

# SURF & TURF

LEGAL NEWS IN TRANSPORTATION & LOGISTICS

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## CLEANUP COSTS: THE SAN PEDRO BAY CLEAN AIR ACTION PLAN SETS OFF DIRTY DISPUTE

By Steve Block

What could be better intended, more magnanimous or otherwise healthier for all concerned than a plan aimed at systematically cleaning port facilities? At the core of our international business sector is an efficient ocean transit infrastructure. Port stations capable of receiving and processing freight are the foundation of that infrastructure, especially now that America operates only on the fringes of the ocean liner industry. With modern technology and volumes, pollution of U.S. coastlines has emerged as a by-product of our competitive port system, one that threatens to compromise the health and beauty of American shorelines and their nearby communities.

Over the past decade, America's largest port complex - the San Pedro Bay, encompassing the Ports of Long Beach and Los Angeles in California - has emerged as a principal victim of industrial pollution. In response to growing health and environmental concerns, the State of California's port-governing departments, in coordination with federal agencies such as the U.S. Environmental Protection Agency, adopted in November 2006 the San Pedro Bay Clean Air Action Plan ("CAAP"). The program's goals are laudable. What could be more desirable than a safer and prettier environment? How can anyone quibble with a program designed to keep us healthy and ensure a smog-free future for our children?

CAAP is a phase-in program designed to curb emissions from trucks, ships, trains and other port equipment "by at least 45 percent in five years." Most of CAAP's meat involves slowly eliminating the use at ports of aging equipment whose exhaust is

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more toxic than newer models built subject to more rigid guidelines and advanced technology. New port rules will include shore-side electricity for docked ships; reduction of vessel speeds in harbor waters, and automatic shut-off systems for idling train locomotives; low-sulfur fuels; research of future technologies; and other measures. The ports are prepared to invest hundreds of millions, but intent to collect a cargo tax to help pay for CAAP (currently proposed to be \$35.00/TEU).

But a few CAAP measures have prompted protests from and raised blood pressure amongst the trucking industry, particularly drayage outfits that service the San Pedro Bay. Part of CAAP is the "Clean Truck Program," which includes a requirement that all drayage operators enter into "concession agreements" with the ports. Only motor carriers that operate their own rigs are eligible to become concessionaires, thereby excluding owner-operators and trucking outfits that lease them. The contemplated concession agreement also requires trucker partners to either begin using equipment with higher emission standards, or pony up fifty bucks per port visit if they don't.

## Cleanup Costs... (Continued)

Transportation organizations, most notably the National Industrial Transportation League and the Pacific Merchant Shipping Association, have issued a formal protest in response to the Clean Truck Program. Put simply, say the trade groups, the system can't handle this kind of shock therapy, well intentioned or not. Owner operators service a significant segment of Long Beach/Los Angeles' drayage industry. Truckers who exclusively operate their own equipment probably can't service the demands of this large a facility. If they tried, the combination of newly purchased equipment and strained supply and demand would cause drayage fees to skyrocket. The U.S. Maritime Administration issued a letter essentially concurring with that sentiment.

Moreover, the measure is probably illegal under the current U.S. Shipping Act in that Operating Agreements the Ports of Los Angeles and Long Beach have on file with the Federal Maritime Commission don't mention concession agreements (a requirement if a marine terminal operator intends to enforce a policy). And while clean air is important, it's at least arguably not so compelling as to justify what appears to be an anticompetitive and discriminatory practice (when other measures might be effective).

Concurrently with CAAP and its fallout, the two ports are wrestling with the concept of individual bans on "dirty trucks." Long Beach is considering a "Clean Trucks Program Tariff," and L.A. is in the midst of developing a similar concept. The terms of these programs are still being debated and challenged, with dates for proposed banning of trucks with high emissions still up in the air. One proposal would begin the prohibition in October 2008 by excluding certain aging trucks, and reach its full force in January 2014 when all vehicles not in compliance with current federal standards are blackballed. Port commissioners postponed voting when they realized two separate programs might create the undesirable circumstance of truckers being qualified to operate in one San Pedro port but not the other.

Few industries present the level of challenges borne of contrasting economic and environmental concerns that does transportation. While CAAP, a

Clean Trucks Program Tariff and a Clean Truck Program might be valiant efforts sanctioned by at least some level of federal authority, their level of complexity and controversy demonstrates America's need for a uniform federal policy regarding marine terminal operator environmental regulation.

*Ref: website of the San Pedro Bay Clean Air Action Plan at <http://www.cleanairactionplan.org/> and joint letter from the National Industrial Transportation League and the Pacific Merchant Shipping Association, available at <http://www.nitl.org/PR092607.pdf>.*

## PERIL OF THE SEA: WHEN SHOULD CARRIERS BE RESPONSIBLE FOR BAD WEATHER?

By Steve Block

Second Circuit Court of Appeals Judge Jon O. Newman put it nicely in a concurring opinion he recently wrote: "The perils of the sea have been with us since Noah sailed his ark, and some will always remain, but in the 21st century, I think we can do better at reducing the risk of ship collisions."

Yes, boats have been wrecked, cargo lost and damaged, and crewmembers hurt by perilous weather on the seas throughout mankind's history. Ocean transit's inherent risks haven't been just a sideshow of cargo transit's organization and methodologies over the ages; in many ways our shipping industry forefathers viewed the sea's unpredictable dangers as very much the main act in determining business and operational arrangements.

So it's not surprising that law developed to accommodate service providers who brave the wet elements. After all, how could we expect ocean carriers to assume responsibility (and liability) for cargo their shippers entrust to them when unforeseeable conditions - wholly beyond their capacity to forecast or prepare for - might at any time destroy that property? Who would do business like that? Thus was born the "Peril of the Sea" defense, essentially a salty version

## PERIL OF THE SEA . . . (Continued)

of the “Act of God” defense which is better known landside but also appears as a concurrent basis of ocean carrier vindication.

Now stated in the U.S. Carriage of Goods by Sea Act as the “dangers of the sea or other navigable waters” defense, Peril of the Sea has been defined through generations of eloquent judicial prose no legal commentator could match. For example, to avail itself of the defense in response to an aggrieved shipper’s cargo claim, a carrier must show that a storm or other natural event was “of an extraordinary nature or arising from irresistible force or overwhelming power which could not be guarded against by ordinary exertions of human skill and prudence.”

Or, “a ‘peril of the sea,’ which will absolve vessel owner of liability for injury or loss is something so catastrophic as to triumph over those safeguards by which skillful and vigilant seamen usually bring ship and cargo to port in safety and storms relied on to explain loss of a vessel in rebuttal of a claim of unseaworthiness must be shown to have been of extraordinary intensity.”

And how about this: “Perils of the sea means all marine casualties resulting from the violent action of the elements, as distinguished from their natural, silent influence upon the fabric of the vessel; casualties which may, and not consequences which must, occur.”

In other words, neither nasty weather on the high seas or other insuperable circumstances imposed by the man upstairs are an automatic bailout from cargo liability. Storms, interference by sea plant or animal life, gaseous emissions by cargo and other events are all naturally occurring phenomena. But a carrier’s capacity to predict or avoid these potential sources of loss has increased with advancing technology, such that it’s not always fair for those service providers to walk Scot free with their shoulders shrugged and index fingers pointed to the heavens in response to cargo claims.

Maritime law will enforce a Peril of the Sea defense only when it’s clear the carrier did everything reasonably expected of an entity in its position to avoid the loss. And once that’s on the record, “it is the duty of the carrier to exercise at least reasonable diligence in endeavoring to save the shipment and prevent further loss.” Otherwise, the carrier’s back on the hook.

Cases in which Peril of the Sea is interposed as a defense often devolve into factual battles over what the carrier predicted, suspected, knew, or did (or “should have” with respect to each). Just ask the parties to a recent cargo claim in Louisiana that involved cargoes damaged by high winds. The carrier pointed to its anemometer (wind speed gauge) readings and experienced captain’s observations to substantiate a peril of the sea defense. The plaintiff shipper thought that official meteorological readings and expert testimony confirmed the storm wasn’t that bad and was at least somewhat predictable. Moreover, other cargo on the vessel had been better secured and wasn’t damaged.

Unfortunately for the shipper, a federal district court judge found the captain more convincing, and the Fifth Circuit Court of Appeals wasn’t inclined to disturb those factual conclusions. Admiralty trials being without a jury, it often boils down to a single judge’s perspective of whether uncontrollable forces are to blame. Fortunately for shippers, most cargo insurance policies cover freight damaged or loss by a peril of the sea.

That said, Judge Newman’s words ring true. We should be able to do better at protecting cargo from the elements than we could centuries ago, and the law should be applied accordingly.

Ref: 46 U.S.C.A. § 30706(1); *Corus UK Ltd. v. Waterman Steamship Co.*, 2007 WL 3027066 (5th Cir. 2007)

## HOT RECENT CASES IN MOTOR CARRIER LAW

By Steve Block

**A motor carrier - the real one - must receive freight before Carmack controls.**

*PNS Jewelry, Inc. v. Dunbar Armored, Inc.*, 2007 WL 4216915 (Cal. App. 2 Dist. 2007)

Jewelry store PNS regularly hired motor carrier Dunbar to haul very expensive cargoes of fine stones and such. Dunbar had its own uniforms, its own shipping documentation, and its own secret code by which its employees could be verified when they picked up deliveries from shippers.

In January 2005, a man showed up at PNS in the right garb, with the right truck, uttering the right coded signal, and giving no reason for PNS to suspect he wasn't legit. PNS handed over jewels it wanted hauled interstate to a trade show. Unfortunately, the man was an imposter with apparent inside connections at Dunbar. Yes, he disappeared with some \$1.5 million in jewelry.

PNS sued Dunbar based on common law negligence principles, pointing to an array of alleged no-no's the carrier committed before, during and after the heist. Dunbar was quick to seek shelter behind Carmack, and sought dismissal of the action based on federal preemption principles. A California state court agreed and tossed the case, but a Golden State appeals court sent it back.

Carmack doesn't kick in unless and until a motor carrier actually receives freight. Dunbar, by its own admission, never touched the goods here. No cited case supports the notion that a carrier can avail itself of Carmack when goods were stolen before the carrier ever touched them. A phone call PNS made to Dunbar placing the delivery order doesn't constitute a contract, and the carrier never issued a bill of lading. This is a garden variety negligence case which should be adjudicated as such.

**New STAA provisions strengthen employee claims, but not retroactively.**

*Elbert v. True Value Co.*, 2007 WL 4395626 (D. Minn. 2007)

Amendments to the Surface Transportation Assistance Act (STAA), 49 USC § 31105(a) were signed into law last August, and carriers should be aware of the tightened standards the new law imposes vis-à-vis employee claims for retaliatory firings. Borne of post-911 safety and security concerns, STAA's new provisions empower employees who get canned for protesting dangerous conditions to seek up to \$250,000 in punitive damages. Such claims may be transferred to a federal district court if the Department of Labor hasn't taken care of all issues within 210 days.

Driver Elbert thought his employer True Value had fired him for refusing to operate a truck that had bad brakes. He filed with DOL before STAA was revised. When the admin proceeding didn't yield final results on time, he brought suit against True Value in the District of Minnesota. The employer sought to dismiss on the ground STAA's amendments aren't retroactive.

The court agreed. Going through a nice review of retroactive applicability of federal statutes, the court first noted the "deep-rooted presumption" that statutes silent on the issue of retroactivity have force only after the law goes into effect. When a statute is silent (like this one), courts should apply it to past circumstances only if doing so would not adversely impact the defendant's substantive rights. Elbert urged that jurisdiction within the federal judiciary couldn't possibly impact his former employer's substantive position. However, the court ruled that the parties' earlier proceedings based on the assumption of the pre-amended statute's terms created circumstances that potentially could negatively impact True Value (i.e., they had actually already gone through discovery and trial).

## Hot Recent Cases (continued)

### Owner operator can't get workers' comp benefits.

*Hernandez v. Triple EII Transport, Inc.*, 2007 WL 4531509 (Idaho 2007)

Owner operator Hernandez was under lease to carrier Triple EII. The contract required him to carry his own workers' comp insurance coverage. A policy was procured from insurer Liberty Northwest for Hernandez and his employees, but (1) it was issued over an apparently forged signature of Hernandez; and (2) Hernandez himself was excluded from coverage. Hernandez was hurt on the job, and tried to get benefits under Idaho's State Insurance Fund, which provides health coverage to the Gem State's injured employees.

The Idaho Industrial Commission went through the usual process of determining that Hernandez was not an employee of Triple EII, and therefore not entitled to state benefits. Idaho's Supreme Court, on appeal, agreed. The analysis centers around the degree of control Triple EII exerted, or had the right to exert, over the individual. As a lessee, Hernandez determined most of his own activity, and could refuse jobs altogether from the lessor. He also owned his own equipment and paid his own costs. Everything pointed to his being an independent contract as opposed to an employee.

This claim differed from the typical in that Hernandez wasn't otherwise covered by insurance, despite the contractual provision. The issue of a fraudulent signature was not within the Industrial Commission's purview. While there never was any real coverage for Hernandez himself, the policy wasn't "illusory" in relevant regard because the owner operator's deal with the carrier specifically was premised on such coverage. While Hernandez had no employees, he could have had employees, who would have been covered. Thus, the insurance policy was a red herring apparently of Hernandez' own making. Hernandez is stuck without coverage.

### Eighteen-month statute of limitations for motor carriers to sue for freight charges applies to brokers, and isn't tolled by a failed counterclaim.

*Exel Transportation Services, Inc. v. Sigma Vita, Inc.*, 2007 WL 4150975 (Ga.App. 2007)

Carrier Sigma Vita sued transportation broker Exel to collect unpaid freight charges - eighteen months and five days after the land leg on an international ocean transit had been completed. Apparently, earlier litigation in which the two were involved included a failed motion by Sigma Vita to interpose a counterclaim for unpaid freight charges. Now, the carrier was going after Exel directly.

On cross motions for summary judgment, Exel argued that the claim was time barred under ICCTA's 49 USC § 14705(a), which imposes on interstate motor carriers an eighteen month statute of limitations to file suit for freight charges. A state court in Georgia shot down each of the carrier's responses to that defense, and dismissed the action. First, ICCTA governs this haul, as it was the land portion of an international move, even though Sigma Vita's trucks never left the Peach State. That's the way the statute is designed.

Second, the statute of limitations applies in claims against brokers (and not just shippers). True, carriers most typically sue deadbeat shippers and only in certain circumstances even have freight charge claims against brokers, but nothing in 49 USC § 14705(a) limits the provision to shippers.

Third, this federal statute preempts state-law statutes of limitations for breach of contract issues, so Sigma Vita can't simply reword its claim to sidestep ICCTA.

Fourth, nothing in law or logic suggests a motion for leave to file a counterclaim for unpaid freight charges (particularly one that was denied) tolls a statute of limitations. Sigma Vita is out of luck.

## Hot Recent Cases (continued)

**Assignment of damaged cargo claim doesn't violate contractual prohibition of assignments.**

*Central Transport International, Inc. v. Global Advantage Distribution, Inc.*, 2007 WL 4482271 (M.D. Fla. 2007)

Carrier Central Transport International ("CTI") had a service contract with General Electric to transport lighting products to a designated consignee. That contract contained a clause prohibiting assignment of the contract. When some six hundred grand worth of lighting fixtures were allegedly damaged in transit, GE assigned its rights to Osram Sylvania Products to a freight claim against CTI. Osram Sylvania, in turn, authorized Global Advantage Distribution to go after CTI.

In response to Global Advantage's lawsuit filed in the Middle District of Florida, CTI moved to dismiss based on the non-assignment clause. CTI also urged that GE's time for filing a notice of claim had expired, and that Global Advantage's notice was not effective. The court wasn't impressed.

Assignment of a claim under a contract isn't the same as assignment of the contract itself. The clause might have been worded so as to avert assignments of cargo claims, but this wasn't done. Global Advantage, being well onboard after the assignment, could give an effective notice of claim to CTI. Factual issues precluded summary judgment for a series of other theories on which CTI sought dismissal, so this claim continues.

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