

Hot Recent Cases in Motor Carrier Law

by *Steven W. Block* March 2002

THE COURTS

Court cases reported in this issue of *Association Highlights* focus principally on litigation interpreting federal law and regulations. Federal Motor carrier Safety Administration's Motor Carrier Safety Regulations, Occupational Safety and Health Act, Fair Labor Standards Act. Maybe trucking isn't a simple business anymore.

Improper Log Keeping Is a Serious No-No, but not Proximate Cause

Parker v. R&L Carriers, 2002 WL 203765 (Ga. App. 2002)

Anthony, driving for motor carrier R&L, filled out his log in advance of his haul, estimating the time he'd be in on the road. That, of course, violates 49 CFR §392.3's provisions addressing record keeping. Tragically, his rig collided with a car driven by Mrs. Parker, who later died of related injuries. Anthony then modified his log to show the actual time he was traveling.

Mr. Parker sued R&L in Georgia State court. R&L won a defense verdict (this opinion doesn't get into the specifics). Parker appealed the trial court's refusal to instruct the jury regarding Anthony's improper log keeping.

The Court of Appeals affirmed, finding that Anthony's violations of 49 CFR §392.3 were irrelevant. Dishonest log keeping had nothing to do with the accident, so the violation of pertinent regs couldn't establish proximate cause.

It's a Tolling Task, but You Have to Keep Your Records Straight!

A.D. Transport Express v. United States, 2002 WL 104797 (6th Cir. 2002)

Carrier A.D.'s drivers regularly paid highway tolls. Trouble was, A.D. didn't do such a good job keeping the toll receipts organized. It apparently just bundled them together in big envelopes. Complicating the problem was a computer crash that apparently lost A.D.'s back up data. Along comes the Federal Motor Carrier Safety Administration's auditor, who finds A.D.'s procedures violative of various driver record keeping regs. The auditor hit A.D. with a "conditional" rating.

Upset with the classification, A.D. took the matter to court, and the dispute made its way to the Sixth Circuit. A.D. claimed the auditor's requirement that A.D. produce organized receipts and other documentation went beyond interpretation and enforcement of FMCSA regs, and constituted new rule making outside of regulated procedures.

The Sixth Circuit didn't buy A.D.'s argument. Great deference must be afforded regulatory agencies, given their unique expertise, especially when they address public safety concerns. The court agreed A.D.'s loopy-goopy procedures made it impossible for the FMCSA to verify driver activity.

True, the regs aren't all that well written, but "common sense" controls when regs' intent is clear. This wasn't rule making, because the auditor didn't change any existing law or policy. Rather, he was just putting an altogether justified spin on regulatory language.

A Regulatory Question of Semantics, or, What's an "Accident?"

Cassara v. DAC Services, 276 F.3d 1210 (10th Cir. 2002)

DAC is part of that cottage industry catering to motor carriers in the market to hire new driver employees. DAC digs up the employment histories of drivers so that carriers can comply with Federal Motor Carrier Safety Regulations mandating driver background checks. Among other things, those regs require trucking companies to learn about candidate drivers' previous "accidents."

The term "accident" is defined at 49 CFR §391.21(b)(9), which makes "accident" sound like only a rather serious calamity. But motor carrier employers often use the word "accident" in personnel files much more broadly. For instance, a trucking company might consider a driver nicking his side mirror – which could cost the company money – serious enough to include in a driver's record, labeled as an "accident."

The problem here was that DAC applied any "accident" mentioned in a driver's personnel file, whatever the circumstances, to drivers' assessments when reporting to its customers. Apparently, DAC reported a number of incidents in driver/candidate Cassara's report to a couple of carrier employers, causing Mr. Cassara headaches while he was looking for new work. Cassara sued DAC, claiming the agency failed to adopt reasonable procedures to ensure accurate reporting, as required by the Fair Credit Reporting Act, 15 USC §1681 e (b).

Reviewing the Northern District of Oklahoma's award of summary judgment in favor of DAC, the Tenth Circuit agreed there were problems here. The Court of Appeals didn't say DAC and other agencies had to apply the regulatory definition of "accident" in making their reports, but it did say uniform and semantically understandable guidelines must be adopted. Reversing the summary judgment, the Court of Appeals ruled the district court must give Mr. Cassara an opportunity to show that DAC's approach caused him harm. Thus, DAC and others in its industry must be more demonstrably precise in their reporting criteria than simply restating terms in personnel files.

Applying OSHA Standards in a Civil Case. Well, Sorta...

Scott v. Matlack, Inc., 2002 WL 43222 (Colo. 2002)

The Occupational Safety and Health Act includes regs that do not create private causes of action, as has long been held by courts across the land. Violation of OSHA provisions can land an employer in hot water, but an injured employee can't simply point to an OSHA penalty and be home free in a civil lawsuit against the employer. In other words, while many statutory violations can be the basis for a finding of negligence *per se* in court, an OSHA violation generally cannot be.

In this case, a driver got hurt on the job, and a motor carrier – not even his actual employer – got hit with penalties based on OSHA violations that apparently caused the injury. The driver thought that should be very strong evidence in favor of his tort claim. The employer argued the OSHA fine should be inadmissible as trial evidence.

Colorado's Supreme Court sided with the driver. True, the OSHA violation could not be the basis of a finding of negligence *per se*, but it could be used to support a claim of garden-variety negligence. That's the case even if the OSHA violator wasn't even the plaintiff's employer (the driver was a business invitee). Moreover, the confidentiality of an OSHA settlement won't keep the citation out of court. However, the OSHA matter "must be relevant, offered in support of expert testimony, objective, and recognized and accepted by the industry involved."

Here's News from Illinois:

Motor Carrier Workers Are Exempt from the FLSA

Barron v. Lee Enterprises, 2002 WL 113790 (C.D. Ill 2002)

A few newspaper employees worked long and hard hours in Decatur, Illinois. They attended to a wide variety of tasks, some of which involved actual delivery of papers. Some components of the paper were printed in other states and trucked into Illinois. Realizing the Federal Labor Standards Act ("FLSA") would hold much of their hard work subject to overtime pay (minimum time and a half), the employees sued the newspaper's publisher for back overtime wages.

The paper's attorneys did their homework and came up with a grand defense: because a portion of the employees' job responsibilities included interstate commerce, the employees were exempt from the FLSA pursuant to the Motor Carrier Act, 29 USC § 213(b)(1). Citing a U.S. Supreme Court precedent, this court found that "[t]he activities of one who drives in interstate commerce, however infrequently, are not trivial. Such activities directly affect the safety of motor vehicle operations... Even a minor involvement in interstate commerce as a regular part of an employee's duties subjects the employee to the jurisdiction of the Secretary of Transportation."

Throwing their last card, the plaintiff employees urged that the newspaper had submitted this argument too late, but they couldn't point to any prejudice by the purported untimeliness. Consequently, they were out of luck.

THE AGENCIES

Agency activity reported in this issue of *Association Highlights* includes some interesting, if uncontroversial, items. New household goods carrier rules and filing requirements from the Surface Transportation Board. Suggestions for a HAZMAT security program from the Research and Special Programs Administration. Not much to argue about here.

Surface Transportation Board

Released Value Revisited

Decision, Amendment No. 4 to Released Rates Decision No. MC-999, *Released Rates of Motor Carriers of Household Goods* (December 18, 2001)

Decision, Amendment No. 4 to Released Rates Decision No. MC-999, *Released Rates of Motor Carriers of Household Goods* (January 18, 2002)

The Household Goods Carriers' Bureau Committee (the "Committee") sought authority from STB to change the terms under which its motor carrier members may seek to limit their liability for damage to, or loss of, household goods in their care. The Committee sought to establish two options: (1) the shipper would pay only a base rate for the shipment and the carrier's liability would be limited to 60 cents per pound, per article; or (2) for an additional charge, the carrier would be liable for the full replacement value of lost or damaged goods up to the pre-declared maximum value of the shipment.

The first option is essentially the same as one of the options that has been in effect since the Interstate Commerce Commission last visited the issue in 1993. [*Released Rates of Motor Common Carriers of Household Goods*, 9 I.C.C. 2d 523 (1993)]. The second option, however, implements a change in the liability standard from "depreciated value" to "full replacement value" as declared by the shipper with a minimum exposure of \$4.00 per pound. Some carriers outside the Committee had experimented with a replacement value standard and found it to be a popular option for a large percentage of shippers.

The Board approved the amendment. However, responding in part to the comments of consumer groups, the Board is requiring the carriers to include on the bill of lading a notice, in large type and in a prominent place, explaining the liability options in detail. The notice must advise the shipper that 60 cents per pound is less than the average value of household goods and that if the other option is selected, the carrier will be liable for the full replacement value of lost

or damaged goods. In addition, the bill of lading is required to provide for the shipper to acknowledge receipt of a brochure describing the liability options in detail. The additional requirements are in response to concerns that carriers would steer shippers into accepting the 60-cent limitation.

By an additional Decision published January 18, 2002, the Board approved the Committee's request that it not be required to implement the change until May 12, 2002. The additional time is required to print the new forms and to educate Committee members about their new obligations when discussing valuation options and limitations of carrier liability.

To Get Good Scan

Final Rule, STB Ex Parte 576, *Electronic Access to Case Filings*, 49 CFR 1104, 67 Fed. Reg. 5513 (February 6, 2002)

The Board amended its Rules governing the filing of documents in order to facilitate the scanning of the documents for publication on the Board's web site. All documents must be typed, double-spaced, on 8½ by 11-inch white paper, with dark type no smaller than 12 point. Original documents must not contain divider tabs and must be paginated continuously. The new requirements can be found at 49 C.F.R. §§ 1104.2 and 1104.3.

Those of us who rely heavily on the STB web site will benefit from improvements in the scanning techniques used by the Board. An improved web site would be a step in the right direction.

The Rule became effective March 8.

Research and Special Programs Administration

HAZMAT Security

Advisory Notice; Research and Special Programs Administration; *Enhancing the Security of Hazardous Materials in Transportation*; RSPA –2002-11270, Notice No. 02-4; 67 Fed. Reg. 6963 (February 14, 2002)

As a result of the terrorist attacks of September 11, the Research and Special Programs Administration is engaged in a broad review of government and industry hazardous materials transportation safety and security programs. In its review, RSPA identified several actions that can be taken by persons involved in the transportation of hazardous materials to implement and enhance security. On February 14, 2002, RSPA shared an outline of these actions in a Notice published in the *Federal Register*.

RSPA encourages persons involved in hazardous materials transportation to consider implementing security measures as appropriate to their industry and their operations. RSPA has assisted in the development of these plans through posting of a Risk Management Self-Evaluation Framework on its web site, hazmat.dot.gov.

A HAZMAT security plan should include the involvement of employees. Additional training and regular meetings should be required.

The plan should also implement additional security measures at company facilities. Local law enforcement officials can be called on for assistance in the development of these measures.

Shippers and carriers can work out details regarding security while the hazardous materials are en route. Preferred and alternate routing should be developed. Stops should be minimized.

Contracting and personnel decisions are also important. Shippers should be careful in the selection of their carriers. Employers should verify information on resumes and check references of prospective employees.

The Notice includes a list of resources, including federal agencies and industry associations and organizations, which are available to assist in the development of a security plan.