MAKING TRACKS

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A Transportation and Logistics Law Firm

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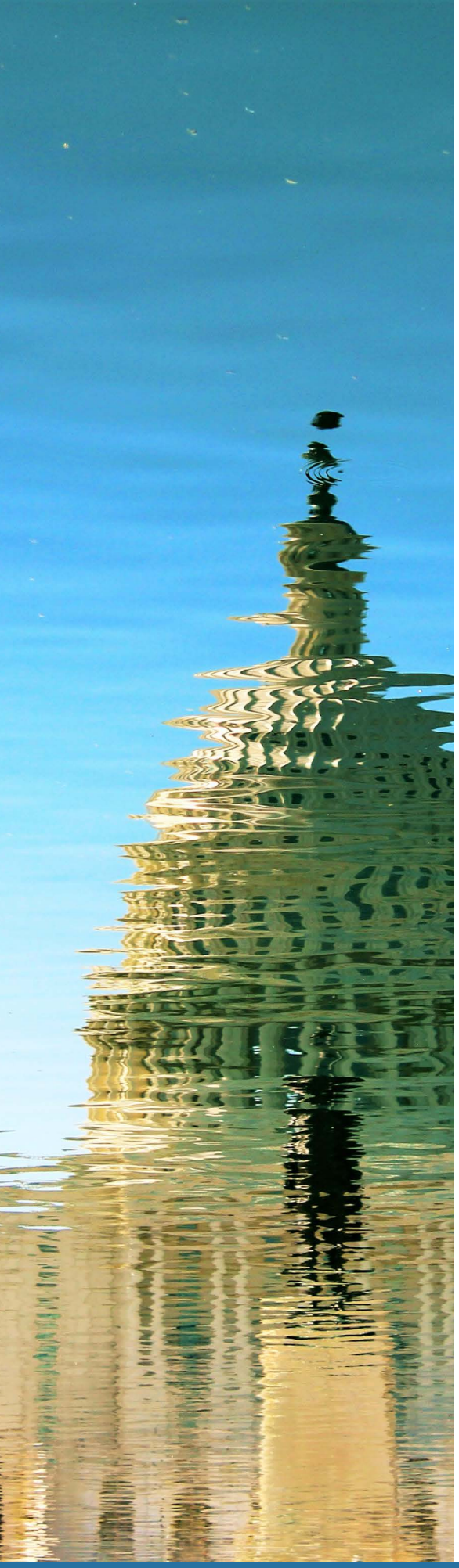
Moseley Marcinak Newsletter Contents

A Note From Rob Moseley

Welcome from Groundhog Day. Or at least it seems that way sometimes. What day is it? Tired of the people in your house? Interesting times. We have never seen anything like this. Will it lead to permanent change or will we get back to something close to normal? Like I said, interesting times. There are lots of opinions on the virus. Some want to make it political. Others are engaging in a scientific discussion. Humility demands we take a deep breath and remember that none of us know what the future holds. We may look back in history and think we should have done more social distancing, or we may look back and think Y2020K. But right now, no one knows. The modern transportation system lead us to a near pandemic. Think about it. If we couldn't travel to places like China, the virus would have stayed there. Along with the rapid movement of the virus, the modern internet gives us an insatiable craving for the newest, instant news and the need to instantly prove ourselves right. What we do know is that the economy is wrecked and that people have died. So let's sit out the social media ambushes and honor the leaders we have elected as they do their best to pull us through this. Let the unfolding of history inform us of the truth. I said interesting times.

Our prayers are with those of you who are mourning and in pain, for you living in and among mass transit and in the big cities, for those in nursing homes and assisted living, for the medically vulnerable and fearful. Our thanks go out to the medical personnel, and of course to THE TRUCKERS!

But what about you? You, as in YOU personally? The Coronavirus has been a time to recalibrate your life's priorities. When you can't do the same thing you have always done, it is a good time to evaluate why you do what you do. It's like a zero-based budget. Time to start rebuilding your life with things you intentionally put in there. So as you do that, you are starting from scratch. This is a great OPPORTUNITY for you. Yes, I said that right, an opportunity. Today is your chance to intentionally consider what you value and rebuild a life based on those priorities. What will you do with this opportunity?



Here's What You May Have Missed In Washington

BY FREDRIC MARCINAK AND
MEGAN M. EARLY-SOPPA

1. FMCSA Issues Notice of Proposed Rulemaking Concerning Drug and Alcohol "Push" Notifications

The Federal Motor Carrier Safety Administration (FMCSA) published a notice of proposed rulemaking (NPRM) on April 28, 2020 seeking to prohibit State Driver's Licensing Agencies (SDLAs) from issuing, renewing, upgrading, or transferring a commercial driver's license (CDL) or commercial learner's permit (CLP) for individuals prohibited from driving a commercial motor vehicle due to drug and alcohol program violations identified by the FMCSA's Clearinghouse.

The NPRM seeks to establish how, and when, SDLAs would access and use driver-specific information from the Clearinghouse to ensure that drivers who violate drug and alcohol rules stay off the road until they complete the DOT return-to-duty process set forth at 49 CFR Part 40, Subpart O. This rule change is intended to deal with the current information gap that exists where a driver can continue to hold a valid CDL while being prohibited from operating a CMV due to a drug or alcohol rule violation.

The most significant rule change proposed by the FMCSA would permit, but not require, SDLAs to receive "push" notifications from the Clearinghouse when a driver is prohibited from driving due to a drug or alcohol violation. The SDLA would also be notified when the driver has completed the return-to-duty process and is able to resume operating a commercial motor vehicle. This option provides States with maximum flexibility to determine how to use Clearinghouse information to enhance enforcement of the driving prohibition.

Following the publication of the NPRM, the FMCSA will accept public comment on the rule changes for 60 days. To leave a comment, you can visit regulations.gov and reference Docket Number FMCSA-2017-0330.

2. FMCSA Release Hours of Service Final Rule – Four Key Changes

On May 14, 2020, the FMCSA published the Hours of Service Final Rule. It has been over 2 years since the FMCSA first announced it would be updating the Hours of Service Rules.

The Final Rule features four key changes to existing Hours of Service requirements.

- The Agency will increase safety and flexibility for the 30-minute break rule by requiring a break after 8 hours of consecutive

driving and allowing the break to be satisfied by a driver using on-duty, not-driving status, rather than off-duty status.

- The Agency will modify the sleeper-berth exception to allow drivers to split their required 10 hours off duty into two periods: an 8/2 split, or a 7/3 split—with neither period counting against the driver's 14-hour driving window.
- The Agency will modify the adverse driving conditions exception by extending by two hours the maximum window during which driving is permitted.
- The Agency will change the short-haul exception available to certain commercial drivers by lengthening the driver's maximum on-duty period from 12 to 14 hours and extending the distance limit within which the driver may operate from 100 air miles to 150 air miles.

The new Hours of Service Rules will be implemented 120 days after the Final Rule is published in the Federal Register.

FMCSA estimates that the modernized HOS rules will provide nearly $274 million in annualized cost savings for the economy and American consumers. Transportation officials noted that these cost savings will be especially important considering the coronavirus pandemic's significant impact on the economy.

What does this mean for you? With key changes like these days away from going into effect, now is the time to start planning how your company will roll this out to your drivers. Safety meetings? Qualcomm alerts? It is important to consider all options and get creative to ensure compliance. It may also be necessary for you to revise your policy manuals and documents in orientation.

3. FMCSA to Make PINs Easier

The great news for those of us who have to write to the FMCSA every few years requesting a new PIN, the FMCSA announced that it is consolidating PIN's for USDOT, MC, and MX numbers into one USDOT PIN. It is the little things that make life easier! While the FMCSA would provide a USDOT PIN by email, it would only provide a MC PIN by regular, "snail" mail. This new change should make things easier for us all by requiring one less PIN to keep track of and allow easier replacement of the PIN when it is lost or forgotten. Also, this represents another step toward the Agency's announced desire to eliminate MC numbers and keep track of carriers by only the USDOT number. Thanks to the government for getting this one right!

Zurich American Ins. Co. v. Ace American Ins. Co.: The New York Appellate Court Interprets the "Any Auto" Endorsement in the Context of Joint Venture

BY ROCKY ROGERS

The New York Appellate Court recently issued an opinion addressing the oft-used "any auto" endorsement for commercial auto liability policies in the context of a complex joint venture. The court found the endorsement extended primary insurance obligations to an accident involving a vehicle owned by a joint venturer of the named insured.

The dispute arises from personal injuries sustained by two construction workers while unloading rebar at a construction site. The construction project was a joint venture between multiple companies. The joint venture entity ("TP"), agreed to have the project insured by an "owner-controlled insurance program" ("OCIP") administered by a third-party administrator for CGL, excess liability, employers' liability, and workers compensation insurance. Members of the joint venture would enroll in the OCIP, which required each to maintain certain primary levels of liability insurance plus excess insurance. Consistent with the OCIP requirements, Zurich Insurance issued a commercial auto liability policy to TP. One or both employees were employed by another joint venturer in the construction project ("BRJV"), who was to be insured through the OCIP. Drive New Jersey Insurance Company issued a commercial auto liability policy to BRJV, which appears to have been issued outside of the OCIP. The Drive NJ commercial policy contained an "Any Auto Legal Liability Endorsement," which extended the definition of "insured auto" to include "any auto" if the named insured is a partnership, corporation, or any other entity.

It was undisputed the workers' injuries occurred as they were unloading rebar from a flatbed trailer that was owned by TP and which was connected to a tractor leased by TP. The court evidently decided the accident occurred in connection with the use of the trailer. The two workers filed suit against TP and other entities alleging negligence and violation of state labor laws. The various insurers exchanged opposing tenders of the defense of the underlying tort suits before Zurich initiated a declaratory judgment action seeking a declaration of the insurers' respective rights and obligations.

The New York Appellate Court held that the Drive NJ commercial auto policy extended primary insurance coverage to the tractor-trailer involved in the accident because TP and BRJV were joint venturers in the project. Stated differently, TP was an additional insured under the Drive NJ policy. Thus, even though the tractor-trailer was also insured under the Zurich commercial auto policy issued to TP via the OCIP, the Drive NJ policy was held to provide primary coverage to TP as a joint venture of BRJV. The court therefore held Drive NJ must provide a defense to TP in the underlying actions on a primary, non-contributory basis, subject to applicable employee exclusions, and ordered Drive NJ to reimburse Zurich for any costs incurred in defending those actions.

While not overly common in the trucking context, joint venture arrangements cause insurers to carefully ascertain the various obligations of multiple insurers. This decision highlights to necessity of insurers to properly analyze their insurance obligations in the context of a larger insurance program. It is unclear from the decision if the CGL would have been drawn into this as well under a theory relating to loading or unloading responsibility.

Headlights, Camera, Action: Dash Camera Video as a Basis for Summary Judgment

BY WILSON JACKSON

Trucking companies have been updating their trucks with the latest technology for years in hopes of improving safety and to preserve data on accident causation. Dash cameras have proven to be useful in replaying collisions and showing exactly what did or did not occur. One recent case shows how dash camera video evidence could be beneficial to the transportation industry and the public in diagnosing how accidents occur.

The United States District Court for the Northern District of Illinois, Eastern Division, recently issued an opinion granting summary judgment for the United States Postal Service ("USPS") based on a dash camera video. *Lazcano v. United States*, 2020 WL 1157368. In *Lazcano*, the Plaintiff—riding a bicycle in the bicycle lane—was involved in a collision with a USPS truck. The Plaintiff and the USPS truck were traveling in the same direction and were slowing down for a red traffic light. The Plaintiff testified the handlebars of his bicycle came into contact with the USPS truck because the truck swerved into the bike lane where he was riding and argued the USPS driver was negligent for failing to maintain his lane.

The USPS driver testified that he did not make any turns or swerves. He explained that his route required him to drive straight through the intersection, and thus he had no reason to deviate from his lane. His testimony was corroborated by the dash camera video from the USPS truck. According to the court's opinion, "the video showed the truck traveling steadily forward, facing the same direction before and after the accident. The footage does not depict the truck taking any sharp turns or swerves." Based on this evidence, the court found the USPS driver did not swerve into the bike lane and granted summary judgment for the USPS. Thus, the video evidence overcame even the Plaintiff's testimony that the truck had swerved.

A similar issue is pending before the Florida Supreme Court in *Wilsonart v. Lopez*. In *Wilsonart,* the driver of a pickup truck ("Plaintiff") died after rear-ending a freightliner truck. *Lopez v. Wilsonart*, 275 So. 3d 831, 834 (Fla. 5th DCA Jul 12, 2019). The Plaintiff's family brought a wrongful death action against the trucking

company. The Freightliner the trucker was operating was equipped with a front facing dash camera, which revealed the truck was traveling straight in its lane and coming to a gradual stop at a red traffic light. The dash camera video showed the Freightliner experience an impact, forcing it to veer to the left. Defense counsel for the trucking company moved for summary judgment based on the dash camera video. The trial court granted summary judgment in favor of the Freightliner based on the video.

Florida's Fifth District Court of Appeals reversed the trial court's decision granting summary judgment for the trucking company. The appellate court ruled that current standards do not allow video evidence, no matter how compelling, to be a deciding factor when awarding summary judgment. The appellate court's opinion emphasized the strict standard for summary judgment in Florida required the court to find against the trucking company because the Plaintiff's witnesses created a question of fact for the jury to decide. Essentially, the appellate court held the dash camera video did not completely negate two independent witnesses and an expert's opinion. The appellate court then certified a question to the Florida Supreme Court asking if "there should be an exception to the present summary judgment standard [when] . . . video evidence completely negates or refutes any conflicting evidence presented by the non-moving party." *Lopez v. Wilsonart*, 275 So. 3d 831, 834 (Fla. 5th DCA Jul 12, 2019).

In regard to the federal court standard for dash camera video evidence, the Supreme Court of the United States stated that summary judgment is available if video evidence so blatantly contradicts the Plaintiff's version of the facts so that no reasonable jury could believe it. *Scott v. Harris*, 550 U.S. 372 (2007). Additionally, a Florida court has previously relied on video evidence to affirm summary judgment when the video "conclusively refuted" the plaintiff's testimony describing the facts of the incident. *Brookie v. Winn-Dixie Stores*, Inc., 213 So. 3d 1129 (Fla. 1st DCA 2017). Thus, there is a tension between recent developments in technology which allow conclusive proof of a fact and the traditional legal standard which requires summary judgment to be denied when there is a "mere scintilla" of contradicting evidence (such as a plaintiff's testimony) available.

We will continue to follow this development in the law, as the usage of dash camera video evidence can significantly impact litigation in cases where the dash camera exonerates a trucking company and its driver. Hopefully courts will follow the old adage "a picture is worth a thousand words."

FMCSA's Formal Adoption of Crash Accountability Program Signals Shift for Non-Preventable Accidents

BY BLAIR J. CASH

On May 1, 2020, the FMCSA expanded its Crash Preventability Demonstration Program (CPDP) to remove accidents deemed "non-preventable" from its prioritization algorithm. If an accident is found to be non-preventable in the CPDP's review, the Safety Measurement System (SMS) will exclude the accident from a carrier's score and note the non-preventable determination in a driver's Pre-Employment Screening Program (PSP) report. Exactly how the CPDP will review accidents, what criteria it will use, and insight into the decision-making process warrants further examination.

This decision stems from the August 2019 CPDP asking motor carriers to submit information and documentation regarding eligible accidents that occurred on or after August 1, 2019. If a carrier is involved in one of the eligible types of accidents, the carrier can submit a request to the FMCSA along with the accident report and supporting documentation. The FMCSA will review the request and make a case-by-case decision of whether the accident is deemed "non-preventable" and therefore excluded from the carrier's SMS profile. The following types of accidents are eligible for review:

- Rear End: accidents where a commercial motor vehicle (CMV) is rear-ended
- Wrong Direction/Illegal Turns: accidents where the CMV was struck by a vehicle traveling in the wrong direction or making an illegal turn
- Parked/Legally Stopped: accidents where the CMV is parked or legally stopped
- Failure of Other Vehicle To Stop
- Under the Influence: accidents where the driver of the other vehicle is under the influence as judged by the legal standard of the jurisdiction where the accident occurred
- Medical Issues, Falling Asleep, or Distracted Driving: accidents where the other driver had medical issues, fell asleep, or was driving while distracted
- Cargo/Equipment/Debris or Infrastructure Failure
- Animal Strike
- Suicide: accidents where the CMV was struck by a person committing or attempting to commit suicide
- Rare or Unusual: examples include being struck by an airplane or skydiver

According to the FMCSA's press release, approximately 56% of the accidents submitted for review were eligible. Of those eligible accidents, the FMCSA found that 93% were non-preventable. Those accidents are still listed on the SMS profile, but not included in the carrier's Crash Indicator Behavior Analysis and Safety Improvement Category (BASIC) score in SMS. These accidents will appear as one of three categories: (1) Reviewed, Not Preventable; (2) Reviewed, Preventable; or (3) Reviewed, Undecided.

This change acknowledges certain shortcomings in the FMCSA's SMS scheme. First, a carrier's BASIC score originally included all accidents, regardless of fault, in determining the carrier's safety record. Many critics of the previous system argued that a motor carrier's safety should not be measured by accidents which could not have been avoided by the CMV driver. It is unfair to the driver and the motor carrier. If the goal of SMS and BASIC scores is to measure a carrier's safety record and evaluate whether the FMCSA needs to intervene, the focus should be on those accidents which could have been avoided by the motor carrier or CMV driver. The CPDP is trying to improve that focus.

Second, by excluding non-preventable accidents, the Federal Motor Carrier Safety Administration will be able to better prioritize motor carriers for safety interventions and audits. SMS data was never intended to be used to determine a motor carrier's overall safety fitness or rating. Even the FMCSA warned the public against

making judgments concerning the overall safety, fitness or status of motor carriers utilizing SMS data. With the exclusion of these accidents from a carrier's BASIC score, the SMS data will hopefully provide the FMCSA with a clearer picture as to which carriers might need intervention in the areas of driver fitness, equipment maintenance, and overall safety.

Third, a non-preventable accident will appear in a driver's PSP report with the appropriate annotation to notify a motor carrier of the accident. This additional notation in a driver's PSP report will aid motor carriers in vetting the backgrounds of driver applicants. If a driver is involved in a subsequent accident that leads to litigation and a negligent hiring claim, a carrier could be attacked for not investigating these accidents appearing on a PSP report, even though a driver had a valid defense to the accident.

If the motor carrier feels that an accident has appeared on the carrier's BASIC score in error, the carrier must follow certain steps in order to seek a Request for Data Review (RDR) with the FMCSA. In order for a motor carrier to seek review of any such accident, the carrier must check several boxes in order to be eligible:

- The carrier must submit a police accident report prepared by the appropriate jurisdiction's law enforcement agency. One important caveat is that if no police report has been prepared or a report is not attached to the carrier's RDR, the FMCSA will automatically close the request.
- The carrier must submit drug and alcohol tests for fatal crashes (or the required documentation under 49 C.F.R. § 382.303(d)(1)-(2)).
- The carrier has the burden of submitting "compelling evidence" that the accident is within an eligible category listed above and not preventable.
- The carrier must submit evidence in support of the RDR which can include videos, pictures, and court documents.
- If requested by the FMCSA, the carrier must provide additional documentation within 14 days.

If an accident does not have an accident report, as might be the case with loading dock accidents, parking lot accidents, or accidents occurring on private property, the FMCSA will automatically close the request. The FMCSA's stance on the need for a police accident report underlines the importance of notifying authorities and requesting a formal police accident report, especially in instances where the CMV driver was not at fault. Although burdensome for a minor accident, requesting a police report should be something the carrier considers for many accidents.

Other issues with SMS data and BASIC scores still remain. It is unclear what transparency the CPDP's decision-making process will have for motor carriers and drivers. Will motor carriers have access to background information underlying the FMCSA's ruling? How readily will the FMCSA provide such information to inquiring drivers and motor carriers? Even though these questions will have to be answered, the FMCSA's shift in allowing an appeal of a mistaken preventability determination is a step in the right direction for carriers and CMV drivers involved in accidents through no fault of their own. We at Momar have regularly assisted carriers with filing RDR's in the DataQ system and have experienced how frustrating it is to reach the right result in that process. We are glad the FMCSA is at least starting to improve the process.

Don't Even Bother Watching the Trailer: *Affainie v. Heartland Express Maintenance Services, Inc., et al.*

BY LESESNE PHILLIPS

We've regularly written that loaning your trailer can often mean loaning your insurance to the user of that trailer. But can loaning your trailer also allow an injured plaintiff to drop and hook you into liability for an accident involving your trailer?

Recently, a decision out of the Tennessee Court of Appeals delivered an important ruling regarding the identification of motor carriers involved in accidents. The case, *Affainie v. Heartland Express Maintenance Services, Inc.*, involved a hit-and-run between a tractor-trailer and a passenger vehicle. The plaintiffs filed their complaint in the Davidson County Circuit Court in 2016. The plaintiffs claimed a tractor-trailer collided into their vehicle on the interstate and refused to stop after the accident. Plaintiffs filed suit against Heartland Express Maintenance Services, Inc. ("Heartland Maintenance") and Heartland Express, Inc. of Iowa ("Heartland Express"). Heartland Maintenance was granted summary judgment based on the fact that it was solely a maintenance company and did not own any tractors or trailers. The trial court granted Heartland Express's motion for summary judgment dismissing Heartland Express as a defendant because the plaintiffs could not prove ownership of the tractor. Specifically, the plaintiffs relied on the fact that Heartland Express was written on the trailer to claim the tractor in the accident was operating under Heartland Express's authority. The plaintiff appealed the decision of the trial court.

The Tennessee Court of Appeals concentrated on the deposition testimony of one of the plaintiffs in its affirmance of the trial court's decision. During deposition testimony, the plaintiff only identified the trailer as belonging to Heartland Express and the plaintiff stated he could not see any information on the tractor. The witness additionally expressed this through a hand-drawn diagram in which he pointed to the trailer and not the tractor. Despite this testimony, the plaintiff, in an affidavit, claimed he saw Heartland Express written on the side door of the tractor. The law in Tennessee requires that directly conflicting statements from the same witness have the effect of cancelling each other out. Based on the cancellation of the statements from the plaintiff and the fact that Heartland Express proved their practice of regularly interchanging trailers with other carriers, the Tennessee Court of Appeals affirmed the trial court's decision to grant summary judgment in favor of Heartland Express. While the plaintiffs provided evidence of ownership of the trailer, the evidence presented by the plaintiffs was not enough to create a genuine issue of fact regarding the ownership of the tractor. *Affainie* followed the holding in *Fuller v. Tennessee-Carolina Transportation Company*, which found when there is evidence of trailer interchange, "the inferred fact that the defendant owned the trailer could not be used as a basis for building a further inference that the defendant also owned the tractor." 471 S.W. 2d 953, 957 (Tenn. Ct. App. 1970).

The *Fuller* case involved a somewhat different fact pattern. The plaintiff in that case was the owner of a commercial motor vehicle that was allegedly run off the road by another motor carrier. Again, the plaintiff's driver could only see the name of the defendant, Tennessee-Carolina Transportation Company ("TCT"), on the trailer. Driver logs of TCT could not be found due to TCT's practice of disposing of logs after one year, and the plaintiff filed the suit more than a year later. Similarly, TCT provided evidence of its practice of trailer interchanges. Despite the trial court's denial of TCT's directed verdict, the Tennessee Court of Appeals reversed the trial court's decision. Importantly, a case from the Alabama Supreme Court, *J.B. Hunt Transportation v. Credeur*, upheld the trial court's decision to deny the motor carrier's motion for directed verdict where the motor carrier did not present any evidence of interchange or interline operations and the plaintiff presented evidence other of identification of the motor carrier on the tractor. Even though the carrier in the Alabama case showed that they frequently sold their trailers to other carriers, it was not enough for the court to rule in its favor on directed verdict.

While *Affainie* and *Fuller* decisions are somewhat limited to the facts involved in the cases, they provide a positive standard when the issue of identification of the motor carrier arises by foreclosing the inference that the owner of the trailer is also the owner of the tractor.

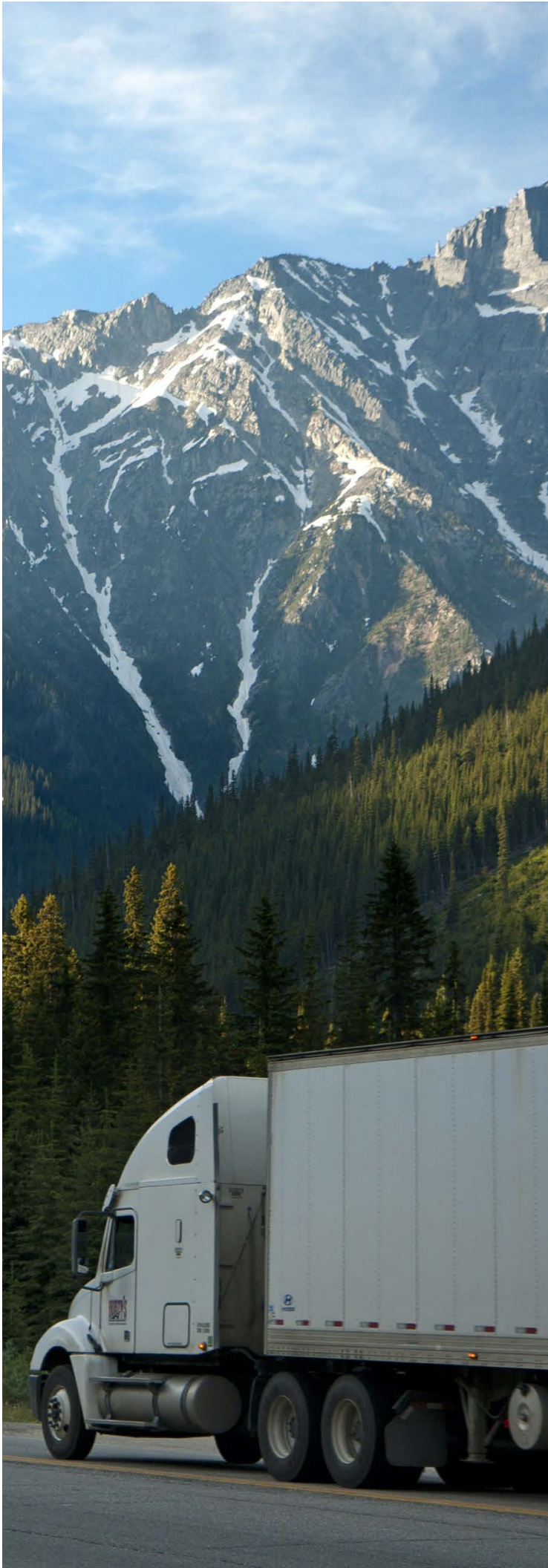
Eighth Circuit Puts Boundaries on Driver Recruitment from a Competitor

BY FREDRIC MARCINAK

For years now, the shortage of qualified, trained, and skilled drivers has been identified by motor carriers as one of the top ten issues the industry faces. To address the issue, many carriers have invested in recruitment and training programs and have sought ways to protect their investment through contractual restrictions on the ability of recruited and trained drivers to leave for a different carrier and for rival carriers to hire away these same drivers. In a decision that is instructive both for carriers looking to protect their investment in drivers and for companies looking to hire drivers away from rivals, the federal Eighth Circuit Court of Appeals, whose jurisdiction includes Minnesota, Iowa, Missouri, Arkansas, Nebraska, and the Dakotas, has now weighed in on how far companies can go in restricting drivers' ability to jump ship (or truck?) to a rival.

The entry burdens to a career as a long haul truck driver are significant. A driver must obtain a commercial driver's license ("CDL"), normally through a driver-training program, which doesn't come cheap. As many large companies do, CRST Expedited, Inc. ("CRST") developed its own driver-training program in which it advances the cost of tuition and other expenses in exchange for the driver's agreement to work for CRST for a specified period of time. Specifically, prior to the start of training, CRST requires its drivers to sign a pre-employment agreement in which the driver agrees that the costs of training are an advance, and the driver must accept an employment contract with CRST if offered. Under the employment contract, the driver agrees to work for CRST for at least ten months ("Restrictive Term"). The driver also agrees to a non-compete provision: the driver will not work for any CRST competitor for the remainder of the Restrictive Term if he or she is discharged or leaves employment prior to the end of the Restrictive Term. During the Restrictive Term, CRST compensates the driver at a reduced rate so as to partially recoup the costs of the training program. Upon the conclusion of the Restrictive Term, the employment becomes at-will and the drivers are compensated at the market rate for long-haul truck drivers.

Some 167 CRST drivers left CRST to join rival TransAm Trucking, Inc. ("TransAm") while still within the Restrictive Term. During the employment verification process required by 49 C.F.R. § 391.23, CRST told TransAm that



the drivers were under non-competes that prohibited them from working for another trucking company. CRST also sent several follow-up letters, warning TransAm that CRST would not release its drivers from their contracts and citing another CRST lawsuit in which a different company had been enjoined from interfering with similar CRST contracts. Finally, in May 2014, CRST sent a cease-and-desist letter to TransAm. CRST says that, even after receiving the several letters detailing the drivers' contractual obligations with CRST, TransAm continued to hire its drivers.

In April 2016, CRST sued TransAm, alleging intentional interference with a contract, intentional interference with a prospective economic advantage, and unjust enrichment. The trial court in Iowa granted summary judgment for TransAm, concluding that, while the drivers were under a valid non-compete contract with CRST that TransAm knew about, there was no evidence that TransAm's actions induced the drivers to breach that contract or that the drivers would not have broken their contracts without TransAm's involvement.

On appeal, the Eighth Circuit Court of Appeals disagreed, holding that CRST presented substantial evidence that TransAm entered into agreements with the drivers not only with the knowledge that the drivers were under contract with CRST, and thus could not perform both contracts, but also with knowledge that its driver agreements provided for a higher rate of pay than provided for under the CRST-driver contracts. This knowledge of difference in pay—an inducement to the drivers to break their contracts—was crucial to the appellate court's decision. As it noted:

> We reject CRST's contention that any prospective employer offering terms it knows are better than an employee's fixed-term contract with his present employer commits tortious interference with that contract. The Restatement draws a clear distinction between contracts that include non-compete provisions and those that do not. With regard to an employee subject to a contract that does not include a non-compete provision, a competitor is "free, for his own competitive advantage, to obtain the future benefits for himself by causing the termination." Restatement (Second) of Torts § 768 cmt. i. The employer "may offer better contract terms, as by offering an employee of the plaintiff more money to work for him . . . without liability." Id. However, in circumstances in which an employee is subject to a non-compete provision, "a defendant engaged in the same business might induce the employee to quit his job, but he would not be justified in engaging the employee to work for him in an activity that would mean violation of the contract not to compete." Id. Based on this distinction, the intentional interference with a contract inquiry asks not merely whether TransAm induced the drivers to work for it by offering superior terms. Instead, the inquiry is more properly framed as whether TransAm intentionally induced the drivers to work for TransAm, by offering superior terms, in an activity that would mean violation by the drivers of the non-compete provision, and thus intentionally and improperly interfered with the CRST contract.

Thus, the Eighth Circuit reversed the dismissal of CRST's claims and sent the case back to the trial court for trial.

The *CRST* case offers lessons in contracting and employment practices for all those in the transportation industry. It strengthens the employer's ability to protect its investment in recruiting and training good employees. At the same time, following *CRST*, a prospective employer must tread cautiously where it knows the prospective employee is under a non-compete with a competitor. It's important to keep in mind that these employment and contract matters are governed by state law, and the Eight Circuit was interpreting Iowa law in its decision. Different states enforce non-compete agreements in different ways. The Eight Circuit found CRST's non-compete provision was not so restrictive as to be void under Iowa law, but the same provision may have been struck down under the law of another state. The lesson for trucking companies is that they should take time and care in drafting non-compete provisions that are legally compliant and that they should make sure they understand the ramifications of hiring employees away from a competitor.

MOMAR TEAM ON THE ROAD
PAST TRIPS AND EVENTS

- Rob was scheduled to give presentations at all of the Great West Conferences –
    - March 4 – Knoxville, Tennessee
    - March 12 – Omaha, Nebraska

Unable to bring themselves to tell Rob he could not speak at further conferences, Great West decided to cancel the rest of their regional leadership meetings under the cover of the Coronavirus. People in these cities were spared:

    - March 26 – Indianapolis, Indiana
    - March 31 – Boise, Idaho
    - April 8 – Grapevine, Texas

- March 19 Rob was set to go to Charleston for the Charleston Motor Carriers meeting, but they did a background check and canceled the meeting.
- On April 1 Fred was to attend and give a presentation at the Trucking Industry Defense Association in Tempe, Arizona, but they social distanced from him.
- April 7 Rob was scheduled to go to Nashville for a Cottingham and Butler client seminar.
- April 22 Rob from the office and Fred from his house hosted the first MOMAR webinar "COVID-19 Transportation and Logistics: Your Questions Answered."
- April 26-28 Rob was set to be on a panel to discuss risk management at The Terry College of Business 35th Annual Trucking Profitability Conference. Maybe it went forward and they just didn't tell Rob.
- April 29-May 2 Fred was to attend and moderate a panel and chair the Freight Claims Committee at the Transportation Lawyers Association meeting in Amelia Island, Florida. But even Florida was closed to him.
- May 4-6 Rob was scheduled to speak to the Auto Haulers of Atlanta but, alas, it was canceled.
- May 18 Rob spoke at a SmartDrive webinar "On-Demand: Both Sides of the Legal Equation: An Insider's Perspective on Fleet Safety." A link to the webinar recording can be accessed at https://www.fleetowner.com/resources/webinars/webinar/21129305/webinar-both-sides-of-the-legal-equation-an-insiders-perspective-on-fleet-safety The firm has turned to webinars to keep Rob distracted now that he cannot travel.

THE ROAD AHEAD

- June 10 – Megan and Blair will conduct a webinar providing an update on all things accident and litigation related.
- June 13-15 Fred was to attend the Conference of Freight Counsel in Dearborn, Michigan, but the conference is postponed to January.
- June 21-23 Blair will attend the GMTA Annual Convention in Amelia Island.
- June 25 Rob will discuss a motor carrier's worst day at the Truckload Carrier's Virtual Safety Meeting.
- June 29 – Rob will conduct a webinar for the Transportation Lawyers Association on trucking insurance coverages.
- August 21 is the annual meeting of the American College of Transportation Attorneys, which will be held virtually.
- September 22-24 Rob is speaking for Marsh Fleet Solutions captive in Nashville, Tennessee.

CONGRATULATIONS CORNER

- Congratulations to Rocky Rogers and his wife Allison who welcomed baby Ellis Charles Rogers into this world on March 16, 2020
- We are excited to announce that Megan Early-Soppa passed the Georgia Bar.
- Partner Tom Chase is proud to announce that his son, Taylor, and daughter, Lynsee, just graduated from high school.

Your MoMar Team

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