



Rollin' On [®]



An Electronic and Facsimile Newsletter for the Transportation Industry

Volume VI, Issue 4

Copyright © 2000

April 2000

NONCOMPETES, WASTE AND RR MARRIAGES

Noncompetition agreements have been discussed here before (*Rollin' On*, July 1999), but I'm sure you didn't get enough so here's a little more (the price is right). When noncompetition is mentioned, some people believe it's a reference to other things, like maybe the L.A. Clippers, but that's not what we're talking about here. Noncompete clauses in employment agreements usually restrict departing employees from engaging in the same business for a certain time and within a certain geographical area. In order to be valid, they must be entered into at the time the employee begins work with the business, or when the employee is given a "bona fide advancement", which can mean a pay raise or substantial change of duties. If this criteria is met, then you look at the time and area restrictions (scope) and other tangibles and some intangibles.

Now if the noncompete looks iffy, some employers and their attorneys, not to be deterred, poke around for other theories to keep the employee restricted. Instead of "noncompetition" agreements, they stick in "nonsolicitation" clauses or confidentiality clauses. How is a nonsolicitation clause different from a noncompetition clause? I mean, if you're the departing employee without a valid noncompete clause hanging around your neck, won't you be soliciting former customers if you're still in the same field? Is that nonsolicitation clause just another animal of the same color?

These issues have been around for years, and are always being tweaked, usually by the courts which means that

LARRY R. DAVIDSON
 Attorney at Law
 1850 Benj. Franklin Plaza
 One SW Columbia St.
 Portland, Oregon 97258
 (503) 229-0199
 Fax (503) 229-1856
 E-Mail: larry@rollin-on.com
 www.rollin-on.com

it's not a precise science.

Solid Waste and Recyclable Materials

You are now entering the exciting world of solid waste, dropboxes and recyclable materials. Do not attempt to adjust your dial, screen or loose bodily appendages.

After a two day trial, a federal judge in Portland recently ruled in favor of my client, a solid waste hauler, and against an Oregon city and county and held that federal transportation law preempts the transportation of dropboxes containing recyclable materials. This includes mixed loads of recyclable and nonrecyclable materials when these loads are transported to a material recycling facility (affectionately known as MRFs, pronounced murfs). There was a lot of interest in the case, as three of Portland's finest (i.e. largest) law firms jumped in to fight the case on behalf of the city and county, franchise haulers and state association.

This ruling affects Oregon's franchise system, which traditionally has allowed the award of exclusive, noncompetitive franchises to a select few haulers. The court found that these dropboxes, which the existing haulers would generally take to transfer stations or landfills, contain "property", the transportation of which Congress preempted over five years ago. Now we can save some of our landfill space and increase recycling rates.

STB: I'm from the government and I'm here to help you.

Rail shippers have complained for years that the ICC (and now the STB, Surface Transportation Board) was and is always on the side of the railroads. The standards for relief set by the ICC/STB for shippers have been unattainably high, and thus the number of complaints filed by shippers have been very limited. Shippers have felt like they were just a bug on the track that would get squished if they tried to do anything about any problems, especially since many are captive shippers.

Now along comes the BNSF and CN and they want to walk down the aisle together in holy monopoly (I mean matrimony) and create a transcontinental rail system. Shippers scream bloody murder but that doesn't matter since the STB never listens to them. But . . . the **other** Class 1 railroads also scream bloody murder as they aren't ready for this type of ballgame, primarily probably because they didn't do it first. Now the STB charges to the rescue, in the name of the shippers but let's get real, and imposes a moratorium on rail mergers for 15 months.

BNSF and CN sprint to court to undo this horrible, against-my-rights-type misdeed, at least as far as they are concerned. (What rights do railroads have? Or foreigners? Or shippers?) Shippers are wondering what's going to happen next. And who knows what the other Class 1 railroads are intending to do with this extra time.

That's all for now. To shippers, carriers, agents and other third parties, keep the cargo rollin'!!

The Obligatory Disclaimer

This newsletter is for informational purposes, does not provide legal advice and does not create an attorney-client relationship

Short Bio

Admitted to the state bars of Oregon, Alaska, Florida and Massachusetts. Practicing law for over 20 years and emphasizing transportation law, business law and related litigation