

## Hot Recent Cases in Motor Carrier Law

by *Steve Block* January 2006

**Broker or forwarder for jurisdictional purposes? It could be either, turkey.**  
*National Turkey Growers Cooperative Association v. ATG Logistics Service v. Jennifer's Delivery Service*, 2005 U.S. Dist. LEXIS (D. Neb 2005)

Shipper National Turkey Growers Cooperative Association entered into an oral transportation contract with ATS Logistics, trying to get a load of turkeys moved from Nebraska to Florida. The deal apparently was rather loosey-goosey, as the shipper wasn't sure whether ATS would be doing the actual carrying, booking it out to someone, or serving as a proverbial travel-agent freight broker. In fact, ATS placed the load with carrier Jennifer's Delivery Service. When the birds were lost on their way south, the shipper sued ATS in Nebraska state court. ATS, in turn, removed the case to Cornhusker federal court and impleaded Jennifer's.

In response to the plaintiff shipper's motion to remand to state court (based on lack of federal jurisdiction), a federal magistrate concluded that ATS acted solely as a broker in the subject haul, leaving no grounds for federal jurisdiction (Carmack doesn't hold dominion over brokers). After all, the shipper hadn't alleged in its complaint (first or amended versions) that ATS was either a carrier or forwarder; and ATS averred in its answer that it was no more than a broker. But when reviewing the magistrate's recommendation, the judge disagreed and denied the shipper's motion. Recognizing that the line between a carrier and broker "is often blurry," the court found the complaint encompassed alternative allegations as to ATS' status. Because the shipper could potentially demonstrate that ATS had held itself out as a carrier, the court ruled discretionary remand would be improper at this time. It wasn't critical to this court whether or not the complaint pleading specifically that APS was a carrier.

**Worker's comp claim of owner-operator's driver gets dumped**  
*Kerns Trucking, Inc. v. Whiteside*, 2005 Ala.Civ.App. LEXIS 715 (2005)

Owner operator AG Enterprises leased a dump truck to Kerns Trucking, and supplied AG driver Whiteside. The lease provided that AG would attend to and remain responsible for employment issues. However, Whiteside's employment contract showed, or at least suggested, that Kerns was her employer. Angie Grimes, AG's owner, had become an employee of Kerns. Moreover, Whiteside filled out a job application which listed Kerns as the employer, and Kerns provided Whiteside its employment manual, apparently subjecting her to Kerns' employment policies. Lastly, Kerns' labels were affixed to the dump truck. Whiteside was injured on the job, and sought worker's comp benefits under Kerns' coverage. Kerns resisted, claiming that Whiteside was AG's employee for purposes at hand. The whole mess went to an Alabama court.

The court ruled that Kerns was Whiteside's special employer for worker's comp purposes. Finding the case substantially identical to an earlier precedent, the Alabama appeals court reversed. Just the opposite, AG exercised requisite control over Whiteside such that it remained her true employer. The Yellowhammer legislature had specifically excluded carriers from classification as "special employers" of their owner operators' employees. The precedent had held that the owner operator's "mere delegation" of duties cannot alter that legislative intent, apparently even if formalized under new employment relationships. Grimes' employment by Kerns was irrelevant, and she gets to take care of Whiteside's medical bills.

**After delivery, a factory worker's injury is no longer the carrier's problem**

*Booth v. Quality Carriers, Inc.*, 2005 Ga. LEXIS 1268 (2005)

Carrier Quality hauled a load of cylindrical containers ("isotainers") from Georgia to North Carolina, having secured the drums. It neither noted nor corrected any isotainer equipment defects. Before departing with the load, the carrier's owner operator driver had performed a required pre-trip inspection. Some six hours after the freight had been offloaded in the consignee's facility, a factory worker was injured by a valve that exploded when he connected a hose.

The injured worker sued Quality, claiming that Quality should have determined and corrected a problem with the valve as part of its inspection. The driver conceded he was not familiar with a discharge valve on the top of the isotainer, but a Georgia court didn't buy the argument, and dismissed the worker's claims. Quality owed no duty to the consignee or its employees. The consignee wasn't the freight's owner until after delivery. Thus Quality's negligence (if any, which the court seemed to find doubtful) didn't give rise to liability to the injured worker. Moreover, the facts suggested the worker was undertrained, not properly supplied with protective gear and/or himself negligent in the accident.

**Oregon commercial tire salesperson is not exempt from state income tax**

*Gilroy v. Department of Revenue*, 2005 Ore. Tax LEXIS 226 (2005)

How far does the interstate transportation industry exemption from state tax liability go? Not so far as a commercial tire sales rep would like. So says an Oregon tax court in response to a Washington-resident truck tire seller's complaint. Under federal law at 49 USCS § 14503, a taxpayer is exempt from state tax obligations if he is (1) a nonresident; (2) compensated by a motor carrier; (3) has duties in two or more states; and (4) is an employee within the meaning of 49 USCS § 31132. Vancouverite Gilroy met the first three criteria with regard to his business activities in cross-the-river Portland, but was he the right kind of employee?

After a telephone trial (how's that for efficiency!), the court concluded he was not. Section 31132 is designed for employees whose work activity "directly affects commercial motor vehicle safety in the course of employment." True, Mr.

Gilroy's tire sales and even some other activities touched on safety. But his "primary duty" was to "maximize sales." The tasks he undertook for safety purposes actually were implemented through other employees. The Oregon court had previously ruled that "direct effect" implies "employees who use their hands in performing their duties." Thus, Mr. Gilroy must pay Beaver State taxes if he wants to sell tires there.

**BMC-32 insurance coverage for contract coverage? We finally get an answer!**  
*M. Fortunoff v. Peerless Insurance Co.*, 2005 U.S. App. LEXIS 27257 (2nd Cir. 2005)

No, BMC-32 coverage is not required for and does not pertain to contract coverage. The Second Circuit Court of Appeals has finally answered that question, reversing the Eastern District of New York. The Federal Motor Carrier Safety Administration, operating within its sound discretion, may require minimum cargo liability insurance coverage for common carriers only, leaving market forces to dictate whether or when contract carriers must procure coverage.

The court goes through an impressive review of Congressional intent regarding the Interstate Commerce Commission Act's treatment of the two varieties of shipper/carrier relationships in addressing a simple fact pattern: contract carrier damages shipper's freight; carrier goes belly up; shipper sues carrier's BMC-32 insurer. The trial court had granted summary judgment in favor of the shipper, and the court of appeals reversed finding Congress intended to allow FMCSA to do just what it's been doing, i.e., impose mandatory cargo coverage on common carriers only.

Notwithstanding ICCTA's abolishment of the difference between common and contract carriers for certain purposes (namely registration), nothing in the law or legislative intent suggests the legislature specifically withheld discretionary authority from the relevant agency regarding insurance coverage. FMCSA explained its position and rationale in its amicus brief, both of which are entitled to deference given the statute's ambiguity on the subject.

The contract at issue apparently contained clauses imposing common carrier liability on the carrier, a point the trial court didn't analyze. The case was remanded for further development on that point, but this shouldn't impact the appellate court's primary conclusion.

**The job's not done until the product's delivered, at least for insurance coverage purposes**

*Secura Insurance v. Stainless Sales, Inc., et al*, pending in the U.S. District Court for the Sixth Circuit under Cause No. 04-2000

This one's not specifically a trucking case, but we found it important enough to include here because its issue and holding could easily apply in the motor carrier context. Steel coil supplier Stainless, insured with commercial general liability

coverage by insurer Secura, sold a series of coils to a Philippines-based buyer. Stainless had the coils trucked to Chicago for rail carriage by BNSF to Tacoma and onward ocean transport. The BNSF train derailed, costing Stainless its sale.

Stainless sued BNSF, and the railroad counterclaimed, alleging that an improperly packaged coil caused the derailment. Stainless turned to Secura for coverage on the counterclaim, asking the insurer to pick up defense costs. The insurer denied coverage, pointing to a policy exclusion for losses incurred based on “products-completed operations hazard.” In other words, the insurer believed there was no coverage for losses to or caused by products the insured had completed. The Eastern District of Michigan and Sixth Circuit Court of Appeals disagreed. Basically, the product hadn’t been “completed” until it was delivered. The courts made sure to point to insurance policy interpretational decisions addressing an insured’s “reasonable expectation” under the purchased coverage.