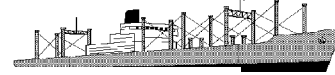




Rollin' On



A Facsimile Newsletter for the Transportation Industry

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CONFIDENTIALITY:

Noncompete or nonplussed?

You know the story. A company hires employees, the employees have extensive contact with the company's customers, the employees become proficient with their work, they eventually feel underpaid, underloved, overlooked, or maybe just have a hankering to try something different, like go to work for another employer or may be go it alone. So they quit their jobs and venture forth. The rub comes when they take their knowledge with them and utilize it in their new endeavors.

The transportation industry is not immune from these concerns, especially with brokerage and carrier operations. And these problems occur with the big boys (and girls) as well, not just the small to medium size variety. A case in point occurred recently with J.B. Hunt Transport and Cardinal Freight Carriers.

Hunt, always on top of things, had its employees sign confidentiality agreements. That's a good start. However, the agreements did not contain a noncompetition provision. The employees, as employees are prone to do, quit their jobs, and, *gasp!*, went to work for the competition at Cardinal Freight. Hunt took umbrage at the prospect of losing some customers, and sued Cardinal for the use of confidential information. The trial court bought Hunt's argument and entered an injunction prohibiting Cardinal from doing business with the Hunt customers.

On appeal, the Arkansas Supreme Court also ruled in Hunt's favor. The court held that the confi-

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deniality agreement did not have to contain a noncompetition provision in order to be effective. The court did not accept Cardinal's argument that Hunt's claim was based on speculation since there was no proof that the departed employees had assisted Cardinal in its Hunt's customer search.

The court further ruled that protected trade secrets were threatened, since the customer information was not generally known and since Hunt had taken action to protect against the disclosure of the information. Finally, the court allowed the injunction to stand, since irreparable harm could otherwise occur to Hunt.

So if you're the employer, what do you do? A cynical answer is not to hire employees. OK, most likely not an option. Plus, if you don't have employees you are deprived the pleasure of paying worker's comp., providing medical coverage, dealing with employee's crisis and all of the other perks of being an employer. Hire employees but limit their contact with customers? That would most likely be impractical. Have the employees sign a confidentiality agreement? That can work, as demonstrated by the *Hunt/ Cardinal* case. But be careful about the noncompetition clauses, since the courts have ruled that they must be reasonable in time and scope. Hunt did without such a clause, although there is a risk in that approach as well. Maybe the best option is to become an employee and let someone else do the worry-

Grey Poupon? But of course.

Remember a few years ago when meals were fully deductible? The problems were the proverbial three martinis and seven course meals being consumed at the expense of the taxpayer. Contrast that with the proverbial blue collar worker who could not even deduct the cost of a baloney sandwich (and for some, a seven course meal meant a possum and a six pack). So a right-minded Congress, shocked by this discovery and even before its recent soul-searching (or other type of searching) in the Bill/Monica files, decided to limit the tax benefit to 50%. This do-gooder act had an immediate negative impact on over-the-road truckdrivers, who can't be at home each night with the spouse and kids. So Congress decided to change that inequity by phasing in the deduction to 80% over a 10 year period. No word yet on whether Congress will switch meals with blue collar folks 20% of the time, and if they like their possum *al dente* or poached.

Even lawyers?

I recently attended an internet training session intended for lawyers. The instructor's handbook had the following flattering comment:

"These systems are all designed to be used by any idiot on the Internet. With a small investment in learning, anyone can be searching the net.

Even lawyers."

I feel better already.

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.