



SURF & TURF

Legal News in Transportation & Logistics

A bimonthly newsletter published by the BPM Transportation & Logistics Practice Group

February 2005

- 1 **NVOCCs Enter the Modern World with Contract Freedom** BY STEVEN W. BLOCK
- 2 **Backtracking Through the Himalayas: The U.S. Supreme Court Rules Connecting Railroad's Liability is Limited by Ocean Bills of Lading** BY STEVEN W. BLOCK
- 3 **Hot Recent Cases in Motor Carrier Law** BY STEPHEN L. DAY and STEVEN W. BLOCK
- 7 **Contact Information**



NVOCCs Enter the Modern World with Contract Freedom BY STEVEN W. BLOCK

Late last year, the non-vessel operating common carrier (NVOCC) segment of the ocean transportation intermediary industry plucked an arm from the stockade of contract prohibition (see December 2004 *Legal Lookout* article). The U.S. Federal Maritime Commission (FMC) had granted NVOCCs provisional permission to enter into volume- and time-intensive contracts with their shippers, allowing them to enjoy, if a bit belatedly, the same freedom of contract the Ocean Shipping Reform Act (OSRA) bestowed on the rest of the international shipping universe.

Now, it appears NVOCCs have ripped all but, perhaps, a finger or two from that allegorical yoke. This may be the most exciting news those cargo-consolidating, slot-chartering, carriers-to-shippers/shippers-to-carriers have ever heard. Yes, it's official: effective January 19, 2005, the FMC has granted NVOCCs full authority to play by the same rules as everyone else. Unless someone successfully petitions a federal court to shoot down the FMC's decision (a possible eventuality depending on whom you ask), NVOCCs now can enter into

confidential leveraged contracts with their shipper customers, free from

concern that similarly situated shippers might assert "me-too rights." Gone is the 1984 Shipping Act's mandatory tariff publication requirement which had caused intermediaries so much grief since OSRA's implementation in May 1999.

This will strengthen the positions of NVOCCs in their negotiations with carriers, as the former will be better situated to commit freight volumes to the latter. It also will enable NVOCCs to best allocate their resources, providing the most advantageous rates in the trades and services their customers require. Shippers, and ultimately consumers, should derive the ultimate benefit of lower shipping costs and more advantageous shipping options.

The FMC's ruling is the culmination of a six-year effort by the intermediary industry (supported vocally by shipper groups) to correct its anomalously unjustified exclusion from the free-trade environment OSRA created. But some of the concerns that led to that exclusion produced an exception to the intermediaries' new freedom: NVOCCs still are prohibited from buddy-ing up with each other in negotiating and forming an NVOCC Service Arrangement (NSA, the latest acronym in the ocean shipping world, not to be confused with the National Security Agency).

Some of the larger shippers associations, with which NVOCCS often compete for customers and freight, expressed discomfort at the new concept's snowball potential. The FMC also wasn't sure inter-NVOCC coteries would be kosher under the antitrust laws (from which intermediaries, unlike carriers, aren't exempt under OSRA). To keep an even keel (or, as FMC Commissioner Harold Creel put it, to avoid a "chilling effect" without delaying the expanded authority), the feds carved out this proviso. The FMC apparently is a little nervous about the possible outcomes of pending court cases which address these competitive restrictions, and might reconsider them if the judiciary ultimately finds them unwarranted.

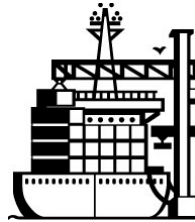
All NSAs (as well as their amendments on an ongoing basis) must be filed with the FMC before freight is moved pursuant to them. Regulatory oversight and ground rules are a bit more stringent than with carrier service contracts; there's a whole laundry list of items an NSA must include. Significantly, a contract's provisions must not be "uncertain, vague, or ambiguous"; and you can't refer to "terms not explicitly contained in the NSA itself unless those terms are contained in a publication widely available to the public and well known within the industry" (i.e., an NSA has to up front, in your face and easily interpretable). Also, an NVOCC is precluded from piggy-backing on a carrier's tariff.

In other words, NVOCCs can enter into contracts, but they have to be darned specific with no deviation or wiggle room allowed. Discriminatory practices or unreasonable preferences regarding rates or ports are expressly *verboten*. Some might say all the FMC has done here is allow NVOCCs to make custom tariffs for the trade segments of their various customers, with all the rigidity of common carriage enforcement from the days of yesteryear. Even if that assessment is fair, the intermediary industry indisputably is a lot better off now than it was before.

While the judiciary could nix or amend this development, NVOCC contract freedom fills the last major piece of the puzzle in an ocean shipping environment driven by market economy factors. Expect ocean transportation intermediaries to develop programs for their shipper customers offering more competitive rates and new services to those who can contractually commit volumes of freight over time. Further expect carriers to feel more secure in dealing with NVOCCs whose bookings are backed by contractual commitment.

Ref: FMC's final rule, "Non-Vessel-Operating Common Carrier Service Arrangements," to be published as 46 CFR Part 531, available on FMC's website at [http://www.fmc.gov/Dockets/04-12%20FINAL%20RULE%20\(2\).htm](http://www.fmc.gov/Dockets/04-12%20FINAL%20RULE%20(2).htm).

Reprinted with permission from *Marine Digest and Transportation News*.



Backtracking Through the Himalayas: The U.S. Supreme Court Rules Connecting Railroad's Liability is Limited by Ocean Bills of Lading

BY STEVEN W. BLOCK

The highest court in the land, having exercised its discretionary option to review a Circuit Court of Appeals conclusion, recently issued a significant, surface carrier-friendly decision regarding limitation of liability. The U.S. Supreme Court has reversed the Eleventh Circuit's determination that the Norfolk Southern Railway could not avail itself of an ocean bill of lading clause extending a steamship line's limited liability to connecting carriers (see April 2003 *Legal Lookout* article). Per federal statutory law, ocean carriers in international transit may limit their liability to a minimum of 500 bucks per package, and commercial relationships typically induce them to extend that advantage to other service providers involved in through hauls. Non-vessel operating common carriers (NVOCCs) may do the same. The extension typically is accomplished by those teeny words on the backside of standard ocean bills of lading under the "Himalaya Clause."

In this case, shipper Kirby booked freight with intermediary International Cargo Control (ICC) for transit of industrial freight from Australia to Huntsville, Alabama. ICC issued Kirby its house bill of lading, and placed the cargo for transit with ocean carrier Hamburg Süd. In turn, Hamburg Süd issued its bill of lading to ICC (designating Savannah as the port of discharge and Huntsville as the final destination), and hired the Norfolk Southern for the transit's surface leg.

ICC's bill of lading limited its own liability to \$500 if Kirby's freight were lost/damaged at sea, and to 666.67 Special Drawing Rights (an artificial unit of currency, set by the World Bank and often used for liability limitation in foreign transportation contracts) for any loss on land. Hamburg Süd's bill of lading

limited its liability to \$500, and contained a Himalaya Clause. Norfolk Southern's train derailed, damaging Kirby's freight to the tune of some \$1.5 million.

When Kirby (and its insurer) sued in the Northern District of Georgia, the railroad urged it was protected by the limitation of liability clauses in both bills of lading. The district court held that Kirby's liability was limited to relative peanuts per the ICC contract of carriage. On appeal to the Eleventh Circuit, Kirby argued that the railroad's liability shouldn't be capped pursuant to a contract (which a bill of lading is) it was not a party to. The court of appeals agreed and reversed the district court. "A special degree of linguistic specificity is required to extend the benefits of a Himalaya clause to an inland carrier," the Eleventh Circuit ruled, and an intermediary contract could bind a shipper only if the intermediary was acting as the latter's agent. Neither was the case here. In other words, Kirby knew nothing about a train, and didn't agree to any railroad's liability being limited.

The Supreme Court granted cert to review whether either bill of lading shielded the railroad. In addressing the issue, the Big Nine first went through an interesting assessment of whether admiralty jurisdiction (which gets maritime disputes into federal court) applies to a railroad loss. The era of intermodal transit has necessarily broadened admiralty jurisdiction's scope, and a contract's primary objective (i.e., ocean transit) governs the issue even if less-salty services are accomplished as part of the deal. Thus, the parties were properly in the federal system.

The high court reversed the Eleventh Circuit. No, a railroad (and by extension, a trucker or other land-based service provider) need not be in privity of contract with a shipper in order to stand under the limitation of liability umbrella hoisted by an ocean carrier. Nor is an agency relationship required. The various circuit courts of appeal had split on these questions, some going one way and some the other. But now, the uniform law of the land is that parties to international water carriage contracts must anticipate that subcontractors of NVOCCs and steamship lines will play roles in the process, and be shielded from full liability to the same extent as the player that issues a Himalaya Clause-containing bill of lading. The court seemed to say, "C'mon, Kirby, how did you think your freight was going to make it from Savannah to Huntsville if not by train?"

In fact, the Norfolk Southern could avail itself of limitations of liability contained in both bills of lading.

That's both fair and practical. Carriers otherwise would have persistent headaches trying to learn whether they're dealing with an intermediary, and if so, how many intermediaries, in order to ensure everyone was fully protected. Moreover, if liability was limited in carrier/shipper contracts, but not limited in carrier/NVOCC deals, carriers would want to hit intermediaries with higher freight rates. This might muddy the waters of common carriage principles regarding nondiscrimination in pricing. Lastly, shippers can always make sure someone is there to sue by refusing to agree to their intermediaries' limitation of liability. This option is more realistic now that NVOCCs are on track toward freedom of contract in their relationships with shippers (see December 2004 *Legal Lookout* article).

The Kirby decision may be a significant consideration in Uncle Sam's participation in ongoing negotiations before the United Nations toward an international ocean cargo liability regime (see June 2003 *Legal Lookout* article). Current talks include proposed terms that might dictate liability of surface carriers that operate pursuant to through ocean transit. An international treaty ratified by Congress would trump a Supreme Court decision, but our high court's interpretation of shipping contract relationships and proper liability allocation might influence, if not dictate, where the U.S. stands regarding internationally uniform law.

Ref: *Norfolk Southern Railway Co. v. James N. Kirby, Pty, Ltd.*, 2004 WL 2514422 (2004)

Reprinted with permission from *Marine Digest and Transportation News*.



Hot Recent Cases in Motor Carrier Law

BY STEPHEN L. DAY
AND STEVEN W. BLOCK

We don't need no stinkin' federal law . . .

Mastercraft Interiors LTD v. ABF Freight Systems, Inc., 2004 WL 2973820 (D. Md. 2004)

Mastercraft, a Maryland corporation, bought furniture from a California manufacturer. Carrier ABF hauled it. Mastercraft thought ABF's charges were higher than what ABF's salesman had promised. The company didn't check its bills and, surprise, the shipping costs seemed a tad higher than expected at the end of the year. After unproductive discussions, Mastercraft sued for breach of the oral contract for rates in Maryland state court. ABF counterclaimed, seeking summary judgment on the ground the alleged oral rate agreement was unenforceable because ICCTA required contracts of carriage to be in writing. Moreover, urged ABF, Mastercraft didn't "protest" the rates as originally billed within ICCTA's 180 day period, so the shipper can't complain now.

The Old Line State court's reading of 14101(b) was that the statute doesn't require a written contract. Rather, the only writing required is for waiver of any of the ICCTA's default conditions, which, the court said, isn't applicable here. Addressing ICCTA's 180-day rule, the court ruled that several STB declaratory orders on the subject weren't persuasive. The court found that the 180-day rule for protesting billed rates only applies if a party intends to bring its complaint before the STB. Thus, summary judgment was denied and the matter remains set for trial on factual disputes regarding the terms of the oral agreement.

In Illinois, written notice of claim isn't needed if loss is actually known

Mitsui Sumitomo Ins. Co. v. Watkins Moro Lines, Inc., 2004 WL 2325421

Shipper Sharp shipped a supply of stock (say that one five times) in interstate transit with carrier Watkins. The carrier lost Sharp's stuff – projectors worth some 85 grand. Sharp gave Watkins verbal notice of the loss immediately, but didn't write a letter about it until 11 months later. After paying shipper Sharp's claim, cargo insurer Mitsui Sumimoto sued Watkins in subrogation.

On cross motions for summary judgment before the U.S. District Court for the Northern District of Illinois, Watkins asserted that Sharp had failed to provide timely notice. The carrier's bill of lading mandated that notice be given within nine months, a period of time sanctioned by Carmack. Certain Seventh Circuit case law (within which the Prairie State sits) suggests that written notice of claim is necessary. But precedents really didn't go that far. Rather, if a carrier is "fully aware" of the loss, the written notice formality isn't required. At least in this jurisdiction,

actual notice is sufficient, and Watkins indisputably knew about the loss.

Watkins also sought a ruling limiting its liability, but a procedural error prompted to court to table the issue.

The feds prevail in another procedural challenge: Acts of DOT's Inspector General in executing search warrant are above board

Airtrans v. Mead, 389 F.3d 594 (6th Cir. 2004)

This issue has cropped up again. Last month we reported on a charge that enforcement officials from the office of DOT's Inspector General had acted a bit too brazenly in seizing a carrier's records (which happened to confirm how said carrier was routinely snubbing hours of service regs). The Fourth Circuit found that the totality of circumstances demonstrated the IG hadn't acted in bad faith, such that the fruits of a raid were admissible as trial evidence.

This time, the Sixth Circuit scrutinized a similar DOT IG raid, which was aimed at finding evidence of a cover-up of federal safety violations. Carrier Airtrans alleged that it was unable to operate after IG snatched its computers and records, causing it to suffer losses. Airtrans was tangled up in a billing dispute with two other players, which had led to a criminal investigation by the feds.

The result here was the same down as was it down in the Fourth Circuit, but based on a different rationale. DOT successfully asserted qualified immunity from private causes of action such as the one Airtrans was pursuing. Under the Motor Carrier Safety Act of 1984, DOT is authorized to ensure vehicle safety. To do so, it may enforce subpoenas of records and witnesses, as well as inspect motor carriers. The search at issue here was directed specifically at criminal activity, i.e., evidence demonstrating a cover up of hours of service violations. The search was confined accordingly, and the warrant for it was validly obtained.

FAAAA doesn't smoke New York law: carrier practices are limited in the Empire State

New York State Motor Truck Association, et al v. Pataki, 2004 WL 2937803 (SDNY 2004)

A number of trucking associations whose members haul cigarettes in New York brought suit in the U.S. District Court for the Southern District of New York

asking the court to strike a New York statute. A newly enacted addition to the Empire State's Public Health Law provided that carriers could get in all kinds of trouble for delivering more than 800 cigarettes to a consignee who wasn't licensed to sell or warehouse them. This, the truckers urged, would create myriad administrative problems. The truckers believed provisions of the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") trumped the state law under the U.S. Constitution's Supremacy Clause, as the FAAA prohibits state from enacting legislation relating to intrastate trucking (subject to certain exceptions primarily dealing with safety).

The court addressed the parties' cross motions for summary judgment, and first explored whether the state statute was facially constitutional (such that it couldn't be applied under any set of circumstances). The court examined other courts' treatment of FAAAA's preemption of state law, and found that the term "relating to" when describing intrastate trucking had been interpreted to mean "interfering with." In enacting FAAAA's trucking regulation provisions, Congress was most concerned about the impacts of state meddling in intrastate carriage on interstate commerce. Because the New York state law couldn't conceivably impede (or "interfere with") activity outside the Empire State, the court found it was not facially unconstitutional.

Next, the court considered whether the no-smokes-to-unauthorized-folks law was unconstitutional as an "applied claim," i.e., that it imposes unconstitutional restrictions specifically on truckers who have to jump hoops before hauling cigarettes. There was an imminent threat that the truckers already were operating under the threat of being charged. But to succeed, the truckers would have to show that the added burden wrought by New York's statute might ultimately hike up the cost of a pack of stogies. The truckers hadn't demonstrated this, so the matter was tabled pending further factual development.

The court also examined whether the state law violated federal equal protection concepts, given that the U.S. Postal Service wasn't subject to it and could deliver cigarettes willy nilly. The truckers also thought the 800 cigarette rule sounded arbitrary. The court wasn't so impressed with these arguments, finding the Post Office clearly outside the scope of state regulation and, hey, truckers themselves were still free to deliver a few packs just like anyone else.

More to come on this one. Take a look at it for a good review of the FAAAA's impact on intrastate trucking regulation.

Sign of the times: Dallas tows the line, Texas style

VRC, LLC v. City of Dallas, 2004 WL 2958385 (N.D. Tex. 2004)

Here's just a slightly different angle on a common theme we've seen in trucking cases over the past couple years. Trucker VRC, one of the tow variety, believed the FAAAA preempted local ordinances which require the posting of certain signs before nonconsensual tows could be effected. What safety issue or other exception to FAAAA applied here? VRC also urged that the towing in question was consensual because there actually were signs in the lots in question; they just said something to the effect that "by parking your rod here, you consent to VRC hauling it away." Moreover, Dallas' representative had testified in another matter that posting such "park at your own peril" signs was sufficient to make towage consensual.

The U.S. District Court for the Northern District of Texas disagreed, and found no federal preemption. Apparently, hauling away parked cars is a risky business in the Lone Star State, with gunfights ensuing typically enough to become part of the legal analysis. The court ruled on that basis that sign posting did implicate a safety concern subject to state regulation. Wait a minute, isn't it motor carrier safety that was excepted under FAAAA?

The court was similarly unimpressed by the implied consent argument, finding that the warning signs weren't prominently enough displayed for all parkers to see them. Dallas wasn't bound by its official's earlier statement under an equitable estoppel theory because that equitable doctrine doesn't apply to government units, and, per the court, "justice, honesty and fair dealing" wouldn't be promoted by it anyway.

Motor carrier tax refund claims must be heard in state court

May Trucking Co. v. Oregon Department of Transportation, 388 F.3d 1261 (2004)

Forty eight states and ten Canadian provinces sought to simplify motor carrier fuel tax collections by

entering into the International Fuel Tax Agreement (“IFTA”). The arrangement is fairly simple; it just provides that a trucker’s home state may collect all fuel taxes imposed by any state the trucker operates in. IFTA relieves interstate carriers from having to deal with each taxing state and province individually.

IFTA and the Tax Injunction Act, 28 USC § 1341, provide that any beef a carrier has with taxing authorities should be pursued in the state courts of the jurisdiction at issue if those courts can provide an adequate, or “plain, speedy, and efficient,” remedy. Oregon-based carrier May Trucking believed the Beaver State’s auditing procedures were off kilter. It also took umbrage at taxation of fuel burned while May’s trucks were idling, given that that IFTA specifically applied only to fuel consumed for “propulsion.”

May filed suit against Oregon in the U.S. District Court for the District of Oregon, which dismissed for lack of federal subject matter jurisdiction. On appeal, the Ninth Circuit agreed and affirmed the dismissal.

Congress made clear in IFTA and the Tax Injunction Act its concern about states protecting their own tax revenues through their own laws and court systems. The fact that IFTA is multi-jurisdictional, while arguably a basis for federal jurisdiction, isn’t enough to trump Congress’ stated intentions. The U.S. Supreme Court has even opined that state protection of tax revenues should be broadly considered for jurisdictional purposes.

May unsuccessfully argued that Oregon courts couldn’t provide an adequate remedy for tax issues that inherently involved other states. But Oregon is only one state where May could seek recourse. Just because it’s located in the Beaver State doesn’t mean the carrier can’t sue elsewhere. Even though constitutional issues touching on federal law might be implicated, this is primarily a statutorily imposed, state-law issue which can be addressed in as many states as necessary. There is no risk of needlessly repetitious litigation, as each state tax issue would be different.

Lastly, it made no sense that Oregon courts wouldn’t provide an adequate remedy because Oregon law was at issue. State courts cut down state agencies’ actions all the time.

This case provides nice little summaries of IFTA, for those curious about the legal underpinnings of fuel tax collection, and of federal jurisdiction (or its absence) over governance of interstate business transactions.

Vision loss isn’t an ADA-protected disability

Johnson v. Roadway Express, 2004 WL 2958470 (EDNY 2004)

Johnson was employed by carrier Roadway as a line haul driver operating trucks up to 80,000 pounds. Johnson had a stroke, which impaired his vision such that he failed the DOT physical for that class of driver. However, he could operate trucks in different classes (such as dump trucks), and continued to do so for another employer.

When Roadway terminated Johnson, the driver sued, claiming he was “disabled” as defined by the Americans with Disabilities Act. The U.S. District Court for the Western District of New York disagreed. To be disabled under the ADA, an employee must demonstrate he is unable to perform a class, or “broad range,” of jobs. Johnson couldn’t do so, as he was actually employed as a driver as he stood there in the courtroom. Driving within a particular trucking class is a “specific” job, which isn’t ADA protected. Moreover, Roadway had no available clerical or dockworker jobs for Johnson to assume, and it was questionable whether Johnson would be qualified for them anyway.

Reprinted with permission from the **Association for Transportation Law, Logistics and Policy**.

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
Dana A. Henderson	dhenderson@bpmlaw.com
Maury A. Kroontje	mkroontje@bpmlaw.com
Taro Kusunose	tkusunose@bpmlaw.com

For additional articles or background information on each attorney please see the Betts Transportation & Logistics' Web site at <http://www.bpmlaw.com/>.