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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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FLASH NO. 57
10TH CIRCUIT HURLS KNUCKLEBALL AT CARRIERS ATTEMPTING ELD ROLL-OUTS

While the rest of the country was basking in the glow of the Cleveland Indians improbable trip to the World Series last week *(ok so maybe just the City of Cleveland)* the 10th Circuit Court of Appeals threw a knuckleball to motor carriers that operate with independent contractors ("ICs") and may be in the throes of rolling out electronic logging devices (ELDs) in compliance with the looming mandate by FMCSA.

The decision rendered in *Fox v. TransAm Leasing Inc.*, No. 15-3203 (10th Cir. Oct. 18, 2016) addresses the issue of communication devices in the trucks that ICs lease to motor carriers pursuant to the Leasing Regulations (49 CFR §372.12 et seq.). The decision deals with a fact pattern from 2012, but the fact pattern exists today with motor carriers, particularly in the truckload segment.

According to the decision, it appears that TransAm was operating under a 'lease-back' program by recruiting independent drivers to lease vehicles directly from TransAm with an option to purchase (an "Equipment Lease") (which is a practice that we would not recommend). The drivers would, in turn, lease the vehicles and driving services back to TransAm presumably pursuant to independent contractor service agreements ("ICSA") as required by the Leasing Regulations.

TransAm's standard ICSA required that an IC's vehicle have a satellite communication unit which was compatible with TransAm's satellite communication system (which is not an unusual contract provision). If the IC did not have a compatible unit, the IC could "borrow" one from TransAm. The ICSA further provided for the IC to pay TransAm a satellite communication system usage fee in the amount of $15 per week, and allowed for a charge-back of such amount from IC's compensation, regardless of whether the IC provided its own unit or borrowed one from TransAm.

TransAm's satellite communication system allowed for direct communication between the carrier and driver, temperature monitoring of the refrigerated trailers, route planning, and keeping records of hours of service and fuel taxes. TransAm provided the same communication system and access to its employee drivers, but without a fee.

The Court determined that TransAm's charge-back of $15 per week for use of its satellite communication system was in violation of the Leasing Regulations, particularly, 49 C.F.R. §376.12(i), which prohibits a motor carrier from requiring an IC to purchase or rent any products, equipment, or services from the authorized carrier as a condition of entering an ICSA with the motor carrier. It reasoned that it was a violation because it required the IC to purchase a service—*use of the motor carrier's satellite communication system*—as a condition of entering into the ICSA. Instead, according to the Court, the motor carrier must give the IC the option of obtaining equipment or services—*including satellite communication systems*—from outside sources.

(continued)

The Court, which has experience in Leasing Regulation disputes, reached its conclusion (1) even though the motor carrier was only charging a portion of the $25 cost per week from the satellite communication provider, and (2) without any reference to the fact that in-cab electronic logging devices have now been mandated by FMCSA with a 2017 operational deadline quickly approaching. However, as a side note, TransAm did prevail in part, as the Court reversed the previous ruling denying TransAm's Motion for Summary Judgment due to Plaintiff's failure to offer sufficient evidence of actual damages. The Court did not address any issues related to cost of the in-cab device, selection of a service provider, or other issues related to the technological challenges of implementing an effective communication system.

The Court's plain reading of the Leasing Regulations further underscores (a) the necessity that a motor carrier with a similar communication system program review its written ICSA to avoid a similar result, and (b) the continued importance Courts place on compliance with the Leasing Regulations. Further, the decision demands that motor carriers which are, or plan to, allocate all, or a portion of, the costs related to the installation of ELDs with its ICs to strategically consider their approach to compliance to ensure that an IC has an option regarding sourcing the required equipment to be compatible with the motor carrier's technology. The vast variety of technological platforms may make such ELD roll-outs more difficult, and may increase the operational costs beyond what they already are today.

As the ELD mandate rapidly approaches, carriers and ICs are left to figure out how to implement ELD's without much guidance from the regulatory agencies or the courts. Other than having the motor carrier absorb all the cost of the ELD and the related service fees practical issues remain as to how to effectively choose a U.S. DOT compliant ELD device; a service provider to support the service; integrate the communication system; and ensure compatibility, all while trying to remain compliant with the Leasing Regulations and withstand the numerous challenges by governmental agencies and disgruntled ICs.

There are ways to accomplish such a result, but it requires the motor carrier to be alert in its approach. The lawyers within Benesch's Transportation Group have worked with several motor carriers and their ELD service providers in structuring successful roll-outs of ELDs. Please feel free to contact us as we would be glad to assist your team as well.

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