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

ROAD REPORT

(INDUSTRY LEGAL NEWS)

■ **CARRIER PROFITS NOT ILLEGAL** An owner-operator challenge to carrier profits on flat-fee, lease charge-back items was rejected as failing to establish a violation under the federal "Truth-In-Leasing" regulations. Noting from the rule's history that the ICC had initially considered but then failed to address carrier markups in its final rules, the court concluded that the scope of the relevant inquiry is whether the charge-back is "clearly stated," not whether charge-back produces a profit for the carrier.

OIDA v Landstar, 11th Cir 2010

■ **LOCAL DRIVERS' OVERTIME CLAIMS GROUNDED** FLSA overtime claims of shuttle drivers providing airline passengers transportation to and from air terminals were dismissed based upon the Motor Carrier Act exemption. Even though there was no showing that the Secretary of Transportation had exercised any authority to regulate the drivers' qualifications and hours of service, the Motor Carrier exemption was triggered upon finding that shuttle passengers were flying to or from places outside of the state under vouchers for ground service provided by airline booking agencies.

Abel v Southern Shuttle Svcs, 11th Cir 2010

■ **FMCSA COMPLIANCE REVIEWS NOT HEARSAY.** In a

PROPERTY BROKERS — RISKS AND REWARDS

Page Two

ON THE DOCK

(CURRENT D&F PROJECTS)

■ **D&F PROGRAM IN DEMAND** Well over 100 people registered for D&F's December Transportation Seminar. Joining D&F's John Bryant (hours of service and related matters) and Jim O'Brien (insurance/liability coverage) for this year's program are Matthew Fabry, FMCSA Federal Programs Manager (CSA 2010), Stuart Sutton from Sylectus, a division of GPSNet Technologies (carrier markets), and Debbie Dent from Border Connect (cross-border operators). If you missed announcement of this year's program, secure your spot for future programs with an email to transportationlaw@DFLaw.com.

■ **AMBASSADOR BRIDGE RAMP LITIGATION** D&F has become involved in the extensive litigation concerning disputes between the State of Michigan, the Ambassador Bridge, and related parties. On behalf of three trucking companies, D&F has filed suit against representatives of the MDOT to compel the State to open three ramps off I-75 which provide for direct access from the freeway onto the bridge. The State has kept the ramps closed because of a dispute between the State and the bridge ownership over other issues. The trucking companies contend that the bridge ramps were constructed with public funds and should not be held hostage to the State's disputes with the bridge owners over other portions of bridge operations.

D&F Attorney: John Bryant

■ **ORDINANCE OFFICER'S AUTHORITY CHALLENGED** D&F challenged the authority of City of Detroit ordinance officers to write truck overweight tickets under the state Motor

PROPERTY BROKERS — RISKS AND REWARDS

By John Bryant

Many trucking companies are setting up property broker operations to handle excess freight or reduce operating costs and risks. Is this worthwhile? Do property brokers really avoid the financial risks that face trucking companies?

While recent court cases suggest that being a property broker is not risk free, there still may be good reasons for trucking companies to either establish property broker operations or provide similar services under their existing trucking licenses.

Licenses. True property brokers hold licenses issued by the Federal Motor Carrier Safety Administration (“FMCSA”). Their legal definition is as persons who “arrange the transportation of property by an authorized motor carrier.”

Obtaining a property broker license is very simple. The major hurdle is arranging the \$10,000 surety bond that must be filed with the FMCSA. Practically speaking, this entails making a \$10,000 cash payment to a bonding company which is unlikely to be returned for many years.

Agreements. Property brokers largely are governed by the agreements they enter

into with shippers and carriers. Broker-shipper agreements cover pricing arrangements, the extent to which the broker assumes responsibility for loss or damage to the shipper’s goods, and the extent to which the broker will indemnify the shipper from any accident lawsuits that arise from the transportation arranged by the broker.

Broker-carrier agreements cover the price that the carrier will charge the broker for the actual trucking service, require proof that the carrier has its trucking license, and may contain prohibitions against re-brokering or back solicitation.

Many broker-shipper or broker-carrier arrangements are one-time situations often established by internet or fax documentation. It is very important that any broker have pre-packaged agreements that it can easily send to a shipper or trucking company to cover a particular load brokered on short notice.

Risks. Compared to trucking companies, property brokers have almost no exposure to risks involving loss of trucking equipment, compliance with trucking regulations, or employer-driver relationships. Brokers also have no automatic statutory liability for cargo losses. In many instances, however,

shippers are not willing to deal with brokers unless the brokers assume cargo responsibility.

For many years it has been assumed that property brokers have no risk of liability when the trucking companies hired by these brokers have an injury accident. This assumption has been called into question by a number of recent cases.

Some cases hold a broker liable because the broker allegedly should have known that the trucking company had a bad safety record. Other cases have found brokers liable for truck accidents when the broker exercised direct control over the trucking company’s driver or took other steps that made it a joint participant with the trucking company in controlling the operations of the truck.

The best solution to liability risks for brokers is to maintain adequate insurance. Ordinary trucking insurance, however, may not cover a broker because the broker does not own or control the equipment. So-called commercial general liability coverage may protect brokers as long as they have been forthright with their insurer and advised that they are involved in truck brokerage.

ROAD REPORT

(CONTINUED)

Surface Transportation Act action for retaliatory discharge of a driver refusing to exceed hours of service, earlier FMCSA compliance reviews and reports were deemed properly admitted under the “public records” hearsay exception on the issue of the carrier-employer’s knowledge of a pre-termination history of hours of service violations.

R&B Trans. v US DOL, 1st Cir 2010

■ COGSA LIABILITY LIMITATION EXTENDED TO MOTOR CARRIER

The Carriage of Goods by Sea Act’s \$500 per-package limitation extended to a motor carrier damaging a printing press on the last leg of Germany-to-Indiana intermodal movement. The issuance of a through bill of lading in Germany, and a “Himalaya Clause” extending COGSA defenses and limitations to all agents and subcontractors, operated to defeat the claim that Carmack Amendment liability applied to the motor carrier portion of the movement.

Royal & Sun Alliance v Ocean World Line, 2nd Cir 2010

ON THE DOCK

(CONTINUED)

Vehicle Code. Successfully convincing the 36th District Court that local ordinance officers are excluded from the limited class of persons authorized to enforce the state statute, overweight charges were dismissed.

D&F Attorney: Neill Riddell

■ **RICO CLAIM DISMISSED** D&F attorneys again successfully obtained summary judgment resulting in dismissal of RICO claims asserted against a motor carrier for purported improper worker compensation claims handling procedures. Following remand from the 6th Circuit Court of Appeals, the court accepted D&F’s arguments that the type of damages sought by driver interests did not meet RICO’s “injury to business or property” standards and that RICO could not be used to bypass the exclusive procedures and remedies provisions of the Michigan Workers’ Disability Compensation Act.

D&F Attorneys: Janet Lanyon, Jerry Swift

Alternative. Trucking companies may wish to take advantage of an exemption in FMCSA rules that allows authorized motor carriers to arrange transportation via other motor carriers. All that is required is that the trucking company accept the shipment on its own bill of lading. No separate license or \$10,000 bond is required. The trucking company, however, has the same liability for cargo loss as would be the case if it transported the load with its own equipment. With proper documentation, however, the trucking company has no greater accident liability risk than a property broker.

Being a property broker can be a highly profitable arrangement for a motor carrier with established shipper contacts and experience in dealing with other motor carriers. It is very important, however, to be certain that correct documentation and insurance provide protection from the financial risks that are involved.

The information contained in this newsletter is not intended to be legal advice. Readers should not act or rely on this information without consulting an attorney.