

Hot Recent Cases in Motor Carrier Law

by *Steve Block* March 2003

You gotta give notice (no matter who issued the bill)

***Fireman's Fund McGee v. Landstar Ranger*, pending in the U.S. Dist. Ct. for the Southern District of Texas, Civ. Action No. H-02-1940**

Empire Resources imported some aluminum extrusions. Southern Warehouse received the cargo and issued a bill of lading as Empire's agent, directing surface delivery by carrier Landstar to ultimate consignee Arrow Metals. The bill incorporated "tariffs in effect" (without stating *whose* tariffs), and specified the cargo must be kept dry (which it wasn't). Empire's insurer, Fireman's Fund, paid Empire some twenty two grand in damages, then sought recovery in subrogation against Landstar.

Landstar, a member of the National Motor Freight Classification, pointed to the Uniform Straight Bill incorporated by NMFC 100-Z. That bill requires that a shipper notify the carrier of loss within nine months of delivery. Neither Fireman's Fund nor Empire beat that deadline.

But Landstar didn't even issue the bill of lading, responded Fireman's Fund. Southern's bill didn't expressly incorporate Landstar's NMFC tariff, so it shouldn't come into play. The court wasn't sympathetic to Fireman's Fund's logic. The shipper had a burden to request a copy of the carrier's tariff. The fact that Southern's bill didn't state who the carrier would be didn't make any difference. Summary judgment was granted dismissing Fireman's Fund's claim.

And on a similar notice . . .

***Kolman v. Andrews d/b/a First Choice Marine*, pending in the U.S. Dist. Ct. for the District of South Carolina, C/A No. 3:02-2235-22**

Kolman contracted with First Choice Marine to transport a yacht from South Carolina to Tennessee (what he was going to do with it in the Volunteer State is anyone's guess). Somewhere along the way, the yacht was damaged and returned to First Choice's facility in North Carolina. An upset Kolman later hired another carrier to bring his boat to Tennessee. After paying his damaged cargo claim, Kolman's insurer sought recovery from First Choice in subrogation.

Again, the issue was timely notice of claim. Here, First Choice relied on 49 CFR Part 1035 App. B § 2(b) language, which was incorporated in its straight bill of lading. That reg requires notice within nine months. The regulatory language was activated by a bill of lading term subjecting the carriage "to all conditions not prohibited by law, whether printed or written, herein contained (as specified in Appendix B to Part 1035)." First

Choice apparently had relocated and never received a series of letters from Kolman about the loss.

In response, Kolman cited, and the court bothered to analyze and distinguish, 49 CFR § 1035.1(a)(1). That provision requires carriers to print timely notice requirements explicitly on their bills of lading. While the court bought First Choice's rebuttal that this section applies only to order bills of lading, it could more easily have dismissed Kolman's argument by pointing to that reg's applicability only to railroad carriers (49 CFR 373.101 applies to motor carriers and works quite differently).

The court properly found that Carmack *allows* a carrier to require notice of loss to a minimum of nine months after delivery, but doesn't actually impose such a notice requirement as a matter of law. Moreover, the regulatory language, even though recited in First Choice's bill of lading, is designed to impose an obligation on carriers, and not on shippers. Thus, it isn't sufficient to squelch a lawsuit based on untimely notice. Lastly, Kolman filed his complaint within nine months of the loss, which would constitute adequate notice in any event.

A driver takes an FMCSA inspector and a Smokey to task
Kukla v. Hulm and Brown, 310 F.3d 1046 (8th Cir. 2002)

Driver Kukla saw on the highway a truck inspection stop, one that apparently wasn't there just recently. He pulled in, not quite sure the stop was for real. An un-uniformed, un-badged, un-emblemated "inspector" approached him and asked to see his log book. The inspector said he didn't have to identify himself. Kukla had heard of phony truck inspection stops before, and this one felt peculiar. He refused.

The inspector, it turns out, was legit. He was Federal Motor Carrier Safety Administration representative Brown, who ticketed Kukla for failure to produce his logbook. Kukla refused to sign the ticket, prompting Brown to call the South Dakota State Patrol. Patrolman Hulm responded. Kukla says he cooperated fully, but Hulm nonetheless manhandled him. The driver suffered physical injuries in the ensuing tussle, and sued both fed and cop.

The defendants moved for dismissal. At issue was whether the law enforcement officials enjoy qualified immunity from individual liability. To get under this umbrella, they must demonstrate they "reasonably believed their conduct was lawful in light of clearly established law and information they possessed." Kukla argued there was no probable cause to arrest him, given the absence of Brown's identification and the circumstances in general. Moreover, neither failure to produce a logbook nor refusal to sign a ticket are criminal offenses.

Clearly, the court was ticked about this one. The defendants' motion to dismiss was denied. A factual issue remains as to whether the cop used excessive force, so the matter will proceed.

Carriers can turn down drivers who take certain medication

***Equal Employment Opportunity Commission v. J.B. Hunt Transport, Inc.*, 2003 WL 245658 (2d Cir. 2003)**

Federal law sets forth guidelines carriers must comply with regarding driver capacity. These are automatic deal breakers, and include things Uncle Sam has concluded raise sufficient concern about safety issues that specific regs are in order. But the law allows carriers to implement more stringent requirements than those regs impose. A question arises: how far can a carrier exercise its liberty to tighten driver qualification requirements before it crosses the line drawn by Congress with the Americans with Disabilities Act (“ADA”)?

That question recently came up in the context of the Equal Employment Opportunity Commission’s action against J.B. Hunt. Hunt won’t hire for its more demanding hauls (long distances with heavy equipment) drivers who take certain prescription medications, even though those drivers would qualify under the federal regs. The EEOC argued the precluded drivers qualify as “disabled” under the ADA, such that their employment is protected. EEOC’s position was that Hunt “regarded” the excluded drivers as disabled and acted accordingly, which should be enough to trigger ADA dominion.

The Second Circuit Court of Appeals took a closer look at the ADA before affirming the Northern District of New York’s granting of summary judgment in favor of Hunt. The ADA protects an employee whose incapacity “substantially limits” a “major life activity.” The term “substantially limits” means “significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person. . .” The court found that operating “40-ton, 18-wheel trucks over long distances” is not a class of job nor a broad range of jobs. Other varieties of truck driving could be undertaken by these drivers, and Hunt would let them do it if such work were available. The fact that Hunt might not always have such other work does not alter the equation. Accordingly, Hunt is free to refuse employment to drivers who take certain medications.

Permissive counterclaims in class action suit aren’t available against un-named plaintiffs

***Owner-Operator Independent Drivers Association v. Arctic Express, et al*, 2003 WL 76093 (S.D. Ohio 2003)**

OOIDA brought a class action suit against carrier Arctic Express alleging a series of Truth-in-Leasing violations. Not all of the allegedly injured drivers joined the suit. Arctic wanted to counterclaim against both class and non-class drivers on a breach of contract theory. This typically would be a compulsory counterclaim, in that it must be brought as part of the pending action or be lost.

At issue was whether Arctic could bring breach of contract counterclaims against non-class drivers as part of the class action suit. This brought into question whether the court had subject matter jurisdiction to hear counterclaims against entities not currently parties to the lawsuit or otherwise before the court.

The court ruled that Arctic must make an independent demonstration of jurisdiction to haul the non-class drivers into the pending proceeding. In essence, Arctic's counterclaims against the non-class drivers were permissive and contingent on separate jurisdictional grounds. While permissive counterclaims aren't subject to a diversity analysis when interposed against a plaintiff in a pending action, that's not the case here. The non-class drivers aren't before the court, so Arctic has to start from scratch with them. Because Arctic couldn't demonstrate federal diversity (its counterclaims against the non-class drivers were less than the \$75,000 jurisdictional amount), its counterclaims against them were disallowed.