

Hot Recent Cases in Motor Carrier Law

by *Steve Block* November 2006

Carmack can be waived, but the waiver must be clear

Central Transport International, Inc. v. Alcoa, Inc., pending in the U.S. District Court for the Eastern District of Michigan under Cause No. 06-CV-11913-DT, decision reported at 2006 WL 2844097 (E.D. Mich. 2006)

Shipper Alcoa booked interstate transit of a gearbox with carrier Central Transport International ("CTI"). The transportation contract said the cargo's value was 100 grand. CTI delivered some saw blades to the consignee instead of the gearbox, and eventually determined that the gearbox had been lost. Alcoa sought compensation, but CTI wanted to limit its liability to the gearbox' actual value (as provided by Carmack), which was \$35,000.

Alcoa and CTI were unable to resolve their dispute, and went to the mat in the Eastern District of Michigan. Confirming that Carmack preemption of state and common law theories of recovery still applies, the court granted CTI's dispositive motion on the extent of liability. Alcoa urged that its transportation contract contained a choice of law provision in favor of Pennsylvania, suggesting the parties had opted out of Carmack by electing a particular state's law. Not enough, ruled the court. While parties to a transportation contract may waive Carmack, that election must be clear and unambiguous. Notably, the court noted that Alcoa's alternative pleading for relief under Carmack did not amount to a concession that Carmack applied.

Why transportation contracts should be written. . .

Patriot Logistics, Inc. v. Contex Shipping (NW), Inc., pending in the U.S. District Court for the Northern District of Ohio under Cause No. 1:06CV552, decision reported at 2006 WL 2869559 (N.D. Ohio 2006)

Contex and Patriot entered into an oral agreement whereby Patriot would arrange interstate transport of a cargo of tunnel boring equipment. Patriot apparently did so (details are sketchy in the opinion), and consignee/beneficial owner Robbins received the freight. Everything was hunky-dory, except that Contex didn't pay Patriot's freight bill. Patriot sued Robbins seeking to collect, and Robbins moved to dismiss Patriot's claim on the ground that 49 USC § 13706 doesn't permit a transportation broker to collect against consignee/beneficial owners of freight.

"Transportation broker," huh? While a consignee in Robbins' shoes might be held liable for unpaid freight charges, the court denied the motion, finding issues of fact as to what hat(s) Patriot might have been wearing throughout this transaction. Patriot claimed it was a motor carrier, and pointed to its FMCSA licensing to prove it. But just because a company holds carrier licensing doesn't mean it was operating as one (especially if it didn't move freight on its own truck). No written contract spelled out the obligations and roles the players agreed to undertake. Consequently, a detailed factual record must be

developed for the court to rule, and the lawsuit continues.

Motor carrier not liable for freight damaged while still in air carrier's care, custody and control

Sompo Japan Insurance, Inc. v. Nippon Cargo Airlines Co. Ltd., 2006 WL 2579706 (N.D. Ill. 2006)

In this factually-intensive analysis of he-said-she-said conflicting testimony, we see how important the circumstances of freight transfer between carriers can be as to who gets to pick up the tab for damaged freight.

Sompo Japan is back in the news, this time as the subrogated cargo insurer of Hitachi Data Systems ("HDS"). HDS engaged (through a Japanese air forwarder) air carrier Nippon Cargo Airlines ("NCA") to transport a series of palletized computer systems from Japan to Chicago. HDS separately booked transit with motor carrier Pace from the Windy City to HDS' distribution center. The computers made it to O'Hare just fine.

The problem arose when NCA and Pace personnel were loading HDS' freight into trailers for the ride to HDS' distribution center. What was done, by whom and at whose direction was the subject of conflicting testimony when Sompo Japan sued NCA to get back the 100 grand it paid HDS. The extent of someone's potential liability would be determined by whether this loss happened during air carriage subject to Warsaw Convention terms, was a good old fashioned Carmack claim, both, or neither. At issue was whether NCA had effectively handed off the freight to Pace before it fell onto the pavement outside NCA's loading dock. The court's struggle in reaching a bench-trial verdict was that it really didn't believe anyone's story (both versions were confusing and "fraught with improbability, confirming the maxim that truth is stranger than fiction").

In the end, a driver whose pre-litigation statements could not have been tainted by threat of liability carried the day. NCA had begun loading a trailer before the Pace driver had returned from doing paper work. The delay caused a mechanical malfunction in loading equipment, preventing a roller from operating properly. Consequently, a pallet became wedged in the space between NCA's loading dock and Pace's truck. At NCA's direction, the driver moved his truck, causing another unsecured pallet to roll back and knock over the lodged one. All of this happened on NCA's watch, so the damage occurred during carriage by air.

Notwithstanding an MCS-90, two insurance policies amount to one coverage for purposes of determining when an umbrella opens

Triple Crown Services Co. v. Insurance Company of the State of Pennsylvania, 2006 WL 2917176 (N.D. Ind. 2006)

Here's an interesting motor carrier insurance coverage case in which a carrier took its excess liability insurer to task when the latter refused to pay full value. Carrier Triple Crown had two primary liability policies in place, both written by Travelers Property Casualty and with \$1 million ceilings. One Travelers policy was designated for coverage inside Texas, and the other was for "All Other States." Triple Crown also had an umbrella

policy from the Insurance Company of the State of Pennsylvania ("Insurance of Pennsylvania") to a cap of \$4 million but subject to other coverages being first exhausted.

A Triple Crown truck was involved in a catastrophic accident in Michigan that produced a multi-million dollar settlement. Insurance of Pennsylvania claimed that fully \$2 million had to be paid before its umbrella coverage kicked in. It urged that the designation "Texas" in one of Travelers' policies doesn't mean an accident had to occur in the Long Horn State for coverage to apply, as other policy language provided that the policy would kick in for liability anywhere in the country. Thus, per Insurance of Pennsylvania, Travelers had to pony up two big ones before it paid a dime (which would reduce coverage under the umbrella substantially). But this really made no sense, as it would mean Triple Crown bought two identical but separate policies, obtaining no additional benefit over having just one.

Insurance of Pennsylvania pointed to the MCS-90 endorsement Travelers had affixed to its policies, claiming that federal law precluded an insurer from refusing coverage when this statutorily-mandated attestation of coverage was in place. Going through an analysis of minority and majority judicial positions addressing the issue, the Northern District of Indiana adopted the majority approach, and ruled that MCS-90 endorsements and other provisions of mandatory motor carrier insurance were not designed to protect insurers from each other. Insurance of Pennsylvania could not argue that Travelers' policies were activated pursuant to federal insurance requirements, and its umbrella opened after Travelers forked out \$1 million only. Note that some circuits might go the other way.

An insured subrogor finds itself defending a lawsuit

Nipponkoa Insurance Co. v. Ozark Motor Lines, pending in the U.S. District Court for the Middle District of Tennessee under Cause No. 3:06CV0447, decision reported at 2006 WL 2947467 (M.D. Tenn. 2006)

Insurer Nipponkoa insured Toshiba's cargoes of television sets, which Toshiba tendered to carrier Ozark in Tennessee for transport to Pennsylvania. After Ozark's rep signed for the first load, but before it ever left Toshiba's facility, the freight disappeared. What's worse, an identical theft happened a month later! Ozark's trucks were recovered damaged. Nipponkoa paid Toshiba and went after Ozark for payback.

Ozark wanted to implead as third-party defendants Toshiba and Wackenhut Corporation, which provided security at Toshiba's facility. Ozark realized it might be liable under Carmack (having signed for the freight), but felt the real wrongdoers were Wackenhut and Toshiba employees who allegedly were asleep at the switch when securing the place. Ozark wanted to recover the costs of repairing its damaged trucks.

Nipponkoa and Toshiba opposed Nipponkoa's motion for leave to file third-party actions, claiming Toshiba essentially already was a party to the action though its subrogated insurer. Moreover, Carmack should be dispositive as to all rights and obligations between shipper and carrier.

The court disagreed and allowed the third-party actions Fed.R.Civ.P. 21 provides that certain claims, counterclaims and cross-claims are compulsory, such that Ozark could be found to have waived them if they were not asserted and litigated as part of the primary action. Claims are compulsory if they arise out of the same transaction or occurrence at the heart of the main action and don't require jurisdiction over persons beyond the court's jurisdiction. Toshiba's participation in its own right is appropriate to defend claims that its negligence resulted in loss to the carrier, something outside Carmack's exclusive dominion.

Noncompliance with FMCSA safety regs lands two drivers in the slammer

United States v. Marquez, 462 F.3d 826 (8th Cir. 2006)

This case shows how log book records, bill of lading information, driver inspection requirements and other regulatory hoops do more than just keep roads safe and the shipping business honest. They also impose barriers to drug running.

Two drivers were caught hauling a load of marijuana hidden in their trailer behind stacks of insulation. The drivers claimed ignorance. Affirming a trial court conviction, the Eighth Circuit didn't buy the drivers' story, and ruled a jury could reasonably conclude that drivers who had irregularities in their logs (false entries) and bill of lading (not matching the drivers' story about routing) probably were lying when they gave that look of dumb-founded surprise about the dope. Moreover, it would be impossible for a driver to look in the trailer without getting a goof whiff of pot.

All told, experienced drivers in this "heavily regulated industry" generally should be assumed to know what it is they're hauling.