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A PUBLICATION OF BENESCH FRIEDLANDER COPLAN & ARONOFF LLP'S TRANSPORTATION AND LOGISTICS GROUP

Current Labor Organization Trends in Trucking

The Bureau of Labor Statistics' (BLS) just-released annual report on union membership in the U.S. workforce shows that for the first time in nearly 30 years, total union membership actually rose. The number of union members increased by more than 300,000 (133,000 in the private sector) and rose from 7.4% to 7.5% of the private sector workforce.

Union leaders hailed the increase, but, obviously, one year does not herald a trend. In fact, union membership has been in steady decline for decades, nowhere more so than in the transportation industry.

The 2007 BLS statistics have not yet been disaggregated by industry, but it appears that much of the increase is attributable to organizational gains in health care. Union membership in the transportation industry has been in marked declined, losing more than 150,000 workers in the past two years. The steepest decline has occurred in trucking and warehousing, where union membership percentages dropped by more than 50% between 1996 and 2006. The total number of organized truck drivers fell from 446,619 in 1996 to 182,020 in 2005, with a modest uptick to 194,128 in 2006.

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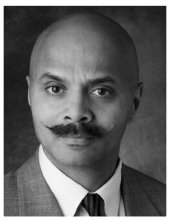
Peter N. Kirsanow Returns to Benesch



We are pleased to announce that our partner, Peter N. Kirsanow, has returned to the firm, where he will resume his practice in the Labor & Employment Practice Group with a subpractice in Transportation & Logistics. Peter has been in Washington, D.C., for the past two years serving on the five-member, President-appointed National Labor Relations Board. Peter has also been reappointed by President Bush to the U.S. Commission on Civil Rights, where he will serve his second six-year term. This is a part-time position.

Peter will once again focus his law practice upon representing management in employment-related litigation as well as in contract negotiations, NLRB proceedings, EEOC matters and arbitration. He will continue to testify before and advise members of the U.S. Congress on various employment laws and issues.

Peter formerly served as Senior Labor Counsel of Leaseway Transportation Corp. and Labor Counsel for the City of Cleveland. He has extensive experience in public sector employment matters as well as in industries such as trucking and employee leasing.

Peter is Past Chair of the Board of Directors of the Center for New Black Leadership, has been an adjunct professor at the Cleveland Marshall College of Law and testified before the Senate Judiciary Committee on the nominations of John Roberts and Samuel Alito to the Supreme Court. He is a valuable addition to our Transportation Group, with his industry background and his access and exposure to the corridors of power in Washington.

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Soon after Democrats gained a majority in Congress in November 2006, union leaders began a vigorous push for legislation aimed at combating the decline in union membership by easing and expediting union organization. The centerpiece of the effort was the Employer Free Choice Act (EFCA). EFCA would, among other things, amend the National Labor Relations Act so that a union could be certified as a collective bargaining representative upon presentation of valid authorization cards signed by a majority of employees in the bargaining unit. EFCA would eliminate the ability of employers to demand a National Labor Relations Board-conducted secret ballot election.

A cloture vote on EFCA failed last year, but it remains a priority for labor. This is particularly true in light of the NLRB's recent decision in *Dana Corp.*, 351 NLRB No. 28, 182 LRRM 1457 (2007), that provided a window period of 45 days for employees to file a decertification petition (or for a rival union to file an election petition) after receiving notice that an employer has voluntarily recognized a union. Many labor leaders maintain that *Dana* reduces the incentive for employers to voluntarily recognize unions pursuant to a card check. Therefore, it is nearly certain that EFCA will be reintroduced should a Democrat win the 2008 Presidential election, and its chances of passage are good.

EFCA's passage will be followed by an era of vigorous organizational activity, especially in the trucking industry, where unionized carriers have struggled over the last 15 years against non-union competition. Further augmenting the organizational activity would be another priority of labor—amendment of Section 2(11) of the National Labor Relations Act to significantly narrow the definition of a supervisor. The contemplated Amendment would eliminate "assign" and "responsibly direct" from Section 2(11)'s definition of a supervisor, reducing the probability that someone would be excluded from the bargaining unit by virtue of supervisory status and permitting unions to organize potentially millions of additional workers.

Should either EFCA or the Section 2(11) Amendments pass, employers in the trucking industry should expect strategic organizational efforts to be waged in certain sectors of the trucking industry, particularly dedicated operations and carriers that service Big Box stores, the employees of which may be the big prize in the organizational efforts.

The Section 2(11) Amendments are a direct response to the NLRB's decision in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), that expounded upon the definition of a supervisor under the National Labor Relations Act. *Oakwood* had been severely criticized by organized labor even prior to its issuance. Labor anticipated that the *Oakwood* decision would significantly expand the definition of a supervisor, thereby removing millions of employees from existing bargaining units and making it more difficult to organize other bargaining units. Indeed, some labor commentators predicted that as many as 15 million employees would be effected by the *Oakwood* decision. A complaint was even filed with the International Labor Organization maintaining that *Oakwood* violated principles of international law.

The dire predictions regarding *Oakwood* did not come to pass. Had *Oakwood* resulted in massive restructuring of existing bargaining units, at some point the NLRB should have seen a significant increase in unit clarification petitions with the Board. There has been no such phenomenon.

Nonetheless, the absence of consequences adverse to organized labor as the result of *Oakwood* has not impeded the push to pass the Amendments.

EFCA and the Section 2(11) Amendments are only two of a raft of legislative proposals that are likely to be introduced in a political climate favorable to organized labor. Should either EFCA or the Section 2(11) Amendments pass, employers in the trucking industry should expect strategic organizational efforts to be waged in certain sectors of the trucking industry, particularly dedicated operations and carriers that service Big Box stores, the employees of which may be the big prize in the organizational efforts.

For more information, please contact Peter Kirsanow at pkirsanow@bfca.com or (216) 363-4481.

Ignorance is *Not* Bliss: The Importance of Knowing What "Transportation" Really Is

In today's dynamic marketplace, an ever increasing number of businesses offer services that are "related to" interstate transportation to one extent or another. Moreover, transportation companies themselves offer a wide variety of ancillary services "related to"—but which they may believe are distinct from—the actual physical transportation they provide. These companies risk forfeiture of important rights and remedies if they are ignorant of the expansive definition of "transportation" under federal law. In particular, the broad, federal definition of "transportation" is crucial in two areas: (1) liability for freight claims and (2) liability for freight charges.

The bottom line is that any company that provides actual transportation services must keep in mind that its ancillary services may likewise constitute "transportation" even when those services do not necessarily involve the physical movement of freight.

49 U.S.C. § 13102(19) provides a very broad definition of "transportation":

> ***Transportation.—The term "transportation" includes—***
>
> (A) a motor vehicle, vessel, warehouse, wharf, pier, dock yard, property, facility, instrumentality or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and
>
> (B) ***services related to that movement***, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking and interchange of passenger and property.

[emphasis added] In other words, a party providing services "related to" an interstate movement of goods may be engaged in transportation even if that party is engaging in tasks other than the physical movement of goods.

Freight Claims

The disposition of a freight claim can vary dramatically depending on whether or not the allegedly bad actor was engaged in "transportation" under federal law. For instance, in addition to moving goods, a motor carrier might also store certain goods in a warehouse for a period of time. If the goods are damaged or lost while in storage, the motor carrier may nonetheless be able to assert that the damage or loss occurred during "transportation" since the definition of "transportation" quoted above includes "storage." Consequently, courts have consistently applied the Carmack Amendment to claims for recovery of goods being shipped interstate that were allegedly damaged during storage of the goods.

For instance, in *Margetson v. United Van Lines, Inc.*, 785 F.Supp. 917 (D.N.M. 1991), the Court found that claims against a warehouseman were preempted by federal law:

> ***This preemptive effect extends to damages allegedly occurring as a result of improper storage methods.*** The Carmack Amendment is to be broadly construed; … [t]he Court finds that Congress clearly intended to legislate limitations on liability with respect to services generally performed by a common carrier such as defendant, ***and not to limit the legislation to damage incurred while articles were actually being moved. Storage comes within the ambit of the legislation*** … Clearly, transportation is to be broadly construed and the drafters contemplated that transportation would extend to storage facilities.

Id. at 919-20 [emphasis added]; *see also PNH Corp. v. Hullquist Corp.*, 843 F.2d 586, 590-91 (1st Cir. 1988) ("[The defendant] … insists that … storage is not "transportation," … however, [the] broad definition of transportation … includes all of a motor carrier's services incident to carriage and delivery. ... Therefore, if [the defendant] is otherwise a motor carrier, its storage facilities are "transportation" within the meaning of the Act.") (citations omitted); *Great Northern Ins. Co. v. McCollister's Moving & Storage, Inc.*, 190 F.Supp.2d 91, 93 n.1 (D. Mass. 2001) ("The Carmack Amendment defines 'transportation' under 49 U.S.C. § 13102(19) to include warehouses and storage."); *S. R. Co. v. Reid*, 222 U.S. 424, 440 (1912) ("transportation means not only the physical instrumentalities, but all services in connection with receipt, delivery, and handling of property

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transported"); *Centraal Stikstof Verkoopkantoor, N.V. v. Alabama State Docks Dept.*, 415 F.2d 452, 456 (5th Cir. 1969) ("services rendered by a common carrier ***in connection with*** transportation of goods shall be covered by the Act"). [emphasis added]

In short, companies that have provided ancillary services, such as storage, that are "related to" interstate transportation should carefully consider whether or not they might successfully claim that they are engaged in "transportation" for purposes of responding to a freight claim. A successful argument along these lines can provide that party with strong defenses that would otherwise be unavailable (federal preemption, a shorter statute of limitation, etc.).

Freight Charges

Another area where the broad definition of "transportation" can be critical is in the area of freight charges. However, whereas the broad definition of "transportation" may benefit carriers in defending freight claims (and obviously burden shippers), the same definition may delay pursuit of payment for services rendered (and obviously benefit shippers). For instance, a carrier who claims that it has not been paid for providing "transportation" services must generally commence an action within 18 months of its claim accruing. Therefore, determining the scope of the services that actually constitute "transportation" services is an essential first step. As carriers provide more and more ancillary services, this task can become more and more complicated.

For example, in the recent Ninth Circuit case of *Emmert Industrial Corporation v. Artisan Associates, Inc.*, 497 F.3d 982, 2007 U.S. App. LEXIS 19180 (9th Cir. 2007), the party attempting to collect money for services rendered, Emmert Industrial Corporation ("Emmert"), did business as "an engineering and transportation" company. Emmert provided a range of services to its customers that were related to transportation of extremely heavy loads. These services included inspecting the goods, surveying port facilities, preparing pre-moving analyses and route surveys, assembling route plans and detecting strains on bridges that would be crossed. Emmert claimed that it was owed substantial sums by one of its customers, Artisan Associates, Inc. ("Artisan"). Artisan claimed that Emmert had waited too long to pursue recovery as more than 18 months had passed since the expenses were incurred. However, Emmert took the position that much of its bill related to services distinct from "transportation" and were, therefore, not barred by the statute of limitations.

However, the court once again looked at the broad definition of "transportation" contained in 49 U.S.C. § 13102(19) and concluded that all of the services Emmert provided were in fact "related to" transportation:

> Taking the evidence in the light most favorable to Emmert, each of the services for which it seeks reimbursement—engineering, research and operational costs—is directly related and incidental to the actual transportation of press components, and each was aimed at furthering that purpose. Although not every service directly involved the physical shipment of goods, each was undertaken specifically as a means toward that end. Given the expansive statutory definition of 'transportation' in 13102(23) we follow the broad construction our sister circuits have applied to similar definitions ....

Id. at *19. As a result, the court found that Emmert was barred from recovering payment for any of these allegedly distinct services. Emmert simply waited too long to commence its lawsuit.

The bottom line is that any company that provides actual transportation services must keep in mind that its ancillary services may likewise constitute "transportation" even when those services do not necessarily involve the physical movement of freight. A prudent carrier will rely upon the broad definition of "transportation" when defending claims for freight damage or loss that likely occurred while the carrier was performing an ancillary service. Likewise, a prudent shipper will rely upon the broad definition of "transportation" when defending claims for payment of ancillary services rendered.

For more information please contact Marc Blubaugh at mblubaugh@bfca.com or (614) 223-5382.

More on the Battle for the Hours of Service Rules

The Federal Motor Carrier Safety Administration (FMCSA) has adopted an Interim Final Rule (IFR) amending its Motor Carrier Safety Regulations to allow drivers of commercial motor vehicles up to 11 hours of driving time within a 14-hour non-extendable window from the start of the workday, following 10 consecutive hours off duty. In addition, under the IFR, drivers may restart calculation of the week's on-duty time limits after the driver has had at least 34 consecutive hours off duty. Although framed in terms of a new rule, the IFR, in effect, reestablished the same hours of service rules in effect before the DC Court of Appeals overturned some of the rules in July 2007.

According to FMCSA, the IFR is necessary to prevent disruption in hours of service enforcement compliance and negative effects in the timely delivery of essential goods and services.

According to FMCSA, the IFR is necessary to prevent disruption in hours of service enforcement compliance and negative effects in the timely delivery of essential goods and services. FMCSA was required to adopt the IFR to meet the December 27 deadline imposed by the DC Court of Appeals. In 2004, and again in 2007, the Court of Appeals overturned some of the hours of service rules because the rules were not properly adopted under the Administrative Procedure Act. The Court of Appeals gave FMCSA until December 27 to fix the problems. Otherwise, the rules in effect before 2004 would again become effective.

As part of its support for the IFR, FMCSA published scientific data demonstrating that motor carrier operations were safer under the 11-hour/14-hour limit and the 34-hour restart than operations under the old rules. FMCSA based its analysis on studies it completed after the new rules went into effect in 2004.

In addition to the research, FMCSA's support for the IFR includes affidavits and supporting documentation in support of the IFR filed by some of the large trucking companies.

As of the end of January 2008, approximately 3,000 comments have been filed. Based on a sample of January submissions, the motor carriers filing comments were very much in support of the new rules. Individual truck drivers, while preferring the new rules to the old ones, were not necessarily supportive of everything, particularly the new sleeper berth rule.

As FMCSA admits in its comments to the IFR, the scientific evidence supporting the new rules could not have been published before the new rules became effective and carriers had a chance to develop an operating history. As a practical matter, FMCSA could have had no data on fatigue-related accidents in the 11th hour of driving because the old rules did not permit the 11th hour of driving. Therefore, as opponents of the new rules have argued, FMCSA did not have a sound scientific basis supporting the new rules at the time they were adopted.

Notwithstanding the above, many of us who follow the trucking industry are hopeful that the DC Circuit will be satisfied that the IFR will provide safety benefits for drivers not available under the old rules and that the IFR will become final. As expected, *Public Citizen* is again taking its opposition to the new rules back to the DC Court of Appeals.

In the middle of the controversy over the DC Court of Appeals Decision on the hours of service rules and the IFR as discussed above, Dart Transit Company filed an application for exemption from the hours of service rules. The application was on behalf of 200 of Dart's owner operators who provide an over-the-road service requiring sleeper berths. Apparently, these drivers prefer the old rules to the extent they permitted a driver to continue to work after the 14th hour after coming on duty. In addition, the Dart drivers would prefer to be allowed to have two sleeper berth periods rather than the one required under the new rules. For the most part, the Dart proposal addresses rules included in the IFR that were not overturned by the DC Court of Appeals.

Under Section 4007 of the 1998 highway legislation (TEA-21), FMCSA is obligated to consider applications for exemptions from the Federal Motor Carrier Safety Regulations. Notice of the proposed exemption must appear in the Federal Register and the public must have the opportunity to comment. FMCSA is to grant the exemption if the exemption would likely achieve a level of safety equal to or better than the level achieved under the existing rule.

Dart's application for exemption is supported by scientific data developed by Dart following the effective date of the new rules. The Dart drivers found that the 14-hour rule and the new "one period" sleeper berth rule interfered with their ability to obtain good quality sleep.

Comments filed, including comments by the American Trucking Association, the Owner-Operators Independent Drivers Association and some individual drivers, were highly supportive of the exemption requested by Dart. However, FMCSA may not want to tinker with the new rules before they are final. Even then, if FMCSA wins its fight at the DC Court of Appeals, it may prefer to leave well enough alone for a while.

For more information please contact Bob Spira at rspira@bfca.com or (216) 363-4413.

Mandatory Training for Truck Drivers

FMCSA is proposing to revise the mandatory training requirements for entry-level operators of commercial motor vehicles who are required to have a commercial motor vehicle license (CDL). Persons applying for a CDL will be required to complete a minimum classroom and behind-the-wheel training session from an accredited institute or program.

The new requirement would not apply to drivers who currently have a CDL or who obtain a CDL before a date three years after a final rule goes into effect.

Under current FMCSA rules, a CDL driver is required to have 10 hours of training. Although details are preliminary, FMCSA contemplates a 120-hour requirement for a Class A CDL. A Class A CDL applicant would be required to have 76 hours of class room training and 44 hours behind the wheel. Class B/C applicants would be required to have 90 hours of training, 58 in the classroom and 32 behind the wheel.

FMCSA estimates 40,200 drivers would need training every year at a cost of $167.8 million per year. A crash reduction of 19.7% in the affected population (i.e., first year drivers who otherwise would not be trained) would result in benefits of $167.8 million annually. The reduction amounts to 19.1 and 507.2 fewer fatal and non-fatal crashes. FMCSA is confident that the training would reduce enough crashes to be cost effective.

Comments are due March 25, 2008.

For more information please contact Bob Spira at rspira@bfca.com or (216) 363-4413.

On the Horizon

Marc Blubaugh and **Eric Zalud** will be attending the **International Warehouse Logistics Association's Annual Convention & Exposition** in Indian Wells, CA, from March 9 – 11, 2008.

Bob Spira will be presenting *Litigation for Logistics* at the **Council of Supply Chain Management Professionals Cleveland Roundtable Monthly Meeting** in Cleveland, OH, on March 20, 2008.

Eric Zalud will be speaking on *Protecting the Assets of Transportation Companies* and *Learning About the Latest Legal Developments and How They Impact 3PL's* at the **Annual Conference of the Transportation Intermediaries Association** in Washington D.C., on April 12, 2008. **Bob Spira** and **Martha Payne** will also be attending this event.

Marc Blubaugh, Martha Payne and **Eric Zalud** will each be attending and speaking at the **Transportation & Logistics Council, Inc. and Transportation Loss Prevention and Security Administration 34th Annual Conference** in San Diego, CA, on April 21 and 22, 2008. Mr. Blubaugh will present *Cargo Claims – A Short Course*, Ms. Payne is Co-Chair of the Educational Program and will speak on *Transportation Contracts* and Mr. Zalud will be discussing *Freight Intermediary Issues Relating to Registration, Liability and Contracting*.

Eric Zalud will be inaugurated as President of the **Transportation Lawyers Association** at the group's Annual Conference, which will be held in Fort Lauderdale, FL, May 6 – 10, 2008. **Bob Spira** will be presenting *China: Transportation To, From and Within* at the conference. **Marc Blubaugh**, who is an Executive Committee Member of TLA, and **Martha Payne** will also be attending.

Frank Reed will be presenting *An Update on the Enforcement Initiatives of U.S. EPA and Ohio EPA and their Impact on Ohio Businesses* at the **Ohio State Bar Association Annual Convention** on May 15, 2008, in Columbus, OH.

David Neumann, Frank Reed and **Eric Zalud** will be attending the **National Tank Truck Carriers Annual Conference and Equipment Show** May 18 – 20, 2008, in New York, NY.

For further information and registration, please contact Lindsay Wise, Client Services Coordinator at lwise@bfca.com or (216) 363-4174.

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