

## **Hot Recent Cases in Motor Carrier Law**

by *Steve Block*    March 2004

**Is GES a broker or a Carmack-liable forwarder? Only the facts will tell.**  
*Lumbermens Mut. Casualty Co. v. GES Exposition Services*, 2003 WL 23272964 (N.D. Ill. 2003)

Shipper ARI booked, through intermediary GES, transport of its cargo of computer equipment from a trade show in Nashville back to its facility in Carrollton, Texas. GES placed the haul with carrier Swift, which damaged the cargo in transit. ARI collected from its insurer Lumbermens Mutual under a cargo policy. Lumbermens promptly sued GES and Swift in subrogation.

GES moved for summary judgment, proclaiming it was a transportation broker not liable under Carmack. The Northern District of Illinois agreed brokers aren't liable for cargo lost or damaged through no fault of their own, but found an unresolved factual issue as to whether GES had held itself out to GES as a forwarder or a broker. What an entity represents itself to be, as opposed to how it "labels itself," controls (the court doesn't much get into other factors distinguishing brokers from forwarders). If GES is a forwarder, then it's liable like a carrier would be under Carmack.

The court did allow GES the defense of limited liability even if the intermediary can't take refuge behind a Carmack shield. The GES contract provided for a \$1,000.00 limitation of liability, which the court declined to find "unconscionable" (despite Lumbermens/ARI's urging). This was based partly on both GES and ARI being "corporate repeat players," something akin to calling ARI a "sophisticated shipper."

Swift tried to escape through the back door by claiming its tariff made it a beneficiary of ARI's insurance policy, such that Lumbermen's was precluded as a matter of law from subrogating against the carrier. That failed because no shipping record actually incorporated Swift's tariff. Thus, the shipper wasn't on notice of, or subject to, the tariff's terms.

**Complete federal preemption means state-law stated claims "morph" into a Carmack action**  
*United States Aviation Underwriters v. Yellow Freight System*, 296 F.Supp 2d 1322 (S.D. Ala 2003)

Here's another subrogated insurer trying to get its payment back from a motor carrier which damaged insured freight in an interstate haul. This time, a damaged jet engine was the subject of a lawsuit – originally filed in Yellowhammer state court but removed to the U.S. District Court for Southern District of Alabama – against carrier Yellow. The court was hit with cross motions for summary judgment which addressed admissibility of

opinions from laymen regarding scientific topics and other expert testimony issues, as well as sufficiency of evidence to substantiate a Carmack claim.

The more interesting issue involves the insurer's crafting its claim solely in terms of state and common law theories. With the court and all parties in agreement that Carmack preempts these theories, should the matter be dismissed? The court explored this by analyzing whether Carmack supremacy amounted to "complete preemption" or only "defensive preemption" of state and common law claims. In the former instance, the improperly pleaded claims would automatically convert to their properly pleaded, Carmack-ian form. In the latter case, the complaint would be dismissed.

The court ruled Carmack completely preempts state and common law. It looked to a recent U.S. Supreme Court decision addressing the National Bank Act ("NBA"). Because both the NBA and Carmack are specifically stated to provide the "exclusive cause of action" available to a claimant, there can be "no such thing" as a state law claim addressing relevant theories, and preemption is complete (as opposed to merely allowing optional removability). Moreover, Carmack's legislative history "removed all doubt" as to whether the statute provided for exclusively federal dominion. It's a good idea to plead your case correctly, but, per this case at least, erroneous pleading shouldn't mean much.

**And while we're on the subject of preemption. . .**

***Glass v. Crimmins Transfer Co.*, 2004 WL 112630 (C.D. Ill 2004)**

This time, household goods shippers were upset when a carrier allowed their furniture to become mold damaged while in storage prior to an interstate move. Very upset, actually; so much so that they had doctors ready to testify about psychological maladies. On summary judgment, the U.S. District Court for the Central District of Illinois took a look at preemption issues in this context.

Courts can, and often do, allow shippers (especially household goods shippers) to pursue separately actionable tort claims against carriers who ruin their stuff. The typical scenario is particularly egregious. It also involves tortious acts outside the carriage itself. In other words, courts that allow shippers to sue for emotional distress focus on behavior apart from activity integral to the carrier's transportation efforts.

Here, the emotionally distressed shippers were bummed out only because their furniture was ruined. Allowing them to pursue their claims against the carrier in this instance would be tantamount to expanding the carrier liability for cargo damage Carmack allows. That, the court could not do, so the tort claims were ruled preempted.

**If you charge your drivers for workers' comp premiums, they're employees (in the Golden State, at least)**

***Albillo, et al v. Intermodal Container Services*, 114 Cal.App. 4<sup>th</sup> 190, 8 Cal.Rptr. 3<sup>rd</sup> 350)**

Dig out your old Highlights copies; we reviewed the arbitration of this case back in March 2000. One of the issues addressed in this class action dispute was whether carriers' collection of workers compensation premiums from their owner-operators (pursuant to California statute), impacted the nature of the independent contractor relationship. The plaintiff drivers had bought liability insurance through carrier-administered policies (the arbitration panel found that not violative of insurance brokerage laws, which wasn't disturbed by the court). The lease agreement also mandated the workers comp premium payments, but decreed that those payments did not "create an employment relationship."

The arbitration panel found that collection of workers comp premiums may have made the drivers "employees" for workers comp coverage, but didn't make them employees for any other purpose. Therefore, there was no violation of federal owner/operator leasing provisions. The court disagreed. Carriers may not require owner operators to pay for workers comp coverage, and simultaneously enjoy the benefit of those drivers not being full-fledged employees. In California, you can't enjoy the benefit of limited liability for hurt workers without those same workers being your employees for all purposes.

The carriers' actions in collecting workers comp premiums violated California labor statutes, but whether or not the violation amounted to a fraudulent business practice (with all its nasty repercussions) is an unresolved factual issue that the arbitration panel must further explore.