

The Transportation Brief®



Indianapolis Office:
10 W. Market Street, Suite 1500
Indianapolis, IN 46204
Phone (317) 637-1777
Fax (317) 687-2414

Chicago Office:
30 W. Monroe Street, Suite 600
Chicago, IL 60603
Phone (312) 255-7200
Fax (312) 422-1224

Washington, D.C. Office:
1850 M Street, N.W., Suite 280
Washington, DC 20036-5804
Phone: (202) 783-9222
Fax: (202) 783-9230

Los Angeles Office:
2 N. Lake Avenue, Suite 460
Pasadena, CA 91101
Phone: (626) 795-4700
Fax: (626) 795-4790

Kansas City Office:
9393 West 110th Street
51 Corporate Woods, Suite 500
Overland Park, KS 66210
Phone: (816) 279-9835
Fax: (816) 676-1427

Chattanooga Office:
600 Republic Centre
633 Chestnut Street
Chattanooga, TN 37450
Phone: (423) 266-2769
Fax: (423) 266-6784

Detroit Office:
535 Griswold Street, Suite 1818
Detroit, MI 48226
Phone: (313) 237-7400
Fax: (313) 963-7425

Please fax or e-mail address changes to:
The Transportation Brief
fax (317) 687-2414
tbrief@scopelitis.com

Electronic Logging – The Future May Be Now

Last November, the FMCSA reversed its long-standing policy against the use of Global Positioning Satellite (GPS) and other advanced technology for Hours of Service (HOS) audit and enforcement purposes. As a result, FMCSA investigators are now regularly demanding that the detailed data taken from such technology be turned over for purposes of verifying the accuracy of driver logs. Failing to produce such data is considered a critical violation by the FMCSA, automatically resulting in a downgraded safety rating and, most likely, significant monetary fines. Of course, producing the data can also prove detrimental to carriers if the time and location information provided does not match up within one hour of the entries contained on the driver's corresponding log.

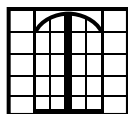
Motor carriers are at risk of failing HOS audits when GPS records are used

Staying below the FMCSA's current 10% violation threshold was easier when logs were reviewed against a very limited number of traditional supporting documents, such as fuel and toll receipts. Investigators' use of detailed GPS records that show truck activity at dozens of points each day make it harder to stay below the threshold. Some drivers are accustomed to making sure their logs match up closely with their fuel stops, roadside inspections and other routine, documented stops, which affords them opportunities to extend their work day beyond the current allowable HOS restrictions by manipulating log entries for the remainder of the day. It appears that the FMCSA's new policy is intended to put a halt to this illegal activity.

What should carriers do?

Removing GPS and other satellite communications from a carrier's trucks is likely impractical given the significant financial investment in such equipment as well as ever-increasing customer demands for real-time updates on shipment status. Alternatively, drivers can be retrained over time on the need to ensure their logs match up with the positional reports generated from the truck's GPS unit. Perhaps the best available option, however, is to convert all drivers from paper logs to electronic on-board recorders. This option effectively eliminates the possibility of drivers' falsifying their work status and makes the FMCSA's new policy on the use of GPS records virtually irrelevant. In either event, carriers and their drivers must be prepared to fully comply with the current HOS limitations in light of this new and powerful FMCSA enforcement policy.

*Timothy W. Wiseman,
Indianapolis*



Briefly...

Combating Whistleblower Claims Starts With Proper Maintenance, Recordkeeping, and Communication

The Surface Transportation Assistance Act (STAA) protects drivers who refuse to violate a safety regulation or operate objectively unsafe equipment. Safety regulation claims most often allege the driver was terminated for refusing to violate hours of service regulations and require the driver to prove that an actual violation would have occurred. Unsafe condition claims require proof that the driver believed the truck was unsafe (for example, that the brakes were soft) and that the driver's belief was reasonable.

The key to avoiding STAA liability in either case involves (1) careful attention beforehand to available hours and clear communication to drivers about how particular runs can legally be made; (2) meticulous maintenance records; and (3) faithfully checking each equipment complaint via a mechanic's inspection. Finally, any time a driver's termination closely follows a refusal to drive, advice of counsel is warranted.

*A. Jack Finklea,
Indianapolis*

What Does Your Certificate of Insurance Really Cover?

Changing trends in the underwriting of cargo insurance have made a thorough review of the policy language an essential aspect of a company's risk management. Because there is no standard form cargo insurance policy, every policy must be reviewed to determine if it covers a carrier's obligations under the Carmack Amendment, contractual obligations to its customers, and the actual nature of its carriage.

Some cargo policies now make coverage for the cost of defending litigation optional. This means that the insurer can decide to pay litigation costs or pay the insured the policy limits, leaving the insured to cover the expense of litigation. Other policies require the insured to elect and pay additional premium for litigation coverage at the inception of the policy. How one fills out the cargo insurance application is also critical because failure to accurately describe the commodities commonly transported, the average value per load, and similar information may result in a denial of coverage.

In the end, neither the carrier nor other parties in the supply chain can rely solely upon a cargo insurance certificate. Rather, the actual wording of the policy must be examined to determine whether it provides coverage for defense costs and the commodities typically handled or excludes coverage for events, such as loading/unloading or delay, that might apply to a particular loss.

*Michael J. Tauscher,
Detroit*

Commercial Lease Tenants May Have Advantage

One benefit of the current economic environment has been the ability of savvy commercial tenants to secure favorable lease terms by taking advantage of the financial pressures felt by commercial landlords. A rising number of vacancies and defaults, combined with the resulting commercial lending pressures, have resulted in an extremely pro-tenant environment in which landlords are willing to negotiate and renegotiate terms in an effort to minimize vacant space and lock in strong tenants for the long term.

Landlord concessions such as reduced rent, reduced expenses, landlord-financed build-outs/work allowances, term flexibility, and assignment/subleasing flexibility, among others, have suddenly become the norm. Tenants will not enjoy this leverage forever, so commencing the negotiation process during the current economic environment could be extremely beneficial to your company's bottom line over both the near and long term.

*Jay D. Robinson, Jr.
Jeffrey S. Jackson,
Indianapolis*

Awareness of Regulatory Rulemaking Critical to Carriers' Compliance Efforts

The FMCSA's reversal of its stance on electronic logging is one of several alerts provided recently by the safety and compliance team at Scopelitis, Garvin, Light, Hanson & Feary.

The new electronic logging policy is the topic of the lead article in this issue of *The Transportation Brief* by Indianapolis partner Tim Wiseman. Wiseman is joined by partner Bill Brejcha in Chicago in monitoring safety and compliance actions by the FMCSA, DOT and other transportation-related agencies.

Other recent actions affecting transportation safety and compliance include

- A change in FMCSA policy allowing imposition of the maximum penalty per violation based upon one prior or concurrent violation instead of the traditional "three strikes" policy;
- New entrant audits by the FMCSA and stricter standards for failing the audit; and
- New intermodal equipment rules requiring inspection of equipment and responsibility of users to repair damage.

A cornerstone of the Scopelitis firm's counsel in terms of compliance is the "mock" DOT audit, a consulting program in which members of the firm's safety and compliance group conduct an on-site inspection of the client's operations. The goal is to spot problem areas and assist the client in meeting a wide range of regulatory demands, thus minimizing potential claims and liability exposure.

The audit offers the motor carrier insights into its potential liabilities under the veil of attorney-client privilege, providing corrective guidance without the risk of enforcement by the DOT and other regulatory agencies. Wiseman, who before joining the firm in 1992 was a safety manager for a large hazardous materials tank-trailer operation, estimates that members of the firm's DOT "mock" audit team have conducted as many as 60 "mock" audits for carriers of varying sizes and characteristics over the past several years.

For the Record

Congratulations to **Jerry Cooper** who was reappointed to the Public Member position on the Illinois Self-Insurance Advisory Board by Illinois Governor Pat Quinn. Cooper has served on the Board under four Illinois governors.

On the Road

Mike Tauscher will attend the Michigan Trucking Association's Annual Meeting and Convention, August 20-21, in **Dearborn, Michigan**.

Greg Feary will deliver a presentation on Owner-Operator Issues at the Truckload Carriers Association's 2009 Independent Contractor Division meeting, August 20-21, in **Dallas**.

Jim Golden will speak at the Arkansas Trucking Seminar, September 17, in **Fayetteville, Arkansas**.

Greg Feary will speak at the Arizona Trucking Association's Annual Conference, September 19, in **Sedona, Arizona**.

Greg Feary will present "Cost Containment Strategies: Utilization of Independent Contractors Throughout the North American Trucking Industry" at the Council of Supply Chain Management Professionals' 2009 Annual Conference, September 20-23, in **Chicago**.

Don Vogel and Fritz Damm will participate in the Canadian Lawyers Association meeting, October 1-3, in **Niagara on the Lake, Canada**.

Andy Light and Greg Feary will speak on Broker Liability Issues and Angela Cash will speak on Accident Liability and Labor Issues Regarding Drivers with Obstructive Sleep Apnea at the American Trucking Associations' Management Conference & Exhibition, October 5-7, in **Las Vegas**. Jerry Cooper also will attend.

Greg Feary will speak on The Future of the Owner-Operator Business Model at the American Association of Managing General Agents' University Advanced Truckers Seminar, October 18-19, in **Dallas**.

Fritz Damm will participate in a panel discussion on Minimizing Risks in Times of Layoff, Recall, and Rehires at the North American Transportation Employee Relations Association, October 25-27, in **Savannah, Georgia**. Jim Hanson, David Robinson, and Don Vogel also will attend.

Tom Farrell will present "What's Up Doc: Solutions to Loading Docks" at the 17th Annual Trucking Industry Defense Association's Industry Seminar, October 25-27, in **San Antonio**. Mike Langford, Don Devitt, and Jim Ellman also will attend.



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Dispatches



Mike Langford reports that the U.S. Supreme Court will hear the *Hertz Corp v. Friend* case to resolve disagreement among the circuits over what constitutes a corporation's "principal place of business." The Court's definition of what constitutes a corporation's "principal place of business" will determine when a corporation can invoke diversity jurisdiction to remove cases to federal court.

Before handing out the last paycheck or settlement for a deceased employee or contractor to whoever comes calling, employers should check applicable state law. A statutory waiting period after death may apply before the funds can be distributed, and an affidavit or court-issued documentation may be required to authorize the claimant to receive the funds. Angela Cash warns that, if the wrong person is paid, the authorized recipient may properly require the company to pay twice.

Bill Brejcha cautions drivers to be aware of speed cameras in areas designated as work zones on major freeways in the state of Illinois. Photo radar is used to take photos of both the driver's face and the license plate of those exceeding the speed limit by as little as one mile per hour. Fines begin at \$375 for the first offense and \$1000, plus a 90-day suspension, for the second.

Jeff Jackson reports that runoff from truck washing is considered an industrial wastewater discharge under federal, state and local laws. Vehicle wash water must be collected and treated separately from storm water runoff.