

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

by *Steve Block* July 2004

### **Carrier not liable for owner operator's negligence after transport ends, but hay, where does it end?**

***Oldakowski v. M.P. Barrett Trucking, Inc.*, 680 N.W.2d 590 (Minn Ct. Apps 2004)**

Owner-operator Scholl regularly hauled hay to farmer Oldakowski's place. This time, he did so at motor carrier Barrett's behest. Scholl's lease was only for transport services, but per his usual practice, he unloaded the freight at destination "as a favor" for Oldakowski. Scholl apparently dropped a bale on Oldakowski, hurting him.

Oldakowski sued Barrett. Barrett moved a Minnesota state court for summary judgment, urging that its statutory liability for Scholl's acts ended when the owner operator pulled up to the Oldakowski farm. The trial court granted Barrett's motion.

The court of appeals reversed. Even though Scholl was only doing Oldakowski "a favor," there was at least a question of fact as to whether the owner operator had extended the terms of his lease by agreeing to offload the hay, such that he potentially was still within the statutory employment scope when Oldakowski was hurt.

Hmmm. Can a driver do that unilaterally? Is the North Star State's court of appeals messing with federal regs addressing terms of owner operator leases?

### **How much diligence is due when a broker selects a carrier?**

***CGU International Insurance, PLC v. Keystone Lines Corp.*, 2004 WL 1047982 (N.D. Cal. 2004)**

Keystone acted as a broker when selecting carrier Europa to haul Asia United Enterprises' cargo of Coca Cola labeling machines. Europa's driver crashed into an overpass, damaging the freight to the tune of some four hundred grand. The shipper's insurer paid up and brought a subro action against the broker (a revealing, though not fully explained, footnote is that Europa's principal received an insurance check for this accident, and proceeded to spend it for personal use). The subrogated insurer alleged Keystone negligently selected Europa, having failed to fully investigate its background.

The parties agreed that a broker owes a duty of care to its shipper customer, which rises only to the reasonably prudent man standard. However, they disagreed as to what a reasonably prudent broker would, or should, do in selecting a motor carrier. Keystone verified Europa's licensing and insurance. It even had recently visited Europa's facility.

The insurer thought the broker should have been more thorough, and had been hasty in selecting Europa to meet a deadline. The Northern District of California disagreed. An

insurance record review revealed Europa's safety record in relevant regard. The carrier's size and assets were adequate for the haul. Confirmation of these, the court found, was enough to satisfy a broker's duty to its shipper customer.

**Judicial forum hopscotch: A Carmack case bounces twice from federal to state court**

***Ervin v. Stagecoach Moving and Storage, et al*, 2004 WL 1253401 (N.D. Tex 2004)**

Here's a carrier that *really* wanted a case heard in federal court, and a federal court equally unenthused about taking it on. A shipper sued a couple of carriers for freight damaged in interstate transit, improperly alleging state law theories of liability. The carriers removed from Texas state court to the Northern District of Texas.

The federal court remanded the carriers' removal based on the Fifth Circuit's decision in *Beers v. North American Van Lines*, 836 F.2d 910 (5<sup>th</sup> Cir. 1988). The Northern District of Texas held that the "well-pleaded complaint rule" precludes federal jurisdiction under those circumstances.

But a few weeks later, the Fifth Circuit ruled that the U.S. Supreme Court's *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003), had made hash out of *Beers*. Moreover, the *Ervin* shipper amended its complaint to include agency theories of liability.

These developments prompted the carrier to seek removal again. The Northern District of Texas remanded again, ruling that changes in the law came too late to help the carriers' cause. Moreover, the bases of federal jurisdiction take effect when they first are learned, and have only a 30-day shelf life. The amendments to the shipper's complaint didn't present anything new, ruled the court, and certainly weren't a recently created basis for federal jurisdiction.

**And while we're discussing removal in the Longhorn state. . .**

***Marks v. Suddath Relocation Systems, Inc.*, 2004 WL 1173016 (S.D. Tex 2004)**

This time the removal stuck. Here, a shipper booked a cargo of household goods for transport from San Diego to Spring, Texas. The freight was packaged and warehoused in California by two agents of carrier United Van Lines ("UVL"). Although the warehousing apparently wasn't really part and parcel of the haul, neither the agents nor UVL jumped hoops required by 49 CFR 375.12(c) and 609 to change the storage's legal status to permanent (as opposed to in-transit). Thus, the freight remained governed by UVL's bill of lading.

When the shipper's stuff arrived damaged in crushed up boxes, he sued in Texas state court. The carrier and agents removed to the Southern District of Texas. The shipper moved to remand, and the agents moved for summary judgment. The shipper urged his belongings were damaged during storage, and not in transit. But the Fifth Circuit

recognizes the doctrine of complete preemption, such that the question of where and how the property was damaged is irrelevant. If it was governed by an active bill of lading, the rest matters not. The motion for remand was denied.

But the agents are still on the hook. True, they were not carriers. But they were *agents* of carrier who are still subject to Carmack liability as provided by 49 USC 13907(a). Case law supports the notion. Of course, questions of fact remain as to where, how and under whose watch the freight was damaged.

**Carmack dogged by a through ocean bill of lading**

***Allianz CP General Insurance Co. v. Blue Anchor Line, et al*, 2004 WL 1048228 (S.D.N.Y. 2004)**

Insurer Allianz CP General, as subrogee of shipper Tractabel, sued a number of water and surface carriers, in addition to a freight forwarder, when a cargo of power plant equipment was damaged on the highway. The freight was en route from Thailand to Mt. Vernon, Ohio based on a through bill of lading issued by the ocean carrier (actually, a non-vessel operating common carrier, the wet equivalent of a surface freight forwarder). The motor carrier had issued its own bill of lading as well, but the ocean bill was still effective.

The surface carrier (whose driver botched up by hitting an overpass) moved to dismiss, claiming it wasn't subject to liability under the ocean bill, and that Carmack didn't apply. The Southern District of New York agreed Carmack didn't control. Case law clearly states that a through ocean bill governs the stateside portion of an international haul, the trucker essentially being a participant in the transit's ocean character. Unless the connecting surface carrier has received consideration for its services in addition to that provided for the through ocean haul, Carmack doesn't apply.

However, the trucker does qualify as a "participating carrier" under the subject ocean bill of lading's terms (i.e., the Himalaya clause). The through bill precluded actions against participating carriers as a matter of contract, placing the surface carrier outside the loop of directly liable carriers. The trucker's motion for summary judgment on this issue was granted. The shipper may proceed against the ocean players only, and gets to struggle with the \$500 limitation of liability provided by the U.S. Carriage of Goods by Sea Act.

**OOIDA plaintiffs don't have enough for a preliminary injunction**

***OOIDA v. Swift Transportation, et al*, 367 F.3d 1108 (9<sup>th</sup> Cir. 2004)**

The Owner-Operator Independent Drivers Association sued a number of carriers alleging various violations of federal Truth-in-Leasing regs. They claimed terms regarding duration and compensation weren't spelled out properly in their leases. The drivers asked the District of Arizona to slap a preliminary injunction on the carriers to prevent further

harm. The district court refused to enjoin the carriers, and OOIDA appealed to the Ninth Circuit.

The applicable standard for deciding preliminary injunction motions is an equity balancing test which addresses specified factors. These include (1) the likelihood of the moving party ultimately prevailing on the merits; (2) the possibility of irreparable injury absent a preliminary injunction; (3) a look at the parties' respective hardships under the proposed injunction; and (4) public interest concerns. The drivers lost in this analysis, and didn't feel they shouldn't have.

But they did disagree as to whether the court should apply the traditional equities balancing test in the first place. Rather, OOIDA urged that a rarely applied "reasonable cause" test should be used (which would address the issue from the "likely future violations" perspective). Congress has imposed a "flat ban" on certain activities violative of Truth-in-Leasing regs. This, urged OOIDA, should move the analysis into a new realm.

The Court of Appeals disagreed and affirmed. Congress didn't explicitly state that the reasonable cause should be used in Truth-in-Leasing motions for preliminary injunction (as had it with other statutes). Instances of judicial application of the alternative standard were far more compelling than, and distinguishable from, this essentially commercial row. Because *any* statutory restriction could be interpreted as a "flat ban," the statute's nature and intent didn't change the equation.