

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

by *Steve Block* May 2002

### **COURTS**

In our normal hodgepodge of court reports we cover a class action case involving owner-operators, a nasty household goods cargo claim (yes, there is still some regulations there) insurance *not* applying to claims for uninsured motorists, FMCSA enforcing its regs (as it reads them), and a close call on local regulations of mixed garbage and recyclables.

#### ***A claim for understated revenues: owner operators show their class***

*Sheinhartz, et al v. Saturn Transportation System, Inc.*, 200 WL 575636 (D. Minn. 2002)

The District of Minnesota recently certified a group of owner operators as a class entitled to sue a carrier for under-reporting freight revenues as part of the calculation of the drivers' compensation. The drivers claimed carrier Saturn issued two invoices for each haul – one for payment by the shipper and a “dummy” stating a lower charge for purposes of determining the drivers' pay. They also alleged the carrier was charging them insurance premiums which were higher than those paid by the carrier to the insurer. The drivers wanted class status in their suit to recover underpaid fees and overpaid insurance costs pursuant to federal and state regulations.

The court didn't get much into the merits of the claim; rather, it focused on whether a group of owner operators could constitute a class. Going through the elements stated in Fed.R.Civ.P. 23(a), the court found (1) numerosity, because there were 400 angry drivers; (2) commonality, because their anger was similarly derived; (3) typicality, because the named plaintiffs were just as angry as the bulk of the class, and could be quelled by the same relief; and (4) adequacy, because the named plaintiffs, represented by their capable attorneys, could tow the line for all concerned. Satisfying Fed.R.Civ.P. 23(b)(3), the court found questions pertaining to the class as a whole predominated over any points specific to individual plaintiffs.

Thus, the stage is set for a class action against Saturn, and a precedent exists for this procedural mechanism in disputes between owner-operators and carriers.

#### ***Pushing the limits of preempted state remedies and limitation of liability***

*Rankin v. Right on Time Moving & Storage, et al*, 2002 WL 453245 (D. Mo. 2002)

If you want to see just how bad things can go in an interstate household goods haul, take a look at this one. The Rankins booked transport of their stuff from Missouri to Maine with carrier Right on Time. Right on Time subbed the haul to carrier SI Trucking. Right on Time sent Mr. Rankin a letter “bill of lading,” and someone scribbled a signature on it accepting its terms (including a 60¢ per pound limitation of liability).

When SI arrived in Maine, the Rankins' cargo was all banged up. The shippers also saw their stuff dropped, observed a driver's eight-year old kid break a vanity, and endured screaming and hollering by SI personnel (one of whom declared he was off to buy drugs in Thailand). All of this caused the Rankins documented emotional distress. They sued for the full value of their damaged cargo, as well as for negligent and/or intentional infliction of emotional distress.

Right on Time sought to limit its liability to the peanuts noted in the bill of lading letter. The court's opinion goes through a brief review of limitation of liability for household goods movers under ICC regs and decisions from a few years back. That law allows household goods carriers to limit their liability to 60¢ per pound. However, that allowance is not unconditional: a carrier must get its shipper's agreement to the lowered exposure before the haul commences.

In denying Right on Time's motion for summary judgment regarding limitation, the court found there was no clear agreement by the shipper to less than full liability. It was not apparent who signed the letter or under what circumstances, or when the letter was generated. Thus, issues of fact remained regarding whether the carrier had jumped all hoops necessary to limit its liability.

Despite SI's egregious misconduct, the court nixed the Rankins' emotional distress claim. Whether the distress was negligently or intentionally inflicted, such relief is preempted unless it is demanded pursuant to wrongdoing that is "separate and apart" from the movement of goods. That was not the case here.

***Requiring a carrier to keep good records isn't new rulemaking, it's interpretation and enforcement***

*A.D. Transport Express, Inc. v. United States*, 28 Fed.Appx. 448 (6<sup>th</sup> Cir. 2002)

We took a look at this situation in our last column, but the saga continues between carrier A.D. and Uncle Sam over A.D.'s failure to adequately log specifics regarding truck toll crossing. The carrier had the receipts, but no information or documentation confirming what driver and truck were involved for each entry. Consequently, the Federal Motor Carrier Safety Administration issued a conditional rating to A.D. This time around, the carrier argued that FMCSA's record keeping requirements exceeded what the record keeping regs specifically call for (they don't say anything about receipts!), and therefore constituted "new rule making" subject to the Administrative Procedure Act's notice and comment requirements.

An increasingly frustrated Sixth Circuit disagreed. Federal regs don't have to state precisely everything that is required for compliance, and common sense dictates that truck and driver information is necessary for any reasonable verification of toll booth receipts. Given that an agency's interpretation of its own regs is entitled to a high degree of deference, and the importance of highway safety, the court found A.D.'s conditional rating the result of interpretation of existing regs, and not of new regs altogether.

***Covenant Not to Compete: a trucker's less-than creative attempt to reel in customers fails***

*Quality Carriers v. MJK Distribution, et al*, 2002 U.S. Dist. LEXIS 5700 (S.D. Ill. 2002)

Quality is a national carrier that moves bulk commodities through a series of regional trucking companies such as MJK Distribution in Illinois. Quality includes in its contracts with local haulers covenants not to compete for one year after termination of the relationship. In exchange, regional haulers get access to Quality's customers and good will.

MJK, owned by a married couple, ended its association with Quality, and wanted to continue benefiting from the relationship with Quality's shippers immediately. Because the no-compete provision precluded MJK from hauling for its previous cache of customers, MJK's owners simply formed a new trucking company. Thus, K Distribution was established, with the same address, e-mail, telephone and ownership as MJK, and K soon started hauling cargo for Quality's customers. It worked in concert with another trucking company based in Indiana as well. A pretty simple solution to an inconvenient problem, right?

Wrong. Quality sued MJK, K and its owners for breach of the MJK-Quality covenant not to compete, and immediately moved for a preliminary injunction. The Southern District of Illinois wasted little time in granting Quality's motion. This was a blatant attempt to circumvent a contractual obligation by parties trying to do in form what they couldn't do in substance. Going through the required elements for a preliminary injunction, the court found it likely Quality would prevail on the merits, and that the defendants' actions, if allowed to continue, likely would lead to irreparable harm. Accordingly, the defendants were prohibited from soliciting business from Quality's customers, and likely will have a hefty freight bill to pay when the smoke clears.

***No uninsured motorist coverage for a trucker***

*Maines, et al v. Hill, et al*, 2002 U.S. Dist. LEXIS 4777 (W.D. Tenn 2002)

A two-truck, one-automobile accident injured plaintiffs (who were in a truck) in western Tennessee. They sued the culpable parties, who were uninsured, as well as the carrier they were driving for. The carrier moved for summary judgment to dismiss plaintiffs' uninsured motorist claim, asserting it had no uninsured motorist coverage under any policy, having legally rejected such coverage as a part of its CGL coverage.

The court found the defendant carrier had properly rejected uninsured motorist coverage by doing so in writing (as required by Tennessee state law). Tennessee law does not require truckers to carry uninsured motorist coverage, so the plaintiffs were out of luck.

***Garbage (at least some varieties of it) isn't "property"***

*AGG Enterprises v. Washington County, et al*, 281 F.3d 1324 (9<sup>th</sup> Cir. 2002)

State and local authorities regulate garbage removal, and federal statutes (per the Federal Aviation Administration Authorizing Act of 1994, and others) control transport of “property.” AGG was in the business of hauling two types of refuse, that which was fully recyclable and that which contained mixtures of recyclable and non-recyclable garbage. The latter was at issue when some local authorities came down on AGG for hauling without a locally issued license.

AGG responded by urging that the state and local regs are pre-empted by the FAAA. Somewhere between ten and fifty percent of the mixed refuse contained valuable recyclable material. That, per AGG, was “property.” The District of Oregon agreed, and declared the local regs unenforceable.

Unfortunately for AGG, the Ninth Circuit disagreed and reversed. The legislative history of the FAAA makes it clear that garbage hauling is a state and local issues and was not meant to be preempted. The Court cited its previous *Woodfeathers* case on this issue (March-April Highlights, Vol. 21, No. 3). The court seemed to find the portion of garbage in AGG’s mixed hauls more compelling than the portion of recyclable material. Accordingly, state and local authorities are entitled to call the shots when it is transported.

## THE AGENCIES

The Federal Motor Carrier Safety Administration has been busy following up on matters that had been languishing on its "to do" list. Although some of these may lack excitement, they should all have an impact of the day-to-day operations of carriers within FMCSA jurisdiction. Carriers domiciled in Mexico got the bad news with respect to the hoops they will have to jump through if they want to operate in the U.S. Along the same line, the Research and Special Programs Administration decided not to lower the HAZMAT registration fees as they had promised.

### FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

#### ***To Know You is to Love You***

Final Rule; *Motor Carrier Identification Report*; Docket No. FMCSA-00-8209; 67 *Fed. Reg.* 9410 (March 1, 2002)

Responding to the direction of Congress in the Motor Carrier Safety Improvement Act of 1999 (“MCSIA”), FMCSA has amended its Regulations (49 C.F.R. § 390.19) to require motor carriers to file the motor carrier identification report (Form MCS-150) prior to beginning operations and no less frequently than every 24 months thereafter. The MCS-150 is a form that includes basic census information about each carrier and its operations.

Under the new rule, the carrier is required to file an updated MCS-150 during the month that corresponds to the last digit of the carrier’s USDOT number. To meet the twenty-

four month filing requirement described in MCSIA, each motor carrier is required to file in odd years if the next to the last digit of the carrier's USDOT number is odd and in even years if the next to the last digit of the carrier's USDOT number is even.

FMCSA published an Interim Final Rule on the new MCS-150 filing requirements in November 2000. The Agency reports that they were pleased with the results of the filings under the Interim Final Rule. The Agency was able to update over 115,000 motor carrier records. The Final Rule, which is essentially the same as the Interim Final Rule, became effective April 1, 2002. FMCSA expects some problems and confusion among the carrier community, as carriers become familiar with the new filing schedules.

### ***If They're Certified They Must Be Good***

Interim Final Rule; *Certification of Safety Officers, Safety Investigators and Safety Inspectors*; Docket No. FMCSA-2001-11060; 67 *Fed. Reg.* 12776 (March 19, 2002)

MCSIA required FMCSA to adopt procedures to improve training and to provide for certification of auditors who conduct motor carrier safety inspections and reviews. Accordingly, FMCSA has adopted an Interim Final Rule addressing these procedures. An FMCSA employee who is qualified to perform these reviews on the effective date of the Rule (June 17, 2002) will continue to be qualified. A person who is not qualified as of the Effective Date will have to complete classroom training and examinations as described on the FMCSA website. All persons who perform these reviews will have to meet the quality control and retesting requirements as described in the website. The goal is for all safety inspections, audits and reviews to be conducted by certified auditors. FMCSA advises that the training requirements have been in place for a number of years and should pose no new burden on previously trained Federal investigators or on state or local government employees participating in the MCSAP program. Auditors will have to maintain their certification by conducting a certain specified number of audits each year with "acceptable" quality.

In addition to the training certification requirements, the Interim Final Rule includes adoption of a new form of carrier review called a "safety audit." A safety audit is an examination of a new motor carrier's operations for the purpose of providing educational and technical assistance to the carrier on the requirements of the Motor Carrier Safety Regulations and to make an assessment of the carrier's safety performance and basic safety management controls. A safety audit is not intended to produce a safety rating but to assist a carrier in establishing effective safety controls and procedures.

### **"Go North, Young Man"**

Final Rule; *Revision of Regulations and Application Form for Mexico-Domiciled Motor Carriers To Operate in United States Municipalities and Commercial Zones on the United States Mexico Border*; Docket Number FMCSA-98-3297; 67 *Fed. Reg.* 126521 (March 19, 2002)

Interim Final Rule; Request for Comments; *Application by Certain Mexico-Domiciled Motor Carriers To Operate Beyond Municipalities and Commercial Zones on the United States Mexico Border*; Docket Number FMCSA-98-3298; 67 *Fed. Reg.* 12701 (March 19, 2002)

Final Rule; *Safety Monitoring System and Compliance Initiative for Mexico-Domiciled Motor Carriers Operating in the United States*; Docket Number FMCSA-98-3299; 67 *Fed. Reg.* 12758 (March 19, 2002)

Notice of Proposed Rulemaking; Request for Comments; *Parts and Accessories Necessary for Safe Operation; Certificate of Compliance With Federal Motor Carrier Safety Standards (FMVSSs)*; Docket No FMCSA-01-10886; 67 *Fed. Reg.* 12782 (March 19, 2002)

FMCSA is following through on three Notices of Proposed Rulemaking first published in the Federal Register on May 3, 2001. In addition, FMCSA has published a new, but related NPRM in response to the requirements of the National Traffic and Motor Vehicle Safety Act (49 U.S.C. 30301 *et. seq.*). These releases relate to the forms and procedures necessary for Mexico-domiciled carriers to apply for rights to operate in the United States. As indicated by the over 200 comments to the NPRM's filed during the past year, these releases are part of the ongoing battle over the implementation of the North American Free Trade Agreement. In addition to responding to the comments, some changes to the May 2001 NPRM's addressed of additional requirements imposed in December 2001 under the DOT Appropriations Act. The Final Rule and Interim Final Rules are all effective May 3, 2002. FMCSA was required to request additional comments in the Interim Final Rules because of certain new provisions in the regulations called for by the DOT Appropriations Act.

FMCSA Docket Number FMCSA 98-3297 finalizes the amendments to Form OP-2 under which motor carriers domiciled in Mexico may apply for authority to operate within the designated border zones on the U.S. Mexico border. The opportunity to operate in these areas has existed since 1982. However, the new forms are intended to give FMCSA additional information regarding the safety programs of any new carrier. Existing certificate holders will also be reevaluated.

FMCSA Docket No. FMCSA 98-3298 completes the revision of form OP-1 (MX) which governs applications of Mexico-domiciled carriers to operate beyond the designated border zones. The purpose behind the new Form OP-1 (MX) is to be certain that carriers domiciled in Mexico who wish to operate in the United States have satisfactory safety controls in place. The new form requires additional information about the applicant's business and operating practices to permit FMCSA to determine whether the applicant will be able to meet the applicable safety standards. In addition, each carrier applying under the new Form will undergo a safety audit before receiving authority to operate.

FMCSA Docket No. FMCSA-98-3299 implements a safety monitoring system for Mexico-domiciled carriers who wish to operate in the United States. The rules are intended to permit the evaluation of Mexico-domiciled carriers within 18 months after receiving provisional authority to operate in the United States. The rule also establishes suspension and revocation procedures.

FMCSA Docket No, FMCSA-01-10886, was proposed pursuant to the requirements of the National Traffic and Motor Vehicle Safety Act. The proposal would add the requirement applicable to vehicles operated in the United States by non U.S.-based carriers. Such vehicles must (a) comply with all of the Federal Motor Vehicle Safety Standards and (b) bear a label certifying that the vehicle was manufactured in accordance with the federal motor vehicle safety standards. The concern here is that carriers domiciled in Mexico or Canada would not necessarily purchase equipment built to U.S. regulations. In contrast, U.S.-based carriers would generally only have access to equipment manufactured in compliance with U.S. law. Therefore, under the new regulations, the carriers based in Mexico and Canada are charged with the responsibility of complying with U.S. law with respect to the equipment that they operate in the U.S. Comments on the proposal are due May 20, 2002.

#### RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION

##### ***Read My Lips: "No New Fee Reductions"***

Notice of Proposed Rulemaking; Status; *Hazardous Materials; Temporary Reduction of Registration Fees*. Docket No. RSPA-00-8439 (HM-208D); 67 *Fed. Reg.* 11456 (March 14, 2002)

Careful readers of *Association Highlights* will recall the previous reports on RSPA's efforts to balance its funding needs with the registration fees paid by transporters of hazardous materials. In December 2000, RSPA proposed to lower the fees for the next six years to eliminate an unexpended surplus in the Hazardous Materials Emergency Preparedness Fund established by RSPA and funded with the registration fees.

RSPA has decided not to implement the reduction. RSPA is concerned that President Bush may adopt a budget proposal that will use the surplus to fund a portion of RSPA's hazardous materials safety program. Therefore, the fee for most carriers will remain at \$2000 plus administrative costs.