# <u>Hot Recent Cases in Motor Carrier Law</u>

by *Steve Block*    July 2005

**Carrier isn't its owner-operators' insurer, but must be truthful in leasing.**
***Tayssoun Transportation, Inc. v. Universal Can-Am, Ltd.*, 2005 WL 1185811 (D. Tex 2005)**

Carrier Universal Am-Can, Ltd. ("UACL") entered into a lease with owner-operator Tayssoun, whereby the latter agreed to provide equipment and drivers to the former. The lease provided that UACL would procure cargo insurance for shippers whose freight moved in Tayssoun trucks, although Tayssoun would foot the insurance-premium tab. Tayssoun drivers hauling for UACL got into a number of mishaps causing cargo damage to the tune of 868 grand. UACL refused to pay Tayssoun some 369 grand in commissions, refundable escrows and other entitlements, claiming the cargo claims exceeded the sums owed.

Tayssoun sued UACL in the Southern District of Texas, alleging the carrier had violated various provisions of the Texas Insurance Code when it "sold" the owner operator insurance it didn't provide. Tayssoun also alleged that UACL had violated common carriage rate-charging provisions, and that the owner operator could pursue a private right of action under federal Truth-in-Leasing regs regarding matters at issue.

In a lengthy opinion that will be interesting to those concerned with transportation insurance, the court found that the Texas Insurance Code's provisions were inapplicable because UACL wasn't "in the business of insurance." In other words, UACL wasn't an insurer, and Tayssoun wasn't UACL's insured as contemplated by the statute.

True, the carrier promised to provide insurance to and had collected premiums from Tayssoun. In practice, the carrier remained self insured with insurance coverage available only after a $1 million deductible. But the court observed that, in drafting the lease, both parties were really concerned about compliance with FMCSA regs mandating carrier insurance coverage. Those same regs bless the variety of coverage UACL had obtained. This finding compares interestingly with Texas' conclusion a few years ago that intermediaries may be deemed to be in the insurance business.

Tayssoun's rate-charge allegations were misplaced and dismissed because, well, this wasn't common carriage. No tariff was involved.

But federal Truth-in-Leasing regs are applicable, and UACL apparently violated them by not doing what it promised in the lease. UACL urged there was no private right of action under those regs, pointing to ICCTA's specified rights of action which would be duplicative (and potentially time barred). The court disagreed, concluding that the Truth-in-Leasing regs would be meaningless if private parties couldn't sue under them (in light of the ICC's demise). Moreover, House committee reports demonstrated the law was

intended to be privately actionable. Summary judgment wasn't appropriate, however, because factual issues remained about Tayssoun's damages.

**ICCTA's broad definition of "transportation" deprives carrier of freight charges.**
***Emmert Industrial Corp. v. Artisan Associates, Inc.*, 2005 WL 913129 (D. Or. 2005)**

In May 1996, Artisan Associates, as an agent of General Motors, hired carrier Emmert to move substantial freight from Japan to various points in the U.S. Artisan's contract with Emmert provided that the latter would be the "primary" carrier in a series of related transportation projects spanning several years. Emmert personnel traveled to Japan to arrange complex engineering elements of the carriage, and effected transport of the heavy freight (metal stamping machines weighing over 100,000 lbs.) during subsequent months.

Freight charges for this haul approached $5 million. Apparently, Artisan's payment to Emmert was some 570 grand short. More apparently, GM wasn't happy with Emmert's services, and directed Artisan to use another carrier for the remaining loads.

For reasons not clear in the opinion, Emmert didn't sue Artisan for some five years. The District of Oregon, at Artisan's urging, noted provisions of the Interstate Commerce Commission Termination Act at 49 USC §14705(a) and (g) that impose an eighteen-month statute of limitations on freight-charge collection actions. Emmert felt its engineering services in Japan were pre-transportation, and therefore weren't subject to ICCTA. On Artisan's motion for summary judgment (continued to allow Emmert every opportunity to explore and brief the issue), the court dismissed the carriers' claims. "Transportation," as ICCTA defines it, is a broad term which includes, yes, engineering undertaken prior to arranging transit. Emmert also had sought damages related to GM nixing its contract, but the court found the term "primary carrier" insufficient to obligate the shipper to use Emmert exclusively.

**Massachusetts may tax passenger traffic, so long as it's the "traffic," and not the "passenger," paying the tab.**
***Jalbert Leasing, Inc., et al v. Massachusetts Port Authority*, 2005 WL 1288108 (D. Mass. 2005)**

The Massachusetts Port Authority ("Massport"), which runs Boston's Logan Airport, hits passenger bus carriers with a fee (read "tax") for each run a bus makes to and from the airport. As the amount of this fee inched its way north, affected carriers became increasingly distraught. They finally brought their beef to the District of Massachusetts in a matter of first impression that might have reaching implications.

ICCTA provisions at 49 USC §14505 proscribe states from charging a fee or tax on "a passenger" in interstate transit. The carriers felt Massport was doing just that when making them pony up for runs of airport-bound or arriving passengers. The court took a look at the Constitution's Supremacy Clause and the doctrine of "express exemption,"

both of which the carriers felt illegalized the fees. Finding that the tax's nature was outside the scope of what Congress meant to avoid, the court found it perfectly kosher.

Massport collects the fee not from passengers, nor even on the basis of how many passengers ride busses. Rather, each and every bus pulling to Logan's curb must pay the pot, even if it arrives or leaves empty. True, the costs probably get passed along to passengers, but any number of such state-imposed costs get the same treatment – legally. The statute's language should not be read more broadly to extend a federal preemption.

Relevant provisions of §14505 were designed to legislatively nix a Supreme Court decision that defined the issue precisely. A similar statute regarding airline traffic was ascribed preemptive effect in another case, but that law contained the important verbiage "directly or indirectly," which was is missing from §14505. Moreover, the court "declined the invitation" to import an aviation statute's legislative history into trucking law.

The court recognizes, but doesn't deal with, the fact that this decision essentially blesses state toll roads at airports. What else might it mean for revenue-seeking states?

**A trial brews in Duluth: district court finds questions of fact regarding intermediary's role in transport.**
***Just Take Action, Inc. v. GST (Americas) Inc.*, 2005 WL 1080597 (D. Minn. 2005)**

Duluth-based shipper Just Take Action, Inc. bought beer fermenter tanks from a brewer in New York, and hired GST to get them to Minnesota. GST engaged carrier Central Transport, Inc. ("CTI") to make the haul. GST apparently issued some sort of bill of lading to the shipper, although it wasn't signed or completely filled out. Just Take Action never had a chance to declare the freight's value. CTI thought GST was its shipper, and its bill of lading to GST incorporated a tariff which limited CTI's liability to peanuts. The tanks arrived damaged, and Just Take Action just filed an action in the District of Minnesota against both transportation companies.

GST and CTI filed concurrent motions for summary judgment. GST claimed it was a broker not liable beyond its own negligence or breach of contract. In an analysis which reveals this court's lack of confidence in transportation law principles, the court denied GST's motion on the ground questions of fact remained as to whether GST was a broker or a "motor carrier." GST quite clearly seems to have been a freight forwarder (subject to virtually the same liability regime as a carrier) under the facts presented, its admitted issuance of a bill of lading being that transportation species' *sine qua non*.

Just Take Action had asked GST to procure "full coverage" for the freight, a service it looks like GST didn't provide. In this regard, the court called GST the shipper's "agent," another conclusion of dubious accuracy. The court found issues of fact sufficient to defeat summary judgment as to the shipper's breach of contract and negligence claims against GST regarding insurance.

Similarly, the court wouldn't let CTI off the hook based on the carrier's limitation of liability. Issues of fact remain as to whether Just Take Action got adequate opportunity to declare its freight's value. This presupposes, of course, that GST was a broker (or might have been), and that CTI's shipper was Just Take Action. The court did correctly find that Carmack preempted state and common law claims against the carrier.

**The Ninth Circuit reads attorney-fee statute literally, and therefore (too?) broadly.**
***Campbell v. Allied Van Lines, et al*, 2005 WL 1331224 (9th Cir. 2005)**

Household goods shippers the Campbells hired a couple of carriers to move their stuff interstate. It arrived damaged. Without invoking the arbitration provisions of 49 USC 14708's "Dispute settlement program for household goods carriers," the Campbells took the carriers to court. A jury awarded them the value of their damaged property and emotional damages. The district court tacked on another 15 grand in attorneys' fees pursuant to the statute that was, uh, not exercised by the shippers.

The carriers appealed the attorney-fee award, urging that it is designed only for those shippers who bow to Congress' encouragement of less burdensome arbitration. A majority on a Ninth Circuit appellate panel disagreed, and affirmed the fee award. Nothing in §14708's language says that attorneys' fees are awardable only if arbitration is undertaken. Per the court's reasoning, the statutory language merely prevents unsuccessful shippers from recovering their litigation costs during arbitration. The "plain meaning" rule mandates that a statute's precise language cannot be ignored. Hmmm.

A lively and persuasive dissent almost audibly retorts to the majority, "Come on!" Labeling the majority's approach "unnatural literalism," the dissent urges that Congress could not possibly have intended §14708 to grant household shippers unfettered entitlement to attorneys' fees. Though perhaps a bit imprecisely worded, the statute is designed to foster arbitration. It would be unreasonable to assume Congress meant to impose fee awards for court actions in this context.

This precedent should be borne in mind by counsel and litigants to household goods claims, especially in the Ninth Circuit's western states.

**Maine law affecting interstate delivery of tobacco products goes up in smoke.**
***New Hampshire Motor Transport Association, et al v. Rowe*, 2005 WL 1319540 2005 (D. Me. 2005)**

Maine, justifiably concerned about an increase in its teenagers' cigarette smoking, sought to limit underage access to stogies via the internet. Apparently, youngsters in Maine were purchasing cigarettes on line for home delivery, thereby skirting age verification by local retailers. Maine enacted a statute that imposed a number of requirements on motor carriers delivering tobacco products into the Pine Tree State. A number of trucking

associations banded together and sued, seeking to have the new law eradicated as violative of the Federal Aviation Administration Authorization Act of 1994 (the "FAAA"). The plaintiffs pointed to the FAAA's preemption of state laws that regulate interstate commerce.

Maine's statute would require delivering carriers to check for packages to see if they contained cigarettes, and learn the age of any tobacco purchaser. It also imposed a number of other requirements on carriers and tobacco product sellers before shipping products into the state.

The District of Maine initially disfavored the claim, focusing on leeway FAAA grants states on enforcing contraband laws, as well as the statute's general good intentions. But in a recent decision, the court reversed course, and struck down two of the statute's three sections. FAAA's preemption is broad, prohibiting states from enacting any law that would be "related to a price, route, or service" of a motor carrier in interstate transit.

The court considered a number of U.S. Supreme Court and lower federal court decisions, noting the broad interpretation ascribed to various FAAA terms when applied to language similar to the statute's. Recognizing the impediments interstate transportation would encounter if states enacted differing requirements, the court ruled that Maine may not require carriers to verify qualifying specifics of a consignee. Forcing retailers to use only carriers that offer certain services is also verboten. Retailers may be required, however, to verify a purchaser's age before effecting a sale.

As demonstrated by this well-thought-out opinion, transportation deregulation has not supplanted the need for uniformity.