

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

by *Steve Block* March 2006

### **FMCSA may require owner operators to hang on to their toll receipts**

*Commodity Carriers, Inc. v. Federal Motor Carrier Safety Administration*, 434 F.3d 604 (DC Cir. 2006)

The Federal Motor Carrier Safety Administration assigns safety ratings to motor carriers when its auditors undertake compliance reviews. Commodity Carriers was unhappy with a “conditional rating” FMCSA slapped on it based on log falsifications committed by the carrier’s owner operator drivers. In violation of FMCSA records retention regs, the drivers didn’t have toll receipts confirming their log entries.

Commodity Carriers took the matter to court, alleging that the FMCSA regs in question didn’t apply to owner operators. If the feds thought they should apply, urged the carrier, then a formal rulemaking procedure (with public notice and opportunity for comment) would be required before the regs’ implementation. Otherwise, enforcement would be arbitrary and capricious, i.e., a willy-nilly agency act prohibited under administrative law.

The U.S. Court of Appeals for the District of Columbia Circuit disagreed. Federal government agencies get a degree of deference when it comes to interpretation of their own rules. An earlier precedent had found owner operators were included in the class of regulated entities that affect commercial motor vehicle safety. Another decision to the contrary had been “almost immediately contradicted” by a definitive case on point. Owner operators are within the class of drivers for whom carriers must keep records.

### **Drivers who make of intrastate deliveries of products pursuant to a national distribution scheme are exempt from overtime-wage laws**

*Billings, et al v. Frito-Lay Sales, et al*, 2006 LEXIS 4698 (S.D. Tex 2006)

Frito-Lay manufactures and distributes its snack food products through a series of centralized distribution centers. The company runs its own private motor carrier service with its own drivers who don’t receive overtime wages.

A class of such drivers sued Frito-Law claiming violations of the Fair Labor Standards Act (“FLSA”), which requires employers to pay increased wages to employees who work over 40 hours per week. However, employed drivers whose time is regulated by the U.S. Secretary of Transportation, i.e., those who run interstate hauls, are exempted from the benefit.

The plaintiff drivers pointed to the fact that they operate only intrastate, such that federal regs governing hours of service didn’t affect them. In ruling on Frito-Lay’s motion for summary judgment, the U.S. District Court for the

Southern District of Texas ruled that the exemption didn't kick in when the DOT Secretary regulated a driver. It's enough if U.S. transportation's top dog has the power to do so. Here, he does.

The transportation at issue is within the DOT's jurisdiction because it "is a practical continuity of movement from the manufacturers or suppliers without the state, through [the carrier's] warehouse and on to customers whose prior orders or contracts are being filled." In other words, the "essential character" of the plaintiff drivers' work was interstate. Points of origin and ultimate destination are in different states, and a series of factors addressing the transportation's nature show an interstate undertaking. The court reluctantly, indeed with express apology, dismissed the drivers' claims to overtime pay.

**Improved packaging for second and third delivery attempts is inadmissible post-loss remedial measure**

*Specialty Products International, Ltd. v. Con-Way Transportation Services, Inc.*, 2006 U.S. Dist. LEXIS 2985 (M.D.N.C. 2006)

Shipper Specialty Products International booked transit of two beer brew tanks with carrier Con-Way from North Carolina to California. The shipper packaged up the tanks with bubble wrap, foam, stretch wrap and pallets, and the freight left the Tar Heel State in good order and condition. It arrived with two puncture marks, prompting the consignee's rejection.

When at first you don't succeed, try, try again. The shipper tried again with Con-Way, wrapping the freight similarly. The freight arrived with the same puncture marks in the same places.

Where there's a will, there's a way. The shipper packaged up a third set of brew tanks, this time with larger skids and wooden box encasements. Third time's a charm; the freight arrived without incident.

But Specialty Products wasn't totally happy, given the four brew tanks it manufactured and lost. It sued Con-Way, seeking damages as allowed under the Carmack Amendment. Con-Way defended by claiming the shipper's packaging was inadequate. The best evidence of this, urged the carrier, was that when Specialty Products finally did get it right, the freight made it safely.

The shipper moved in limine to strike that argument as a post-loss remedial measure, and generally for summary judgment. Con-Way argued that the new packaging wasn't really after the fact, as the transportation relationship was an ongoing event until a successful delivery. The Middle District of North Carolina disagreed, ruling that this was a textbook case of post-loss remedial measure. Enough question of fact remains, however, to defeat the shipper's summary judgment motion.

**Owner-operator is not a carrier's statutory employee absent a written lease**  
*Bookwalter, et al v. Prescott, et al*, 2006 Ohio App. LEXIS 535 (2006)

Driver Prescott appeared, under the usual analysis, to be an owner-operator in interstate transit who routinely hauled a chemical between two companies. He owned his own truck, paid for its fuel and upkeep, insured it, and outfitted it with his own placards. Trouble was, he had no written lease with the company he drove for.

Prescott was involved in a horrific accident in which several motorists were killed. The deceaseds' estates sued the driver, and later named the shipper and consignee companies as defendants based on alleged vicarious liability. The companies moved to dismiss on the ground Prescott was not their employee. Affirming a trial court's order, the Ohio Court of Appeals dismissed claims against the carrier and consignee. The court scrutinized federal law (with which Ohio is in accord per the "majority view") governing owner operators being their carrier-lessees' "statutory employees" for purpose of liability.

Distinguishing a number of seemingly controlling precedents because they were all based on written leases, the court held inapplicable precedents making motor carriers their owner operators' employers for accident purposes. Instead, the court applied a common law analysis of the carrier-driver relationship, and concluded neither company exercised requisite control over Prescott to be his employer.

**In pursuit of business: trucker's insurance coverage is excluded**

*Canal Insurance Company v. Underwriters at Lloyd's London*, 2006 U.S.App. LEXIS 2014 (3rd Cir. 2006)

Owner operator Singh leased his rig to carrier BIR. Canal Insurance Company insured Singh's truck when used for BIR's freight hauling purposes. Singh's truck also was covered by his own "Non-Trucking Liability" policy through underwriters at Lloyd's. The latter policy contained an exclusion for losses incurred pursuant to the truck's "business uses."

Mr. Singh engaged another driver to run the truck to a dealer so as to investigate a trade in for a new truck. On the way, the truck collided with another motorist in Pennsylvania. Canal defended the motorist's claims against BIR. Some 85 grand in liability and defense costs later, Canal turned open-palmed to Lloyd's seeking indemnity.

Affirming the Eastern District of Pennsylvania's granting of the Lloyd's underwriters' motion for summary judgment, the Third Circuit analyzed Pennsylvania insurance law in the context of federal motor carrier insurance requirements. When Singh dispatched his truck for purposes of a possible trade in, he was undertaking a business pursuit. True, he may have thought he'd

purchased the non-trucking liability policy for just this purpose, i.e., for coverage when he wasn't hauling BIR's loads. Canal argued that the exclusion was overly broad and ambiguous, as it implied that only BIR's business uses would be excluded. The court disagreed. The exclusion within Lloyd's policy was clear, and insurers regularly include such terms in policies marketed and sold for limited personal exposures. Regardless of who was behind it, the trip at issue was a business endeavor.

**Air waybill issued after tender doesn't control limitation of liability**

*KPX, LLC v. Transgroup Worldwide Logistics, et al*, 2006 U.S. Dist. LEXIS 6772 (D. Ariz. 2006)

Shipper KPX engaged forwarder Road-e-o to arrange transit of a load of scooters from KPX' facility in Sugarland, Texas to Arizona. Road-e-o brokered the load to forwarder Transgroup, which placed the haul with motor carrier Value Truck. In keeping with its usual practice with Transgroup, Road-e-o typed up a bill of lading containing a \$25.00/pound limitation of liability, and gave it to KPX for presentation to the trucker.

On behalf of Transgroup, the Value Truck driver accepted the Road-e-o bill of lading, but submitted to KPX its own document, an "air waybill" containing a 50¢/pound limitation of liability. Yes, the freight was damaged and arrived short, prompting KPX to sue Transgroup in the U.S. District Court for the District of Arizona.

This apparently was a rather small claim in relation to the efforts all concerned invested; the federal court dismissed KPX's actual freight claim because the bill of lading value was less than \$10,000 (the amount needed for Carmack to drive federal jurisdiction). But the court retained jurisdiction based on allegations that Transgroup violated federal regs by masquerading as an air freight forwarder, and took the opportunity to make definitive decisions on Transgroup's liability for lost/damaged cargo. The court determined that Carmack provides a private right of action for such no-no's, finding that Transgroup's impersonation was part and parcel of KPX' loss. There are time when truckers can operate under an air waybill (e.g., to and from airports, and when air transit is originally contemplated and later rendered impossible), but none were the case here.

The court ruled that Road-e-o's first bill of lading trumped Transgroup's waybill. Not only was it improperly issued, no one rightfully expected it to control. It didn't offer the shipper a reasonable opportunity to choose full liability (a prerequisite to limitation of carrier liability); was essentially a connecting carrier's document not binding on the shipper; and was not communicated to Road-e-o. The court suggests the air waybill was pretty much an attempted sidestep, and awarded the shipper attorneys' fees.