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

ROAD REPORT

■ **NEW CDL RULE FIGHT** The Teamsters have continued to challenge new CDL rules which for the first time could revoke a CDL for a driver's *off-duty traffic violations in non-commercial vehicles.* The Teamsters specifically target the rules' drug/alcohol provisions as requiring CDL suspensions whether or not a state conviction results in suspension of non-CDL driving privileges. The rules were scheduled to take effect September 30.

FMCSA-2001-9709-96

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■ **NO DOCK WORKER OVERTIME** Dock workers'claims that they are entitled to FLSA overtime for loading and unloading trailers have been rejected by a federal court. Determining that activities as "loaders" involved some judgment and discretion in matters affecting safety, the court found the employees subject to the authority of the Secretary of Transportation and exempt from FLSA coverage.

Vaughn v Watkins Motor Lines, 6th Circuit, 2002

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■ **HAZMAT SECURITY** In the aftermath of 9/11, USDOT has published an Advanced Notice of Proposed Rulemaking seeking comments on requirements and procedures to enhance safety of hazmat shipments. DOT ideas: *itineraries, armed escorts, two-driver teams.* D&F is advising a number of clients on comments to the proposed rules. Public comment is accepted through October 15, 2002; another round likely will follow.

FMCSA-02-11650 (HM-232A)

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FEATURE:
When Drivers Skip, Are Carriers Left Holding the Bag?
Page Two

ON THE DOCK

■ **SSRS CHALLENGE** The U.S. Supreme Court will begin its 2002 term with the oral argument on Yellow Transportation's challenge to Michigan's assessment of Single State Registration fees to carriers that are *fee-exempt under legislation passed by Congress in 1991.* D&F prepared the petition which led the Supreme Court to consider this issue, and has represented Yellow throughout its challenge to the Michigan registration fee policy.

D&F Contacts: John Bryant, Ian Hunter

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■ **INTERNATIONAL GRIEVANCE?** A D&F carrier client serving the Detroit area from a terminal in Windsor, Ontario using U.S. drivers received a grievance from a union local in Detroit claiming that the company's use of drivers from that terminal in the U.S. local's area violated the Teamsters National Master Freight Agreement. D&F is advising the carrier on options for dealing with this grievance and its ramification for continuing operations involving its Canadian-based drivers.

D&F Contact: Bob Mercado

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■ **CUSTOMS BONDING?** Apparent demands on U.S. Customs staff arising out of 9/11 have greatly slowed response time on certain types of bonded cargo handling applications. In a recent application filed by D&F for approval of a bonded container station operation, approximately *six months* was required before background investigations were completed and the operation approved.

D&F Contact: Neill Riddell

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■ **DEMURRAGE CLAIMS BARRED?** An ocean carrier recently sued a D&F manufacturing client for demurrage charges involving ocean containers delivered by the carrier to an inland assembly plant. The carrier waited more than two years to bring suit, apparently relying on the statute of

FEATURE ARTICLE

Michigan Supreme Court Nixes Employer's Liability for Disappearing Driver

A truck driver is involved in a motor vehicle accident while on the job. The other driver sues the truck driver and his employer, claiming the employer is liable because of the negligent acts of its employee. Even though the other driver clearly was at fault, the truck driver quits his job, refuses to make any court appearances and disappears.

Is it possible that the truck driver's non-cooperation could make the employer liable, even though the other driver clearly was at fault? Prior to a recent Michigan Supreme Court decision, *Rogers v J B Hunt Transport, Inc.* the answer was yes.

In that case, an employee driver had parked a tractor-trailer on the shoulder of I-96 in the early afternoon. The rig was completely off the traveled portion of the highway with the taillights on. An approaching car went onto the shoulder for approximately 75 feet colliding with the trailer, killing the driver of the car.

The lawsuit against J B Hunt and its driver (who no longer worked for J B Hunt), alleged the truck driver was negligent and J B Hunt was liable for its driver's negligence. Prior to trial, the former J B Hunt driver repeatedly failed to appear for his deposition. On Plaintiff's motion the trial court defaulted the driver and found he was negligent. Surprisingly, the court also concluded that because J B Hunt was liable for the negligent acts of its driver, *it was also prevented from contesting the negligence of its driver at trial*. The Michigan Court of Appeals upheld the trial court's ruling.

This holding was of concern because all employers are vulnerable to claims asserted against them based on the negligent acts of employees. The import of the lower court decision was that where an employee does not cooperate in defending a lawsuit, the employer may lose the ability to contest the employee's alleged negligence, even where the employer has no control over the employee. Under the lower court's ruling, when a default is entered against the employee, damages would have to be awarded against the employer, being reduced only to the extent the plaintiff was also negligent.

Fortunately, the Michigan Supreme Court eliminated this liability trap by holding that, while a default entered against an employee conclusively determines the employee's personal liability, it does not determine the liability of the employer. In other words, the employer can still defend by arguing the employee was not negligent. This should help employers (and defense attorneys) sleep a little better at night.

Even though reversed, the J B Hunt case underscores that it is imperative that a cooperative relationship be maintained with a driver employee throughout the course of accident litigation. This can be difficult if the employee has been terminated.

While an employer should not retain an employee who should otherwise be terminated, timing may be critical. If there is litigation pending, or likely, which could impose liability on the employer, the decision of when to terminate that employee should be reviewed carefully to determine whether termination might produce an undesired result in the litigation.

By Jerry Swift

ROAD REPORT

■ **LOGS – TOLL RECEIPT PENALTY** A Federal Appeals Court has sustained a FMCSA "conditional" rating of a carrier maintaining all toll receipts by month but unsorted by truck or driver. The Court rejected this approach to the required maintenance of records of duty status, although in the ordinary course of business, because the inability to match toll receipts to any particular driver's record of duty status *"does not comply with the spirit of the law and frustrates proper enforcement."*

Andrews Trucking v. FMCSA, D.C. Circuit. 2002

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■ **ENVIRONMENT TOPS PREEMPTION** A state environmental board order limiting the number of truck trips between a quarry and processing center using a federal highway is not superseded by federal preemption of state action affecting "prices, routes or services" of motor carriers because the order is a land use regulation having no *relationship to the regulation of competition.*

Omya v. State of Vermont, 2nd Circuit, 2002

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■ **THEFT NOT WAIVED** A shipper's knowledge at the time of tender that in order to use a carrier's service, the carrier would have to leave the second of two trailers unattended for a brief period in order to accomplish delivery of the first trailer, was insufficient to satisfy the carrier's burden of proving freedom from negligence in the shipper's action for loss following theft of the second trailer.

Union Pacific v. Greentree Transportation, 3rd Circuit, 2002

ON THE DOCK

limitations applicable to water carriers. D&F argued that the carrier's participation in the land portion of the transportation subjected it to the *18-month* federal time limit on freight charge collection suits by *motor carriers.* The case settled for a nominal amount.

D&F Contact: John Bryant

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■ **TRANSPORT REORGANIZATION** D&F is assisting a Canadian holding company in consolidating corporations and transferring properties to simplify a multi-corporate structure resulting from a series of separate motor carrier acquisitions. D&F is handling the U.S. portion of this effort, working closely with the client's Canadian counsel and accountants.

D&F Contact: Keith Aretha

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■ **"INTERSTATE" WEIGHTS?** D&F is defending a client that received an overweight ticket making a delivery on local roads within one mile of a limited access interstate highway. A state District Court Judge has agreed with D&F's argument that the carrier's right of *"reasonable access"* allowed it the higher legal weights applicable to operations on the interstate.

D&F Contact: Neill Riddell

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■ **UNLIMITED LIABILITY?** D&F has been reviewing a trucking client's contract with a major shipper that does not contain language limiting the carrier's liability for "consequential damages" for a delayed delivery. The shipper's contract, however, does not contain *express language excluding the parties from their normal statutory rights.* This gap allows the carrier to continue to assert limitations of liability contained in its internal tariffs, even though the service is performed "under contract".

D&F Contact: John Bryant