

THOUGHT LEADERSHIP

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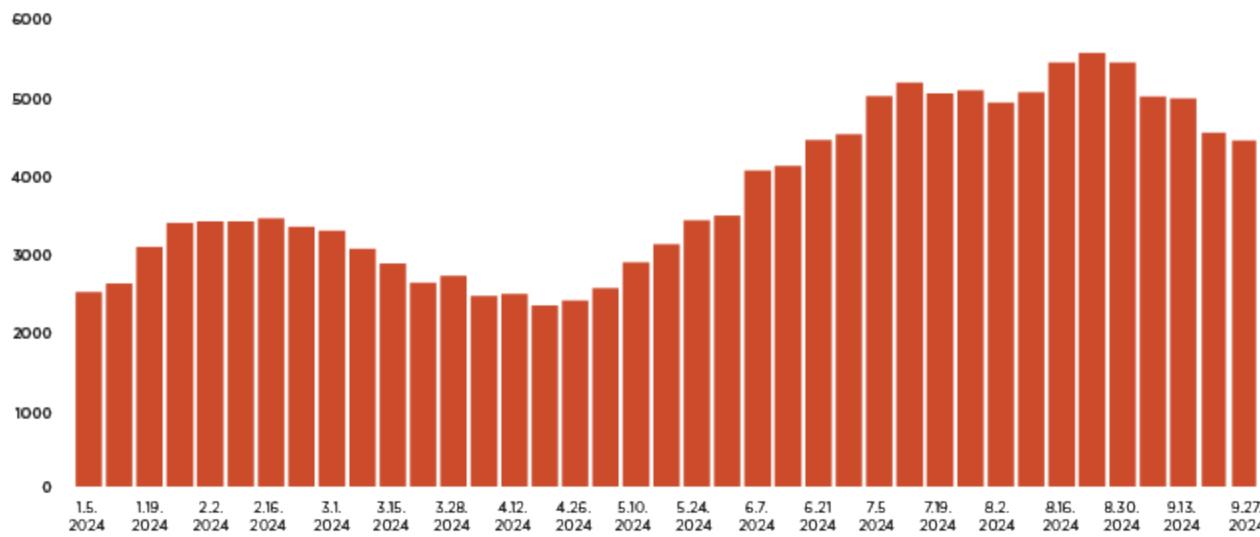
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Legal Insights for Manufacturing: Transportation & Logistics

This article is excerpted from our third-annual *Legal Insights for Manufacturing* report, published in October 2024.

Nearly one-third of industry leaders surveyed by the National Association of Manufacturers in June 2024 cited transportation costs as their primary business concern, reflecting ongoing geopolitical and logistical challenges that have led to steadily higher shipping rates throughout the year. Despite expectations that new capacity would eventually provide shippers with relief, the higher rates have been sticky. As 3Q 2024 drew to a close, the Freightos Baltic Index (FBI) hovered at or near \$5,000. While a return to Covid-era rates is unlikely (the FBI peaked in September 2021 at just over \$11,000), current levels are much higher than year-end 2023 rates and have contributed to elevated operating costs.

FREIGHTOS BALTIC INDEX (FBX): GLOBAL CONTAINER FREIGHT INDEX
Index In U.S. Dollars

Source: Freightos.

Detention & Demurrage

By the end of 2023, with supply chains returning to something close to normal, detention and demurrage (D&D) charges had fallen back to pre-pandemic levels after experiencing a tenfold run-up during Covid. Recent disruptions, however, could reverse this trend.

It was during the Covid-related spike in D&D charges that Congress passed the Ocean Shipping Reform Act of 2022 (OSRA), which sought to even the playing field between carriers and shippers by reforming the invoicing process to provide all parties with clarity, predictability, and timeliness in the assessment of D&D charges.

In February 2024, the Federal Maritime Commission (FMC) published a final rule in connection with D&D billing practices, and the rule took effect May 28, 2024. The rule sets forth the process for invoicing, including who can be invoiced, the minimum information required for compliant invoices, the timing of invoices, and when an invoice can be timely contested by the billed party. Notably, these regulations affect not only shippers and carriers but also Non-Vessel Operating Common Carriers (NVOCCs), steamship companies, customs brokers, warehousemen, and truckers—in short, the complete supply chain.

In April 2024, the World Shipping Council (WSC), a carrier trade association, filed a petition for review with the D.C. Court of Appeals challenging FMC's final rule as "arbitrary, capricious, an abuse

of discretion, and otherwise contrary to law,” as well as seeking an order vacating the final rule. This case and other potential administrative challenges to transportation regulators will be closely watched especially in light of the recent U.S. Supreme Court decision in *Loper Bright*.

Given the wide application of Chevron in administrative law over the past 40 years, it is anticipated that the full impact of *Loper Bright* in the transportation space will play out in the courts, the legislature, and administrative agencies for years to come. For instance, we could see future actions that attempt to curtail the U.S. Department of Transportation’s (DOT) authority to define an “unfair and deceptive practice” or challenge the National Transportation Safety Board’s investigative policies following accidents.

Private Fleets Versus Outsourcing

Over the past decade, episodes of severe scarcity in trucking capacity have plagued the freight markets, leading many manufacturers to implement—or at least, to consider implementing—private fleets. The use of private fleets has waxed and waned over time, along with the underlying economics of building and maintaining what is—for most manufacturers—a truly non-core capability. As manufacturers revisit this perennial question, there are some factors and trends worth considering.

At the top of the list is cost, which is often decisive. The structural overhead associated with trucking has increased, with driver compensation, insurance, fuel, and vehicle purchase and maintenance all experiencing significant inflation over the past decade. This escalation in cost would argue against private fleets, but trends have moved in the opposite direction since the onset of Covid, mostly because the negative effects of not being able to transport product during periods of extreme supplychain dislocations can be enterprise-threatening; thus, private fleets operate as a kind of hedge against certain geopolitical, logistical, and trade-related risks.

Just as the total cost of ownership for private fleets have increased, so, too, have the associated legal and regulatory challenges. In addition to the myriad standard trucking industry compliance areas—such as hours of operation, vehicle inspections and maintenance, cargo handling, driver qualifications, and incident tracking—there are novel regulatory initiatives that will add cost and consume resources for those engaged in trucking. These efforts are typically found in areas relating to sustainability and safety and include stricter federal and state emissions standards, enhanced drug and alcohol testing policies, and the increased (and mandated) use of Electronic Logging Devices (ELDs).

\$13.8 billion

Detention and demurrage fees charged between April 2020 and September 2023 by the nine carriers participating in FMC’s VOCC Audit Program.

Private fleet operators also have exposure to fast-evolving risks that are difficult to measure and manage. As the mandated use of ELDs accelerates, the trucking industry increasingly relies on complex tech systems and network interconnectedness with its rolling assets. Fleet owners need to take adequate cybersecurity countermeasures to anticipate social engineering and phishing attacks, application programming security, and vulnerabilities in trucking technology, including data privacy protections.

Additionally, the operation of private fleets adds a layer of complication to an already complex web of labor and employment law. Operators must be knowledgeable and aware of the state and federal rules affecting the independent contractor classification of certain drivers and other trucking agents.

Recent state laws, such as those in California,

Massachusetts and New Jersey, and the 2024 U.S.

Department of Labor final rule regarding whether a worker is an employee or an independent contractor under the Federal Fair Labor Standards Act can make the economic reality of hiring a difficult one.

There is no single answer to the private fleet conundrum that will work for all manufacturers. For some, the goods and products moved will require highly customized containers, such as climate-controlled units, while other manufacturers might value control over delivery and customer service above all else. The risks and rewards of private fleets will necessarily be different from operation to operation, but the dilemma is not an either/or proposition. Hybrid solutions that mix outsourcing with private fleets allow manufacturers great flexibility in managing its transportation needs.

UPDATE ON ILA STRIKE

On October 3, 2024, the International Longshoremen's Association (ILA) and the United States Maritime Alliance (USMX) reached an agreement that extends the ILA labor agreement that ended September 30, 2024, and that allows dockworkers to suspend their strike that affected East and Gulf Coast port operations. The extension will be in force until January 15, 2025. In the interim, negotiations will continue toward a new agreement.