

IN TRANSIT



Transportation and Logistics Law Group

Contracts, Freight Claims, Rates and Regulation

John Bryant (248) 273-2162
Neill Riddell (248) 273-2189

Hazardous Materials/Environmental

Jim O'Brien (248) 273-2187

Labor and Employment

Read Cone (248) 273-2166
Ian Hunter (248) 273-2179
Bob Mercado (248) 362-1300
Neill Riddell (248) 273-2189
Ken Zatkoff (248) 273-2194

Minority Certification

Gary Graca (248) 273-2174

NAFTA/Cross Border

John Bryant (248) 273-2162
Neill Riddell (248) 273-2189

Overweight/Overdimension

Neill Riddell (248) 273-2189

Pensions/Benefits/Withdrawal

Ian Hunter (248) 273-2179

Real Estate

Gary Graca (248) 273-2174

Safety

Neill Riddell (248) 273-2189
Jerry Swift (248) 273-2191
John Bryant (248) 273-2162

Tax and Corporate

Keith Aretha (248) 273-2160

Trucking Accident Defense

Jerry Swift (248) 273-2191
Neill Riddell (248) 273-2189

Workers' Compensation Defense

Neill Riddell (248) 273-2189

801 West Big Beaver Road, Fifth Floor
Troy, Michigan 48084
(248) 362-1300 ♦ Fax (248) 362-1358
Web Site: www.DFLaw.com
Email: translaw@DFLaw.com

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

ROAD REPORT

■ **CONGRESS INTERVENES ON HOURS** Congress enacted a special statute imposing a one-year stay on the effect of a Court of Appeals decision that had ordered cancellation of the new federal hours of service rules. Revised rules are expected.

*Surface Transportation
Extension Act of 2004*
* * *

■ **NON-MICHIGAN SSRS CHALLENGE SUSTAINED** The Michigan Supreme Court and the U.S. Supreme Court have both refused to consider the state's appeal from a lower court decision requiring overhaul of Michigan's Single State Registration fees for non-Michigan carriers. D&F represents the challenging carriers in these cases.

*Yellow Transportation v Michigan, Schneider
National v Michigan, Michigan Supreme Court,
U.S. Supreme Court, 2004*
* * *

■ **MICHIGAN SSRS CHALLENGE STAYS ALIVE** The U.S. Supreme Court has asked the U.S. Solicitor General to comment on Michigan carrier challenges to the \$100 per vehicle fee charged to Michigan-based interstate carriers. The Michigan Court of Appeals and the Supreme Court had rejected this challenge.

*Westlake v Michigan; Troy Cab v
Michigan, U.S. Supreme Court, 2004*
* * *

■ **CARRIER CAN SUE ILLEGAL OPERATOR** A court refused to dismiss a complaint for damages filed by a properly licensed carrier against an illegally operating competitor which failed to register under the Motor Carrier Act and held that such a complaint is authorized under the *private right of action* provisions of the federal Motor Carrier Act.

Greyhound v Monroe Bus, D. D.C. 2004
* * *

■ **CRYING IN HIS BEER?** An overtime claim by a beer delivery driver operating ex-

ON THE DOCK

■ **TAX PLANNING – DRIVER PER DIEM** After a recent Tax Court decision barring carriers from deducting flat rate per diem payments to drivers, D&F attorneys are currently assessing improvements in client driver per diem practices. **Goal:** Set structure for permissible payments; eliminate per diem where not deductible.

D&F Attorneys: Keith Aretha, Ian Hunter
* * *

■ **CONDITIONAL RATING UPGRADE** A client facing a conditional safety rating, instead received a satisfactory when the FMCSA ruled favorably on D&F's Petition for Review. FMCSA withdrew its earlier determination that certain accidents, while technically "recordable," were in fact "preventable."

D&F Attorney: Neill Riddell
* * *

■ **COMP DOCTOR CHALLENGE** D&F attorneys derailed a driver's state court suit claiming that the company had destroyed his marriage by having the wrong doctor evaluate his workers comp claim. Finding language on doctor choice in the union contract, the case was removed to federal court with a motion to treat the claim only as a labor grievance.

*D&F Attorneys: Janet Lanyon,
Ken Zatkoff, John Bryant*
* * *

■ **HAZ WASTE MANIFESTS** D&F is working with a hazardous waste transporter defending EPA claims of manifesting violations on exports of hazardous waste to Canada.

D&F Attorney: Jim O'Brien

FEATURE:
Tariffs – Secret Weapon?

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SECRET WEAPON IN THE DRAWER? – THE MOTOR CARRIER TARIFF

By John Bryant

“Motor carrier tariffs? Weren’t they abolished?” “You don’t need to file them, so why bother?” “Would any judge pay any attention to one of those things?”

Well, not so fast. When Congress abolished the ICC, it only said that tariffs were not required to be filed. It did not say they were eliminated.

Congress in fact allowed carriers to rely on tariffs to limit their liability for freight damage, establish rates and rules, and avoid showing shippers their tariffs unless asked.

Any carrier that operates without a tariff is missing a great opportunity to protect itself in a dispute with a shipper.

TODAY’S TARIFFS – WHAT ARE THEY? Under 49 U.S.C. §13710, all motor carriers are required to have a written or electronic copy of the “rates, classifications, rules and practices” upon which any rate applicable to a shipment is based.

The standard bill of lading, which almost every shipper issues, also stipulates that the shipment is subject to the “rates, classifications and rules that have been established by the carrier”.

With the elimination of agency filing requirements, requirements for standard numbering, appearance and contents of tariffs have disappeared. The modern tariff usually is a series of paragraphs describing the rules that the carrier has decided to enforce on all of its shipments, coupled with a fall-back rate schedule.

WHO SEES A TARIFF? Whoever the carriers want to see it. Carriers are not required to make tariffs available to the public. Carrier are obligated to give shippers using their service a copy of the tariff on request. They are under no obligation, however, to even indicate that they have a tariff.

Many carriers choose to make their tariffs publicly available, often by putting them on their internet websites. The fact that the tariff is publicly available makes it more palatable for a judge to enforce. From a strictly legal standpoint, however, a tariff kept in a carrier’s desk drawer is just as enforceable.

CONTENT. The contents of a tariff will vary with the carrier. Specialized carriers have specialized tariff items. Almost all tariffs, however, have the same basic items in common:

■ **Limitation of Liability.** Federal law specifically allows carriers to limit their liability with tariff language. Carriers typically limit their liability to a specific dollar value per pound. Courts remain divided on whether carriers must keep a “full value” option available in their tariffs for a higher price.

■ **High Value Shipments.** Most tariffs also contain provisions requiring the shipper to state the value of the goods on the bill of lading and indicating that goods valued at higher than a stated amount will not be accepted for transportation.

■ **Consequential Damages.** Tariffs usually contain language stating that the carrier will not be liable for “incidental or con-

sequential damages”. Such language protects carriers from liability for unexpected factors such as plant closing costs.

■ **Payment Protection.** Carrier tariffs often contain language which enlarges the carrier’s right to withhold delivery and states that freight may be held to satisfy all outstanding unpaid claims.

■ **Late Payment Charges.** Most carrier tariffs assess charges for late payment. LTL carriers often use ‘loss of discount’ provisions which offer service to customers at percentage “discounts” but then cancel the discounts if freight charges are not paid on time. ICC and Surface Transportation Board rules limit such provisions.

■ **Detention.** Particularly with changes in hours of service rules, tariffs also should have provisions which charge shippers for unnecessary detention of equipment after specified “free time”.

ROAD REPORT

clusively in a single state was denied under the federal Fair Labor Standards Act’s “motor carrier exemption.” The Court found the beer was shipped in from out of state in a “practical continuity of movement” establishing the *interstate* character of the operation and triggering the overtime exemption.

Talton v I.H. Caffey Distributing, M.D. North Carolina 2004

■ **OWNER-OPERATORS CAN SUE** A carrier was unsuccessful in obtaining dismissal of claims brought by owner-operators attacking the method used to calculate lease payments. The Court ruled the owner-operators had the right to sue for alleged violations of the federal “Truth-In-Leasing” regulations under the Interstate Commerce Commission Termination Act’s “private action” provisions.

Owner-Operator Independent Drivers Assn v Bulkmatic, N.D. Illinois 2004

ON THE DOCK

■ **OVERWEIGHT AMENDMENT PROBLEM** D&F intervened in efforts to amend Michigan’s vehicle weight statutes to prevent an unintended ban on reduced fines. D&F pointed out that, as written, changes bolstering carrier protections on “misloads” produced a highly undesirable limitation on a court’s discretion to assess lower fines in non-misload situations.

*D&F Attorney: Neill Riddell
* * **

■ **OVERTIME CHANGES** Although recent changes to the overtime requirements of the Fair Labor Standards Act rules leave the “motor carrier exemption” largely intact, the impact of these significant changes on numerous categories of carrier employees other than drivers, loaders and mechanics, which have never been within the scope of the exemption, is currently the subject of extensive review on behalf of various D&F clients.

D&F Attorneys: Read Cone, Ian Hunter

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.