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THE LAW AND YOUR BUSINESS

Illinois Court Refuses to Enforce Prohibition Against Back Solicitation

By Ronald H. Usem

Two recent cases deny enforceability of back solicitation clauses in contracts.

The first case, *C.H. Robinson Worldwide, Inc. vs. Kindersley Transport Limited*, App. IL 1-05-0562 (March 2006). The plaintiff was C.H. Robinson, (CHR), and Defendant Kindersley Transport Limited (KTL) was a licensed-for-hire motor carrier transporting freight in interstate commerce. In June 1999, CHR and KTL entered into a written transportation agreement by which CHR was to tender freight and KTL was to provide motor carrier services. The contract contained a prohibition against back solicitation, which stated in relevant part,

“Carrier agrees that...it...will not back solicit any business of any customer of Broker whom it...comes into contact with...or becomes aware of as a result of any shipments tendered to Carrier by Broker...during the term of this Agreement...Carrier shall not solicit directly or indirectly any customers, freight, or business of Broker...”

The restrictive clause was to apply for one year following termination of the agreement. In addition to the no back solicitation clause, the contract contained commonly used confidentiality language, which stated in relevant part:

“All information furnished to Carrier whether marked ‘proprietary’ or ‘confidential’ shall be deemed to be business proprietary information of Broker and its customers and carrier agrees not to disclose or use it except in the performance of this Agreement without Broker’s prior written consent.”

The restrictive terms are fairly standard in broker/carrier transportation agreements. One clause is intended to prohibit solicitation of brokers customers and the other is intended to prohibit unauthorized use of brokers confidential and proprietary information. The complaint alleged that KTL had back solicited freight shipments directly from Owens Corning, a customer of CHR. The defendant raised affirmative defenses, as well as counterclaiming for non-payment of transportation charges. Affidavits from KTL asserted that it had been providing transportation services to Owens Corning since 1975. In addition, the affidavits asserted that in 1991 Owens Corning request-

ed pricing directly from KTL and that the company had responded with specific rate quotations. KTL also argued that CHR did not have a protectable interest in its customers and that the restriction in the contract was a “restraint of trade.”

CHR argued that it did not claim that KTL first knew of Owens through CHR but rather that KTL had back solicited a lane of traffic that it had never handled directly for Owens previously. CHR further argued that a reasonable interpretation of its contract meant that the prohibited activity referred to the lane of traffic and not to the shipper in an overly broad sense. CHR furnished deposition testimony that essentially proved the back solicitation of traffic from Owens Corning in the contested traffic lane between Alabama and Alberta, Canada.

The Circuit Court (trial court) determined that there were evidentiary issues as to whether KTL had back solicited the new lane of traffic. And, further ruled that the restrictive covenant was enforceable. On Motion For Reconsideration, the Circuit Court granted Summary Judgement to the Carrier. KTL apparently took the position that the traffic lane was not a new traffic lane and that because of KTL’s prior business with Owens, the contract had not been violated.

The saga goes on. CHR appealed to the Illinois Appellate Court. On appeal, CHR argued that it had provided sufficient evidence to raise questions of fact as to whether KTL had solicited Owens Corning during the one year following the termination of the contract. It further argued that the Circuit Court had committed error when it imputed the word “prior” into the restrictive clause thereby creating an exception for customers for whom KTL had prior relationships before entering into the contract. The Appellate Court agreed with CHR on both issues. So far, so good for CHR.

Next, the Appellate Court engaged in an analysis of the enforceability of the Restrictive Covenant and questioned whether there was a legitimate business interest to protect. CHR conceded that it did not have a “near permanent” relationship with its customers but claimed that KTL had obtained non-published information on pricing, customers and equipment requirements and then used that information to obtain Owens business. CHR argued that the information was “confidential” because with it KTL could

solicit Owens directly for a lower amount than CHR charged. CHR provided evidence from its Vice President of Operations stating that, "pricing structure is the most confidential and sensitive information...because its use together with customer information can result in loss revenue hurting the business." Furthermore, he added that confidential information included CHR's customer contact information, frequency of shipments, the commodity insulation and the length of the traffic lane in miles. CHR provided further evidence that KTL knew the importance of the shipping rates in order to solicit new business. On the other hand, KTL denied that it ever used any pricing information, customer contact information or any other "confidential information."

After analysis of cases, the Illinois Appellate Court concluded that "CHR failed to establish a protectable business interest in its pricing and customer information." Contrary to the Appellate Court's earlier statement, the court stated that KTL had a prior relationship with Owens and had bid the same traffic lane that was at issue in this case. The Court provides no reasoning for how it reached its conclusion. The Appellate Court goes on to state, "...even if the Defendant (KTL) had access to the rates that the Plaintiff (CHR) charged Owens to ship its freight, the Plaintiff failed to establish that Defendant had access to how the Plaintiff determined those rates or that it used that information to obtain Owens' shipping business. As to the rate Plaintiff was charging Owens, the Plaintiff failed to establish such information was confidential and that it could not be obtained by calling Owens directly."

The Illinois Appellate Court concluded that CHR failed to prove a protectable interest in its pricing and customer information and therefore refused to enforce the restrictive back solicitation clause and affirmed the decision of the Circuit Court. The Illinois Supreme Court refused to allow an appeal 857 NE2d (669) (2006). Thus, the opinion of the Appellate Court stands as the law of Illinois.

If you are a carrier, you will probably be very pleased with this decision. If you are a broker, you are probably horrified and perplexed to say the very least. While the court goes to great lengths to analyze whether CHR had disclosed any "confidential information," it completely ignored the plain language of the contract, which prohibited KTL from soliciting customers whom it came in contact, as a result of the shipments tendered to it by CHR. CHR even stated that its own interpretation of the contract was that it was attempting to protect only one traffic lane, which KTL had never serviced. The court does not explain why there might be a difference in the result if the

defendant gained knowledge of how the plaintiff had calculated its rates. Furthermore, the Court completely ignored CHR's claim that the customer contacts and equipment requirements were "confidential" although it is not clear what if any evidence CHR presented on these points. We can wonder if the results would have been any different, if CHR had asserted and proven actual damages, which resulted from KTL's solicitation of business from Owens Corning.

The moral of the story: At least in Illinois, it appears that prohibitions against back solicitation should include the following considerations among other items:

- The contract should expressly provide that even if the carrier has previously conducted business with the shipper, that fact should not constitute an exception to the prohibition of the contract.
- A clear prohibition of the carrier from conducting business with shipper regardless of whether the broker's information used by the carrier was confidential. Confidentiality should not be the sole controlling issue. If the carrier learns of the shipper's business through actually serving the broker, the broker's business should be protected.
- The contract should expressly provide a very precise definition of "confidential information."
- Brokers must prove how the information was obtained and how it was actually used by the carrier in order to obtain the shipper's business
- Brokers must prove how the confidential information was protected, i.e., what security measures were taken to protect that information. Please note, there is nothing in the opinion, which deals with that subject.

We can only wonder if the result would have been any different if CHR had proved some actual damages. In the big picture, Illinois courts have set a high standard of proof in order to enforce a prohibition against back solicitation in a broker/carrier transportation agreement. As in most contracts, the issue of enforceability lies in the facts and what the parties can prove. Unfortunately for CHR, the court's opinion was tied to the "confidentiality" issue rather than the intention of the parties as clearly expressed in the agreement.

In the next issue, we will examine what an Iowa court did in a recent decision concerning the enforcement of a prohibition against back solicitation in an Independent Sales Representatives Agreement.

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