

NEWSLETTER

June 2008 **TRANSPORTATION LAW UPDATE**

CALIFORNIA UPDATE:

RECENT REGULATIONS AND DECISIONS CONCERNING THE TRANSPORTATION INDUSTRY

Update on Meal Period Rules

In April 2008, the State Legislature declared its intent to clarify California's meal period rules. This declaration recognizes the confusion surrounding the current law, which requires each non-exempt employee to take a meal period of at least 30 minutes after working more than five hours. Unfortunately, until the laws are revised, employers in all industries are required to interpret the laws and enforce them with their employees at their peril.

The enforcement interpretations of the current laws prohibit an employee from:

- skipping any meal periods
- taking a meal at a later time
- doing work during a meal break
- returning early to work from a meal break
- taking an on-duty meal period, except in very narrow circumstances

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THE NINTH CIRCUIT COURT AFFIRMS CARRIERS' RIGHTS TO COLLECT FREIGHT CHARGES AGAINST SHIPPERS

Early this year, the Ninth Circuit Court of Appeal joined the Fourth, Fifth, and Eleventh Circuits in determining that the shipper, and not the carrier, bears the risk when a freight forwarder or broker fails to forward the shipper's payment to the carrier.

payment to the carrier, even though the shipper had already paid over \$200,000 in freight charges to the broker that had arranged for the transportation.

invoices to NLC which audited the invoices and sent them to Sears for payment. Sears paid NLC which in turn paid Oak Harbor. NLC and Oak Harbor also entered into a contract which provided in part that the shipper agreed to pay the carrier. Finally, depending upon whether the shipment was inbound or outbound, either Oak Harbor or Sears issued a bill of lading for each shipment. All of the bills of lading were designed to comply with industry standards. (Cont'd on page 2)

In the case of *Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co.* (9th Cir. 2008) 513 F.3d 949, the court upheld long standing industry standards, and required the shipper to make

In that case, Sears had entered into a contract with National Logistics Corporation ("NLC") to broker Sears' inbound and outbound shipments, and audit and coordinate payments for the transportation to and from Sears. Under this agreement, the carrier, Oak Harbor, sent

CARRIERS' RIGHTS, *cont'd*

Over ten years later, Sears provided notice to NLC that it would no longer use its services and would terminate the contract. Sears continued to pay invoices to NLC, which then failed to make payments to Oak Harbor. Oak Harbor sued both Sears and NLC for over \$420,000 in freight charges owing and unpaid. Sears defended by claiming that its agreement with NLC overrode the industry standard language contained in the bills of lading, and that it should not have to pay Oak Harbor for the shipments it already paid to NLC.

After analyzing the facts and the relevant law, the Court found and affirmed that:

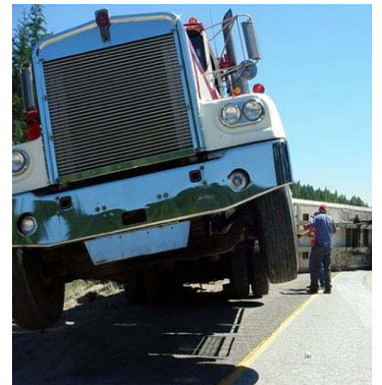
1. The bill of lading is the basic transportation contract, and not merely a receipt;
2. When a bill of lading is intended to conform to industry standards, the consignor remains primarily responsible;
3. The consignor remains responsible under a standard bill of lading unless it is marked "nonrecourse;"
4. The consignee remains responsible for freight charges unless a bill of lading is marked "prepaid;"
5. The consignor, consignee, and carrier can allocate responsibility for freight charges as between themselves, but a separate broker contract cannot alter that responsibility; and
6. Carriers reasonably expect payment to come from shippers, thus, it is the shipper, and not the carrier, that bears the risk when it chooses to pay freight charges through a broker.

UNDERSTANDING THE FMCSA'S COMPREHENSIVE SAFETY ANALYSIS 2010

The Federal Motor Carrier Safety Administration (FMCSA) continues to develop a new operational model for the reduction of commercial vehicle crashes, fatalities, and injuries. Through its CSA 2010 Initiative, the FMCSA is looking for ways to partner with states and the industry, and to improve its data source so that it may better identify high risk carriers.

The goal of the CSA 2010 Initiative is to increase safety by assessing a larger portion of the motor carrier industry than currently assessed by the FMCSA, by assessing the included carriers differently, and by utilizing its own resources more efficiently. The initiative also allows the FMCSA a broader range of measures to ensure compliance. The operational model has four major components: (1) measurement, (2) interventions, (3) safety fitness determination, and (4) technology modernization.

(Cont'd on Page 3)



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Practice Group Update

Based upon her expertise and service to the industry, **Hillary Arrow Booth** was recently re-elected to serve a third term as a member of the Board of Directors for the California Trucking Association, and was elected to the position of Second Vice-President of the Los Angeles/Orange County Unit of the Association.

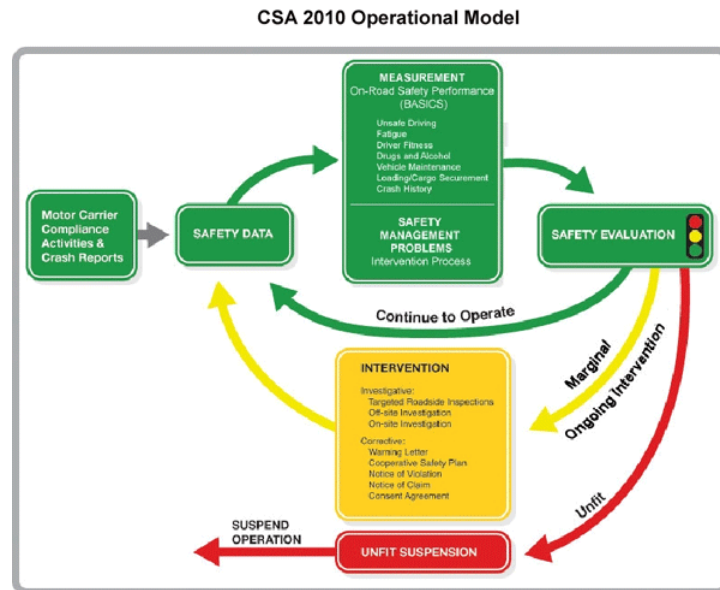
Josh Levine obtained a significant payment for our client from a customs broker that failed to take into consideration a change in the law pertaining to the effects of NAFTA on payment of required duties.

Hillary Arrow Booth and Associate **Paul Rasmussen** negotiated a very favorable settlement for our trucking company clients in the pending case regarding diesel emissions at the Port of Los Angeles.

Tim Swickard and **Hillary Booth** obtained significant modifications to the reporting requirements contained in the California Air Resources Board's TRU ATMC for our client, a company that warehouses and transports refrigerated goods throughout the country.

Hillary Arrow Booth was successful in upholding limitation of liability clauses in two separate cases involving the theft of freight. In both cases, the carrier paid only the limited amount, even though the shippers' insurance companies argued that the limitations did not apply and/or were unenforceable for the shipments at issue.

CSA 2010 INITIATIVE, *cont'd*



The Initiative is based upon the Operational Model shown above. Currently, the FMCSA's safety determinations are based upon compliance reviews. Under the CSA 2010 Initiative, the safety fitness determinations would be based upon performance data that is not dependant upon a safety compliance review. The following are the categories of information that are under consideration for the measurement of the safety fitness of carriers:

1. Unsafe Driving – based upon traffic violations and convictions.
2. Fatigued Driving – based upon hours of service violations and crash reports.
3. Driver Fitness – based upon inspections of documentation, crash reports, and file maintenance.
4. Controlled Substance or Alcohol – based upon roadside violations, crash reports, lack of proper testing or testing programs.
5. Vehicle Maintenance – based upon roadside violations for mechanical defects, crash reports, and inspection violations.
6. Improper Loading/Securement – based upon roadside inspections and crash reports.
7. Crash/Incident Experience – based upon crash reports or crashes discovered by inspection or reported by the carrier.

For further information on these topics, contact Hillary Arrow Booth at 213- 943-6100

“Under the CSA 2010 Initiative, the safety fitness determinations would be based upon performance data that is not dependant upon a safety review.”

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ABOUT OUR FIRM

We are a mid-sized firm providing our clients with first-rate lawyering and professional service at a good value. Most importantly, we see ourselves as being in partnership with our clients. We treat our clients' concerns as our own. Further, it is not by accident, but by design, that many of the Firm's partners are involved in government and politics. Our ability to maneuver our clients' interests through the maze of government requirements, or to obtain government cooperation, is a critical and unique benefit of working with our Firm. We service the litigation, transactional, and regulatory needs of clients in many industries including transportation, manufacturing, energy, recycling, real estate, high-tech, construction, and entertainment. Our success is built upon the professionalism, dedication, and performance of each individual in our Firm. While we plan for future growth, we are determined to retain these qualities and continue to provide energetic and creative representation to our clients.

For more information on our practice areas and attorneys, visit our website at www.dlflawyers.com.

DONGELL LAWRENCE FINNEY -- FIRM NEWS

Client Growth Fuels the Firm's Expansion to Nevada

The Firm is committed to serving our clients throughout the Southwestern United States, and to bolster that commitment we opened an office in Las Vegas, Nevada in 2007. Since opening the office, the Firm has already been retained to serve as litigation defense counsel in several high profile construction projects in Las Vegas totaling over \$25 billion in construction value, including the McCarran Airport Expansion Project, the Wynn Encore, the Fontainebleau Hotel and Casino, the Queensridge Place, the Echelon Resort and Casino, and the Plaza Las Vegas.

The Firm's Las Vegas practice primarily serves our construction, real estate development, transportation, and insurer clients. In addition to local Nevada counsel resident in our Las Vegas office, several of our Los Angeles-based partners are active members of the Nevada bar.

Recent Associate Additions

We have recently added two new associates to our ranks – Ian Culver and Caroline Siefert. Ian obtained his undergraduate degree from Occidental College and his law degree from Loyola Law School in 2006. During law school, he served as a judicial extern to the Honorable Kim McLane Wardlaw, Circuit Judge for the U.S. Court of Appeals for the Ninth Circuit.

Caroline Siefert obtained her undergraduate degree in Neuroscience from the University of California, Los Angeles (where she served as an intern in the emergency room of UCLA's Medical Center), graduating cum laude, and obtained her law degree in 2007 from Loyola Law School (where she received a full tuition merit-based scholarship). Caroline was a member of Loyola's Moot Arbitration Team and advanced to become a semi-finalist in the International Commercial Arbitration Competition in Vienna, Austria. Caroline also served as the National Vice-Chair of the American Bar Association Law Student Division.

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