



# 2013

Year of Questions

Henry Seaton, a transportation lawyer, and Jeremy West, a transportation economist, share their perspectives on what the year holds for the industry, identifying the issues that will define the upcoming year.

## The Lawyer

In the coming year, the trucking industry will face four issues which have serious anti-competitive implications and threaten carriers and brokers alike. The outcome of the fall election, congressional gridlock and the divided interests of industry "stakeholders" create a climate for heightened mischief.

The four issues which are of most concern:

1. Anti-competitive effect of heightened vicarious liability and negligent selection in light of SMS
2. Increased regulations in the name of safety and security
3. Independent contractor model under attack
4. Unchecked cost of theft and fraud.

### 1. Vicarious Liability and negligent selection lawsuits

In previous issues of IT Magazine, I have explained how use of SMS methodology by shippers and brokers effectively blackballs half of the industry as unfit to use. Unless judicial relief is granted, it is clear a majority of the shippers, brokers and insurers will be frightened into using SMS methodology to bar carriers, notwithstanding the fact that the FMCSA has determined the carriers are safe to operate on the nation's roadways.

Not only are carriers, large and small, losing competitive advantage, based upon the soundly criticized SMS methodology, but now insurers are using SMS algorithms for rating purposes. Despite very low loss runs and crash data, many carriers are finding difficulty in obtaining competitive quotes because of SMS methodology. Small brokers, in turn, under pressure from frightened customers to up their vicarious liability insurance limits, are similarly finding that their insurers are uncritically accepting SMS as a fait accompli with a disastrous anti-competitive effect.

continued ▶

## 2. Escalating Cost of Operations

In the name of safety, security, and the environment, the cost of operations, and therefore freight rates, will continue to increase at inflationary rates. The decades-long battle over hours of service is finally winding down. In the name of safety and driver welfare, scheduling flexibility has been compromised with the loss of split sleeper berth and the possibility of a protracted restart. The results are loss of productive use of expensive equipment and the frustration of just-in-time inventory management systems as carriers struggle to juggle pickup and delivery appointments in light of congestion and weather problems. Federal and state environmental restrictions such as CARB and the cost of new technology such as EOBRs (particularly retrofits on older fleets) and the cost of compliance will further increase carrier expenditures.

Finally, there is no fix in sight for the looming driver shortage. Superficially, it is a contradiction to think the trucking industry cannot find qualified drivers when unemployment hovers around 8%, and yet our industry's best drivers and owner-operators are the experienced "old hands" who are exiting the industry due to non-economic reasons, such as age and frustration over increased regulations.

Carriers can steal qualified drivers from one another with increased pay packages and sign-on bonuses, but these tactics do not address the industry-wide problem. How do you create a loyal and incentivized workforce if they cannot "get miles and get home with regularity?"

## 3. Owner-Operator Model Under Attack

In this context, owner-operators, the backbone of many small and large irregular route fleets, are under attack at both the federal and state levels. To be sure, the independent contractor model, as used in the motor carrier industry, is a traditionally accepted special niche which is protected by past precedent, the truth-in-leasing regulations and the so-called safe harbor provisions of the federal statutes. Tax breaks traditionally afforded to independent businessmen in the area of worker's compensation and unemployment compensation (at the state level) and reduced self-employment taxes and itemized deductions (at the federal level) have encouraged blue collar entrepreneurs to invest in older equipment and to grow and prosper. Under pressure from democratic constituencies, expect to see bills introduced at both the federal and state levels aimed at facilitating unionization by reclassifying independent contractors as employees across all industries. Organized trucking interests will have to be vigilant to differentiate our industry and the role of owner-operators from misclassification abuses which occur in other industries and to avoid being perceived as captains of capitalism, out to abuse the working man by denying him benefits. Correctly seen, the owner-operator model is a small business, blue collar entrepreneurial success story. The tax benefits and freedom from worker's compensation requirements in most states must be zealously defended as an important incentive.

Clearly, carriers using owner-operators must exercise great care to comply with the federal truth-in-leasing regulations, distinguishing owner-operators from employee drivers and meet the applicable federal and state control tests. The Obama Administration, together with approximately a dozen states, including some real surprises, such as Texas and Georgia, are working hand-in-glove to identify carriers for misclassification prosecution. Increasingly bad precedent with respect to worker's compensation and state unemployment benefits precludes a one-size-fits-all approach to retaining owner-operators in every state. Bills before state legislatures must be closely monitored on a month-by-month basis. Nothing short of a persistent defense of the independent contractor model will be effective in stemming this tide.

continued ▶

# 4 Increasing Cargo Claims

Increasingly, small carriers and brokers are being compromised by uninsured cargo losses. Most cargo insurance policies contain loopholes which are not disclosed to shippers or brokers on the typical certificate of insurance. Exclusion for theft and fraud are commonplace, and theft of high value shipments through fraud and deception remains a serious unabated problem. Local police are often of little help because none want their own statistics hit by acknowledging a problem occurred in their jurisdiction. Hijack and larceny by fraud are not high on the federal enforcement list, and industry programs often do not filter down to small service providers. Transactional brokers are caught in the middle, as a result of identity theft, particularly when freight is diverted and stolen, or when shipments are double-brokered to unsuspecting third parties, after large advances have been taken by phantom carriers.

Hopefully the benefits of the \$75,000 bond will outweigh the regulatory costs, but as long as brokers are coerced into accepting cargo liability only to subsequently discover the carrier they hire is fraudulent or its insurance policy is worthless, the freight charges payment loop will not be secure. All too frequently, shippers refuse to mitigate claims where seal integrity has been compromised and simply deduct or offset the value of the shipment against accounts payable to the broker, leaving the broker with no effective recourse against the carrier or its insurer. I expect to see the cost of cargo claims due to theft, the absence of mitigation, and faulty cargo insurance to remain a troubling and unresolved problem.

continued ▶

