

Hot Recent Cases in Motor Carrier Law

by *Steve Block* May 2003

Nothing's worse than wet cigars, except an excessive freight charge award!
American National Fire Ins. Co. v. Yellow Freight Systems, 2003 WL 1844694 (7th Cir. 2003)

Tabacalera shipped a cargo of cigars, packaged in cardboard boxes, with Yellow. Yellow's driver noted on the bill of lading that the stogies were received in apparent good order and condition. On arrival, Tabacalera found some of the boxes crushed and water damaged. The shipper collected under a cargo policy, and its subrogated insurer went after Yellow.

The U.S. District Court for the Northern District of Illinois found the driver's failure to note pre-existing damage to be sufficiently reliable to demonstrate good order and condition at time of tender. In finding Yellow liable to the shipper's insurer, the court concluded that evidence suggesting a warehouse may have caused the damage was insufficient to overcome the bill. The district court also found Yellow liable for the entire shipment's freight charges (including those of the undamaged cargo). The whole mess went up the hill to the Seventh Circuit.

Yellow urged that failure to properly package cargo is a recognized Carmack defense, and that the district court failed to analyze the issue in that context. The Court of Appeals found no basis in the record to suspect something was inherently wrong with packaging cigars in cardboard boxes, even if they had gotten wet and crushed before tender. Under the "clearly erroneous" standard appellate courts review a trial court's factual determinations, the Seventh Circuit ruled that the Northern District of Illinois could properly have concluded that the driver's failure to note damage on a bill of lading trumped evidence to the contrary. Moreover, Yellow couldn't prove it wasn't negligent in causing the loss, another element of all Carmack defenses.

But the Court of Appeals didn't agree with the district court's freight charge award. Reviewing various precedents on the issue, the court explained that recovery of freight charges is appropriate when the shipper's costs (the cargo's purchase price at place of shipment) are applied as a measure of the award, but not when the measure is the cargo's delivered value (the shipper would have incurred transportation costs in any event). However, there is no reason why a shipper should ever recover freight charges associated with properly delivered cargo, such as the portion of the stogies that were undamaged. Accordingly, the freight charge award was reduced to reflect only the damaged cargo's portion of the shipping costs. Lastly, the appellate court ruled that a subrogated insurer's pre-judgment interest award should run from the date it paid its insured (not the date of loss), and should be compounded in accordance with federal precedents.

**An oral shipping agreement isn't worth the bill of lading it's not written on
Dictor v. David & Simon, Inc., 106 Cal.App.4th 238, 130 Cal.Rptr.2d 588 (Div. 5
2003)**

Manhattan Transportation Co. drafted a bill of lading for a load of computer equipment worth 267 grand that it subbed to carrier David & Simon. The bill didn't state a declared value; instead, it contained limitation of liability terms. But the parties orally agreed the carrier would procure replacement value insurance coverage naming Manhattan as an additional insured. The computers disappeared. Manhattan's insurer paid the cargo owner full value, and then turned to the actual carrier for payback. That's when David & Simon decided it preferred the bill of lading's written terms to the oral agreement.

Manhattan's assignee sued, alleging reformation of the bill of lading contract. It presented the carrier's deposition testimony confirming that it was "common practice" in the trucking industry for parties to refrain from stating a cargo's true value on bills of lading. This reduced the likelihood of theft.

A California appellate court affirmed a trial court ruling that the parties' discussions didn't justify reformation of the contract. Pointing to Carmack language revering bills of lading as a shipment's holy doctrine, and noting the hoops (some probably no longer required) a carrier must jump to limit its liability, the court ruled that federal law won't recognize essentially falsified shipping documents. Here, a sophisticated shipper (a forwarder playing the role of shipper for purposes at hand) had itself omitted cargo value information from a bill of lading, and blessed the carrier's limited liability. These notions just didn't sit well with the court in the context of the shipper seeking to enforce its rights under, yes, the bill of lading. David & Simon's liability was limited to peanuts.

**What damages can a shipper recover for a broken MRI machine?
Linc Equipment Services v. Signal Medical Services, 319 F.3d 288 (7th Cir. 2003)**

This case asks more questions than it answers, but presents an interesting analysis of recoverable damages for cargo whose worth is measured in terms of monthly rental value. In this case, the shipper had rented a magnetic resonance imager and was returning it to the owner/consignee when a motor carrier damaged it in transit. It took ten months and one hundred thirty grand to repair the MRI machine, which itself had a value of 475,000 bucks. But what about the 30,000 bucks a month the owner was out while its machine was being fixed? Should it get an additional three hundred grand in lost rental income?

The Seventh Circuit, reviewing another Northern District of Illinois decision, didn't think so. It ranted about the potentially inequitable – indeed absurd – results that might obtain by such an approach. But in vacating the district court's award, the Court of Appeals also ruled that the repair costs must not be "a cap" of recoverable damages, and sent the matter back down the hill for further analysis. The opinion pays little attention to Carmack or transportation law's particularized concerns with such issues, other than to

say that Illinois law could be applied based on the federal court's supplemental jurisdiction. We would've liked a little more explanation of that conclusion as well.

A rare coverage victory for motor carrier insurers: an absent MCS-90 won't be legally implied

***Illinois Central RR v. Dupont, et al*, 2003 WL 1704649 (5th Cir. 2003)**

Motor carrier Denmar procured insurance from Underwriters Insurance Company, but, for reasons unknown, never requested a federally mandated MCS-90 endorsement. One of Denmar's rigs collided with an Illinois Central train, causing extensive damages. The truck wasn't covered by Underwriters' policy, and Denmar's pockets weren't deep enough to pay the loss. The IC took Underwriters to the mat, alleging that an MCS-90 endorsement, along with its encompassing coverage provisions, should be legally implied as a matter of public policy.

Both the Middle District of Louisiana and the Fifth Circuit disagreed, and found no coverage. The obligation to obtain motor carrier coverage and a confirming MCS-90 endorsement rests with the trucker, and not the insurer. By legally imposing encompassing insurance coverage, we would be denying the insurer a fair opportunity to assess its risks and charge an appropriate premium.

... and while we're on the subject of MCS-90 interpretation, the endorsement doesn't allocate coverage amongst insurers

***Canal Ins. Co. v. Distribution Services, Inc., et al*, 320 F.3d 488 (4th Cir. 2003)**

Driver Lee was employed by carrier Distribution Services, Inc., which was insured by Canal. DSI had leased the truck Lee operated from AIM Leasing, which was insured by Pacific Employers. Both insurers issued MCS-90 endorsements, but Pacific's contained another endorsement requiring AIM to lease only to motor carriers that had their own liability coverage naming AIM as an additional insured. Lee negligently ran over two pedestrians. Canal settled with the claimants, then sought payback from Pacific. The two insurers duked it out over primary liability for the loss.

In response to Canal's dec action, the Fourth Circuit blessed the Eastern District of Virginia's conclusion that Pacific's endorsement didn't run afoul of federal law governing motor carrier insurance requirements. Canal urged that the endorsement provided it an out for coverage, a result the regs and interpretative case law forbid. Canal argued that Pacific's MCS-90 endorsement nullifies the endorsement.

Joining a host of other circuits (but not all of them), the court ruled that law governing motor carrier insurance requirements is designed to protect the public, and not the insurance industry. When Canal paid the claimants, that purpose was served. The rest is just straight insurance and contract law. Canal gets to pay the loss all by its lonesome.

Expanding the BMC-32 endorsement's applicability to contract carriage: a federal court alters the insurance landscape

***M. Fortunoff of Westbury Corp. v. Peerless Insurance Co.*, pending in the Eastern District of New York under Cause No. 01-CV-3667, order dated March 27, 2003**

Peerless insured motor carrier Fredrickson, and issued a BMC-32 endorsement confirming its coverage of cargo loss/damage claims. Fortunoff shipped several loads with Fredrickson *pursuant to contract*. Some of these arrived damaged. Fredrickson went belly up, and Fortunoff went after Peerless based on its BMC-32.

Peerless urged that BMC-32 endorsement requirements apply only to common carriers, and do not provide coverage for purely contractual transports. Fortunoff argued that Congress' elimination of the distinction between contract and common carriers, as part of the Interstate Commerce Commission Termination Act, controls as to insurance requirements. The regs requiring insurers to issue BMC-32 don't address the nature of the transportation relationship. The court agreed with the shipper. Statutory language and legislative history clarify that Congress intended its elimination of the contract and common carrier distinction to be encompassing.

Nor did the "Transition Rule," 49 USC 13902(d), save Peerless. Rejecting the insurer's argument that the Transition Rule stalls implementation of ICCTA provisions, the court found it applicable only to registration and similar issues. Insurance not being mentioned, ICCTA's identical treatment of common and contract carriers took hold immediately for purposes at hand.

This case raises huge issues for both the insurance industry and the Federal Motor Carrier Safety Administration (which has not been requiring – or even accepting – BMC-34 filings from common carriers). Additional efforts in response to this case from both of these sectors are expected.