of Appeals 2005)

■ **NO FREE RIDES ON MCS-90** Two courts and the FMCSA continue to try to beat back arguments that non-insured parties can become insured by claiming the benefit of federally required MCS-90 endorsements on carrier insurance policies. FMCSA has issued "guidelines" stating that language in the MCS-90 form cannot be read to extend coverage to carriers or vehicles not covered by the carrier insurance policy itself. Texas courts have held that MCS-90 forms do not create additional coverage once the policy itself has paid off to its limits and that MCS-90 does not give excess insurers the right to sue primary insurers for failure to settle. FMCSA - 2005 - 22470

Minter v. Great American; Travelers Indemnity v. Western American (5th Cir 2005)

ON THE DOCK

■ **WITHDRAWAL LIABILITY PLANNING** A D&F client facing a possible loss of a significant customer in one of its operating areas has engaged D&F for advice on possible structuring of workforce reductions or evaluation of possible business aquisitions as alternatives to triggering partial withdrawal liability under a multi-employer pension plan.

D&F Attorney: Janet Lanyon

■ **NO-FAULT INSURANCE QUALIFICATION** D&F currently is evaluating options under Michigan's no fault insurance law for allowing an out-of-state motor carrier to qualify for self-insured status. Nominally self-insured carriers can encounter problems under the Michigan statute if they do not carry no-fault insurance coverage with an approved insurer.

D&F Attorneys: John Bryant, Jerry Swift