



Rollin' On



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NONCOMPETITION VS. NONSOLICITATION

Patience has its virtues. I've been battling a case in court for a few months and, quite frankly, it hasn't gone the way it was supposed to go. Those things happen. If you're a company and in you're in court at times, you may know how this can work. However, if you're a one time litigant and things go this way, well, it's not very encouraging.

So here's the deal. A carrier has a long time employee/dispatcher. They require the employee to sign an agreement. It provides that, upon termination of employment, the employee can work in the industry, but she can't solicit the carrier's customers. It also provides that she can't serve those customers if they call her out of the blue. They can her butt shortly after she signs the agreement.

Now, Oregon law provides that for a "noncompetition" agreement to be valid, it must be signed at the commencement of employment, or when the employee gets an advancement, the common example being a pay raise. This employee received no such raise (in dispute but a subject for a different day). The employer says this is not a noncompetition agreement, it's a nonsolicitation agreement. We say, whoa, if she can't solicit or serve these customers, it sounds like a noncompetition agreement. We don't believe it's enforceable. She got nothing for signing it, and it restricts her post-employment activities.

The carrier files a lawsuit, including a request for preliminary injunction, claiming a litany of horrors. The case is set for hearing. We show the court how the agreement came about, how the agreement is a noncompetition

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agreement within the meaning of Oregon law, which means, judge, we win, they lose. Who's buying the drinks?

The judge says, no, that ain't so, the carrier says it's not a non-competition agreement, and I agree. We're flabbergasted. We know we have other bugs in the case --most cases do or they wouldn't end up in court --but this is not one of those. So this is not a pleasant development for the client or her attorney. It kind of dampens the day, and it narrows quickly who's buying the drinks, assuming the client even cares to hang around.

Well, lo and behold, last week, the Oregon Court of Appeals issues a decision in a case that is, as we say in the trade, "on all fours" with our situation. The court basically asks what everyone's been smoking. If it looks like a duck, walks like a duck and quacks like a duck, there is a good probability that it is a duck. The court's powers of deductive reasoning is at times limitless. If a former employee can't solicit or compete with the former employer for business, it's a noncompetition provision, and don't get cute with your legal mumble jumbo.

So now we just brought this back to the court's attention. That's always fun. I mean, you tell the judge, OK, you didn't believe me, but you have to believe this higher court. That will score big points for us. Again, if the court says, well, let's see here, that case is "not on all fours", we still lose. Can the court do that? I guessed wrong the first time, so my guess may

be a little suspect. Still, I believe the court will reverse itself. Then we get to deal with those other bugs which I mentioned earlier and which just became bigger as the focus is turned to them.

If you're the employer, keep in mind that noncompetition agreements are still alive and enforceable in Oregon. But if you're going to use them, you have to use them appropriately. If not, you can lose, and keep in mind that employer's attorneys usually add that the prevailing party gets attorneys fees (they can't just be one-sided), which means more unpleasantness.

PNWARS, TAP and Port of PDX

On Thursday, March 1 (with a reception the evening before) PNWARS (Pacific Northwest Rail Shippers) will hold its semiannual seminar at the Greenwood Inn in Beaverton. PNWARS's programs always address current issues in the industry, and it's not all rail stuff although that is the emphasis. PNWARS had a high turnout for its last seminar in September, and this promises to be no different.

Following the Thursday program, the Transportation Association of Portland will hold its monthly dinner meeting, also at the Greenwood Inn. The guest speaker is Susie Lahsene, the transportation manager at the Port of Portland. With channel deepening, cleanup, upriver dam breaching and just your everyday intermodal dilemma thrown in for good measure, it promises to be a good program. Call Kathy Hattrick at Streamline Shippers, 605-630-2152, if you want to join us for dinner, or Archie Brown at 541-688-6675 for PNWARS information.

That's all for now. Keep on 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