



SURF & TURF

Legal News in Transportation & Logistics

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The Customs-Trade Partnership Against Terrorism: Government and Industry Join Forces Against Common Foes

BY STEVEN W. BLOCK

As we enter 2004, the most important legal development facing transportation is the series of security regulations and programs implemented primarily by the Customs & Border Protection agency of the U.S. Department of Homeland Security. This is the first of four Legal Lookout articles addressing those regulations and programs.

The Customs-Trade Partnership Against Terrorism, known as "C-T PAT," isn't the first time Uncle Sam has buddied up with the international trade industry toward a common goal. The erstwhile U.S. Customs Service of the Department of the Treasury, on a couple occasions sought to incentivize, or at least entice, the private sector into streamlining entry by dangling certain goodies before players' noses.

But C-T PAT is by far the most important initiative, in terms both of purposes served and potential impact on business practices. Now reconstituted as the Customs & Border Protection agency of the U.S. Department of Homeland Security (you'll see "CBP"

sometimes, but the long-familiar "Customs" is easier), the dock feds have created an organized program designed to maximize American resources in the war on terrorism.

Largely, C-T PAT represents business and government putting aside their differences to attend to our country's most serious threat. But let's face it – it's not that easy. For Uncle Sam, a program must be administrable and expressed by discernible guidelines. For industry, it must make economic sense. Virtually anyone, from ports to warehousemen, can participate (and the eligibility list is growing).

Customs defines C-T PAT as "a joint government-business initiative to build cooperative relationships that strengthen overall supply chain and border security." You can't just raise your hand and join; players have to become C-T PAT approved. Not a terribly difficult process, you basically fill out a questionnaire and agree to operate within C-T PAT's guidelines. But Customs has been lagging behind its estimated 30 to 60-day turn-around time for approval. Some folks have been waiting for months.

Once consecrated, a participant is subject to periodic "validations." It must give Customs updated security profiles based on its trade sector, enforcement history and other elements. Validations include meetings between Customs and a participant's

personnel and, where appropriate, inspection of facilities.

A triage system governs validation, taking into account “import volume, security related anomalies, strategic threat posed by geographic regions, or other risk related information.” A member’s first validation might be some three years out.

After getting a C-T PAT blessing, companies must vow to (1) undergo a comprehensive self-assessment regarding certain security points (both red and green flags); (2) fill out a security profile questionnaire; (3) draft and implement an in-house, C-T PAT compliant security enhancement program; and (4) do your best to communicate your successes, failures and suggestions to Customs and other C-T PAT members. These concepts are a work in process, constantly being fine tuned to account for advances in technology and the membership’s experience.

Why sign up? Does it make economic sense? The program isn’t mandatory, and it could be a short-term pain in the assets. But there are indeed business reasons why organizations should join (in addition to the obvious: helping secure our nation!).

Non-participants’ cargo will be inspected more frequently at the border, resulting in costly delays. Participants are assigned Customs account managers who are familiar with their programs. C-T PAT members get a membership list, which facilitates business connections and promote interplay between approved players. Members also are eligible for certain account-based processes for more convenient payment arrangements, as well as other contemplated programs in the future. One of the biggest benefits members will receive is a general smile of approval from Customs. It certainly beats that other demeanor many are used to – the one accompanied by Customs auditors breathing down your neck. Self-policing sure beats constant government scrutiny.

What about confidentiality of proprietary information? That’s one of the biggest concerns expressed by industry. Customs promises to keep information secret, but some folks just aren’t keen on the concept. But look at the stakes involved. Regardless of an entity’s participation in an optional program, disclosure is going to happen in this era. Make suggestions to Customs regarding how information might be kept confidential. Otherwise, you really just have to deal with it.

Are verification gigs tantamount to the dreaded Customs audit? No, says Customs. Unlike an audit, a validation doesn’t explore compliance with trade regs. Rather, it just looks at whether a company’s security program is C-T PAT compliant. Also, validations won’t last more than two weeks.

How much will C-T PAT security programs cost? That can’t be answered in blanket fashion, because organizations differ greatly. Customs says its design isn’t to make C-T PAT cost prohibitive, lest its membership suffer. But then again, what’s the price tag for *not* joining? This is long-term stuff! Also, we’re not talking legal liability here; a company’s noncompliance with C-T PAT programs just means suspension from the program. It doesn’t mean fines, seizures, etc.

C-T PAT is a carrot, not a stick. But all told, it may be such a sweet incentive, amidst enormous implied disincentives, that it essentially is mandatory. In any event, now’s the time for players serious about a future in international trade to send in a C-T PAT application.

Ref: the Customs & Border Protection agency’s website at <http://www.customs.ustreas.gov/>.

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**A Steamship Line
Dodges a Motor Carrier**
BY STEVEN W. BLOCK

Here’s a case that demonstrates the importance of documentation in intermodal relationships.

Shipper Levi-Strauss imported a load of blue jeans from Honduras by ocean carrier SeaLand to Port Everglades, Florida. SeaLand hired motor carrier Quaker to haul the cargo to its ultimate destination in Little Rock. The ocean portion of the carriage was successful, and SeaLand handed the jeans over to Quaker. Unfortunately, a thief posing as a Quaker employee disappeared with the load before it ever saw a highway.

Everyone agreed the carriers were liable. But the carriers' view of the world was a tad different than the shipper's regarding the extent of damages and limitation of liability. Levi-Strauss sued SeaLand, who sued Quaker, in a New York federal court. The three-way battle centered around Levi-Strauss's attempt to recover lost profits in addition to the cargo's manufacturing costs, and SeaLand's hopes to pin the whole mess on Quaker.

Generally, the measure of damages recoverable under the Carriage of Goods by Sea Act (COGSA, governing the loss per SeaLand's bill of lading) is "the difference between the fair market value of the goods at their destination in the condition in which they should have arrived and the fair market value of the goods in the condition in which they actually did arrive." Of course, the goods in this case didn't arrive at all, so their value at destination was zip.

Under this analysis, lost profits are recoverable damages under COGSA, but the shipper "must show that it in fact suffered lost profits and that it could not mitigate damages by substitution of comparable goods from the market." Levi Strauss couldn't meet that standard. Apparently, all jeans orders were timely filled from the shipper's other manufacturing sources. In other words, Levi-Strauss didn't lose a single sale as a result of the theft, so it didn't lose any profits. Consequently, the measure of damages isn't the jeans' retail sales value in Little Rock, but only the costs originally incurred to purchase the cargo in Honduras (about 240 grand).

SeaLand tried to argue that Levi-Strauss failed to prove the jeans actually were loaded into the ripped-off containers. True, no one testified they actually saw the containers being loaded (as might typically be done), but the court found scanned bar codes and manufacturing receipts sufficient. No evidence suggested the containers hadn't been loaded with jeans. Nice try, SeaLand.

In suing Quaker, the ocean carrier was after reimbursement from the motor carrier for the \$240,000 SeaLand was ordered to pay Levi-Strauss (known as an "indemnity action" in law-speak). Apparently, SeaLand didn't have a limitation of liability argument against its shipper.

Quaker did. The trucker pointed to the limitation of liability clause in its tariff, which purported to cap Quaker's liability for any cargo loss at \$100,000. Quaker wasn't named on SeaLand's bill of lading issued to Levi-Strauss, but the trucker urged that the ocean bill was intended to be a through bill of lading

which would (per tiny words on the back) incorporate all connecting carriers' tariffs.

But Quaker hadn't issued its own bill of lading to SeaLand or Levi-Strauss. Moreover, Quaker had signed an Intermodal Interchange Agreement (IIA) with SeaLand which governed the two carriers' relationship. The IIA provided that Quaker would reimburse SeaLand for any cargo losses that happened on Quaker's watch.

The court found the IIA's indemnity clause enforceable. Even if it weren't, Quaker still couldn't limit its liability to SeaLand. For motor carriers to open that umbrella by way of their tariffs, the law requires them (1) to offer their customers "a possibility of higher recovery by paying the carrier a higher rate"; and (2) to set forth the tariff term "in a reasonably communicative form, so as to result in a fair, open, just and reasonable agreement between the carrier and shipper [in this case SeaLand]." Quaker had done neither, and must pay back SeaLand the 240 thousand. The days of government-filed tariffs are pretty much over, so carriers should expect courts to rigorously enforce provisions regarding notice of their limited liability.

So what's a trucker to do in intermodal relationships like this? The best answer, though not necessarily the logistically easiest, is never to haul a load without issuing a separate surface bill of lading and/or other contract that specifically limits the motor carrier's liability. That might also prove problematic from a business perspective (ocean carriers understandably are very picky about indemnity provisions in their interchange agreements). Another approach is to take whatever steps possible toward ensuring that the ocean carrier's liability is limited for any intermodal haul the trucker participates in, and have a Himalaya clause in the through bill extend that benefit to the trucker.

Ref: Levi Strauss & Co. v. SeaLand, 2003 WL 21108311 (SDNY 2003).

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Hot Recent Cases in Motor Carrier Law

BY STEPHEN L. DAY
AND STEVEN W. BLOCK

Owner operators must unload their trucks if their leases say so

Jessep v. Jacobson Transportation Co., 2003 WL 22844291 (8th Cir. 2003)

This one answers an age-old question often raised by owner operators who don't feel like unloading their trucks. A federal statute, 49 USC § 14103(b), says a carrier can't "coerce" anyone to load or unload cargo. This "lumper law" has been touted in truckstop coffee shops across the country as a freight "no-touch" law. That view, however, is incorrect. When driver Jessep didn't want to get his hands dirty, his lessee, carrier Jacobson, bumped him to the bottom of the dispatch list. Jessep sued the carrier, pointing to the statute.

Notwithstanding Uncle Sam's statutory proviso, nothing says an owner operator can't contractually agree to unload and load. In fact, the lease *must* contain a statement about who is responsible for loading and unloading freight. That's what Jessep's lease provided, that he would do the dirty work. In a very short opinion, the Eight Circuit ruled the contract trumps the statute, and Jessep must empty his truck or go to the back of the line.

Agency law in the Carmack context: Apparent authority is enough to keep a player in the liability loop

Parramore v. Tru-Pak Moving Systems, 286 F.Supp.2d 643 (M.D. NC 2003)

This interstate household goods case tackles a number of issues, such as the usual federal preemption and notice of claim squabbles. On a summary judgment motion brought in the Middle District of North Carolina, the court found questions of fact as to whether notice of claim had been sent (the court paid lip service to the absence of a Fourth Circuit decision defining adequate notice of claim). Whether carrier Tru-Pak might have waived its right to notice by suggesting settlement was imminent also

was factually disputed. State and common law causes of action for negligence and breach of contract were dismissed based on Carmack's preemption.

The interesting point this case addresses regards the law of agency. Tru-Pak had an agency agreement with carrier Atlas to operate as a local. The bill of lading and shipping documentation all had Atlas' logo and listed Atlas as the carrier. The rub came from the prohibition of interstate carriage in the Atlas-Tru-Pak contract. Tru-Pak had specifically directed its driver to disregard that restriction in hauling shipper Parramore's stuff from the Tar Heel State to Michigan. Of course, some of Parramore's belongings were damaged and missing on arrival.

Atlas wanted out of the mess based on the contract term. Atlas urged that Tru-Pak was engaged in an ultra vires mission when it made this haul, one Atlas shouldn't be held accountable for as a principal. Conversely, Tru-Pak sought a dismissal based on 49 USC § 13907(a), which holds principals solely liable for the acts of their disclosed agents. The court disagreed with both, at least on summary judgment. At a minimum, Tru-Pak had apparent authority to effect the move as Atlas's agent, so Parramore was entitled to rely on Atlas being on the hook. An ultra vires act is one undertaken with the "complete absence of authority," which wasn't the case here. Tru-Pak couldn't escape liability under 49 USC § 13907(a) because Parramore alleged that the local carrier had committed its own unauthorized acts leading to the loss.

A misfiled insurance certificate doesn't create coverage

Campbell v. Shura, et al, 2003 WL 22508439 (5th Cir. 2003)

Here's a rare victory for the insurance industry in the motor carrier coverage arena. Truck owner Owens leased his rig to carrier Fikes. Fikes got insurance coverage from insurer Lancer, and filed a certificate of insurance with the Texas Department of Transportation. The lease was completed, and the rig was returned to Owens. However, Fikes and Lancer forgot to cancel their certificate in the Lone Star State.

Owens then leased his truck to carrier Parks for use in Louisiana. Tragically, a Parks driver was involved in a fatal collision. The deceased's estate wanted Lancer to provide coverage. The claimant pointed to

Texas, Louisiana and federal law that interprets and enforces strictly regs regarding confirmation of motor carrier insurance.

This time, however, a federal court found no coverage. The Fifth Circuit, affirming the Western District of Louisiana, ruled that a certificate filed with the government may not “amplify, extend or modify” the terms of Lancer’s policy, which pertained only to the Fikes lease. Moreover, “it is the existence of the insurance which protects the public, not filing it with the” government. Thus, the deceased’s arguments regarding public policy were rejected.

It’s interesting to consider how this might play out in a federal coverage issue involving the FMCSA, whose insurance division takes a pretty hard line on these topics. Maybe Owens should have seen to it that the certificate was canceled to avoid this problem.

**. . . And while we’re on the topic
of agency in the trucking world. . .**

Shinn v. Greeness, et al, 218 F.R.D. 478 (M.D. NC 2003)

Greeness was driving a rig in North Carolina when he crashed into plaintiff Shinn’s car. Greeness was operating under the authority of Anna Beck d/b/a Zippway Transport, and his rig was owned by R&E Townsend Trucking, Inc. Roger Townsend and Ella Townsend were R&E’s executive officers. Greeness and Beck were Texas citizens, and the Townsends were from Georgia.

Shinn sued Greeness in North Carolina, and wanted to amend his complaint to name Beck and the Townsends as defendants. All resisted based on jurisdictional grounds.

When addressing whether a complaint may be amended to name new defendants, a plaintiff need only make out a *prima facie* case of jurisdiction. Thus, the court wouldn’t force the plaintiff to show by a preponderance of the evidence that the out-of-towners had the requisite minimum contacts with the Tar Heel State to be hauled into court there. Instead, it was enough for Shinn to show that, hey, their truck was doing business in the Old North State.

Similarly, Shinn didn’t have to show the Townsends exercised requisite control over Greeness for the driver to be considered their agent in an employment relationship. A *prima facie* case is presented by the fact he was driving their company’s truck. Beck was

on the hook, at least until an evidentiary hearing could be completed, because drivers are indeed statutory employees of the carriers under whose authority they operate. State law, if applicable, would provide the same way.

Because amendment to pleadings must be liberally allowed, Beck and the Townsends have to fight at least one more round in North Carolina.

**Owner operators have to arbitrate
their breach of contract claims against carriers**

OOIDA v. Swift Transportation, et al, 2003 WL 22300528

A group of owner operators represented by the Owner-Operator Independent Drivers Association (“OOIDA”) sued some carriers alleging beach of their contracts (the opinion doesn’t say much about the beef). The carriers responded to the lawsuit, filed in the District of Arizona, by moving to enforce the contracts’ arbitration clauses. The drivers resisted on a number of grounds.

Considering the federal judiciary’s general preference for upholding arbitration agreements, the court ruled against the drivers. Contrary to the drivers’ feelings, the carriers hadn’t waived their right to arbitrate by asking that a preliminary injunction hearing take place concurrently with trial.

True, the Federal Arbitration Act contains an exception for transportation employees, but these drivers, being owner operators, weren’t employees (as a matter of statute). While the drivers thought their claims arose out of activity outside the scope and contemplation of their contracts, the contracts indisputably were at the relationship’s core. The disputes certainly “were in connection with” the contracts, which was the basis for the arbitration clauses’ enforceability, and required interpretation of certain contractual terms. Even if a contract is ruled void as violative of federal statute, its arbitration clause is still okay.

Lastly, the restricted scope of discovery in arbitration, as well as the more limited scope of enforceability an arbitration proceeding provides, are not grounds for setting aside a clear contract term. Those are just limitations you’re agreeing to when you insert an arbitration clause in the first place.

OOIDA's victory over carrier Arctic Express stands!

OOIDA v. Arctic Express, 2003 WL 22439878 (S.D. Ohio 2003)

Drivers represented by OOIDA sued carrier Arctic Express under truth-in-leasing regs based on Arctic's failure to return escrow funds collected from them (the funds were held only to satisfy the drivers' maintenance obligations; apparently Arctic interpreted that term rather liberally). The drivers won on summary judgment in the Southern District of Ohio, citing 49 USC § § 14101-02 and 14704.

After winning that motion, OOIDA lost a similar battle before the Eighth Circuit, which ruled that the truth-in-leasing regs couldn't be retroactively applied. The

Eighters also denied OOIDA drivers class action status.

Based on that appellate decision, Arctic asked the Southern District of Ohio to reconsider. The Ohio court declined, stating it was not bound by the Eighth Circuit's decision (Ohio is in the Sixth Circuit). Besides, both decisions were based on interpretations of U.S. Supreme Court law that were known to the district court when it first considered the issue. Regarding the motion to decertify the OOIDA class, the district court had applied the Sixth Circuit's guidelines, rendering the Eighth Circuit's conclusion even less relevant. OOIDA remains the winner.

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UPCOMING EVENTS

Attorneys in the Betts Patterson Mines' Transportation & Logistics Practice Group are regular speakers at events throughout the country. Upcoming events include:

Steve Block to Present Continuing Education Class

Steve Block will participate in the Washington State Bar Association seminar, "Insurance Today: How to Navigate Placement, Claims and Other Rough Waters - and Stay Dry", on March 5, 2004. The topic of Mr. Block's presentation will be "Ethical Issues for Insurer-Retained Defense Counsel." For detailed program and reservation information please call 800-945-WSBA.

CONTACT INFORMATION

For comments or additional information on the articles in this issue please contact the authors either by phone at (206) 292-9988 or by email using:

Steven W. Block	sblock@bpmlaw.com
Stephen L. Day	sday@bpmlaw.com
Maury A. Kroontje	mkroontje@bpmlaw.com
Taro Kusunose	tkusunose@bpmlaw.com
Lara M. Traylor	ltraylor@bpmlaw.com

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