SURF & TURF

Legal News in Transportation & Logistics

A bimonthly newsletter published by the BPM Transportation & Logistics practice area *February 2006*

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We Finally Have the Answer! Federal Law Does Not Require Cargo Insurance Coverage for Contract Motor Carriage

BY STEVEN W. BLOCK

Regulatory efforts focused on protection of the public at large historically have impacted motor carriage more than any other mode. More freight (by far) moves on the highways than anywhere else, potentially endangering safety and business interests to the same larger extent. Motor carriage was legislatively "deregulated" primarily by two federal statutes, the Trucking Industry Regulatory Reform Act of 1994, and the Interstate Commerce Commission Termination Act of 1995 (ICCTA), the latter abolishing the federal regulatory agency which had been trucking's watchdog since the first truck hauling commercial freight crossed a state line.

Given the complexity of transportation regulation, it's not surprising that we've seen more of an evolution of particularized doctrines *ad hoc* than a complete revolution by statutory fiat. It's one thing to proclaim that Uncle Sam hereby loosens the yoke of trucking regulation by implementing a regulatory regime that promotes contract carriage over the more restrictive and less economically realistic common carriage. It's quite another to sort out how the myriad of essential needs and desirable goals tight regulation used to accommodate will get handled.

For years, federal law has mandated that interstate trucking operations maintain minimum levels of insurance coverage available – practically without defense to coverage – to any member of the public who is injured or has property destroyed at the hands of a culpable trucker. The idea is to avoid truckers going belly up or simply ceasing business in order to avoid liability to a hapless accident victim. Federal law also mandated that interstate truckers obtain minimum levels of insurance coverage for shippers whose freight they lose or damage. The latter was demonstrated by the trucker filing a form BMC-32, first with the Interstate Commerce Commission until its abolishment, then with the U.S. Department of Transportation (DOT), now through DOT's Federal Highway Safety Administration (FMCSA).

Confusion was created by ICCTA's eradication of different regulatory treatment for common and contract carriers for certain purposes (namely, registration). FMCSA interpreted the distinction's removal as a green light for the agency to require BMC-32 filings only from common carriers, i.e., truckers who haul freight booked pursuant to a one-price-fits-all tariff. True, truckers often operate as both common and contract carriers, but FMCSA's post-ICCTA approach, generally, has been to hold

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cargo insurers' feet to the fire only regarding losses incurred during their insureds' tariff-driven hauls.

A few years back, shipper M. Fortunoff of Westbury's freight was damage in interstate transit by a contract motor carrier that subsequently went out of business. The shipper sued the trucker's insurer, Peerless, and coverage was denied based on the contract carriage relationship. FMCSA agreed (the motor carrier did have a Peerless-issued BMC-32 on file for its common carriage operations). The shipper sued, pointing to how Congress had nixed the distinction between common and contract carriers in ICCTA.

The U.S. Court of Appeals for the Second Circuit, reversing the U.S. District Court for the Eastern District of New York, disagreed with that analysis. Nothing in the law or legislative intent suggests Congress specifically withheld discretionary authority from the relevant agency regarding insurance coverage requirements. It easily could have done so. Moreover, no statutory guidelines are provided as to what carriers DOT may require cargo insurance from.

Per fundamentals of statutory interpretation, this means Congress must have meant to leave it up to the agency. A federal regulatory agency, comprised of specialists who govern an industry day in and day out is entitled to deference in situations like this. FMCSA's position makes practical sense in the context of transportation deregulation, as it empowers contract carriers and their shippers to negotiate liability as part of their deal. Contract shippers, typically more sophisticated and with larger cargo volumes than their tariff-based comrades, presumably can obtain lower freight rates or other advantages by accepting lower thresholds of carrier liability. Conversely, they might opt for higher price tags in exchange for their motor carriers ponying up for insurance coverage. Regarding insurance for bodily injury and property damage, nothing has changed: ll motor carriers – common and contract – must demonstrate minimum levels of coverage.

Absent an unlikely U.S. Supreme court reversal or a change in FMCSA's policies, this decision puts to rest the source of much discord between claimant shippers, insured truckers and insurance companies. Not that the issue was ever huge in dollar terms for major losses, as the minimum required BMC-32 coverage is only $5,000.00. Still, shippers involved in smaller losses might not bother to pursue claims against contract carriers when the comfort of easy-access insurance money isn't there. Larger and repeat shippers (as well as their forwarders) might want to negotiate responsibility for insurance coverage when hashing out a motor carriage contract.

Ref: *M. Fortunoff v. Peerless Insurance Co.*, 2005 U.S. App. LEXIS 27257 (2nd Cir . 2005)

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The Latest in Transportation Security's Continuing Evolution

BY STEVEN W. BLOCK

We always knew development of a post-9/11 transportation security regime would be an evolving process marked by experiment, trial and error, technological developments, changing political landscapes, and fluctuating economic environments. The Bureau of Customs and Border of Protection of the U.S. Department of Homeland Security ("Customs") never claimed that regulatory programs such as the Container Security Initiative, advance manifest reporting (the "24-hour Rule"), the Customs-Trade Partnership Against Terrorism ("CT-PAT"), and others Customs administers (see January through April 2004 Legal Lookout articles) were quick fixes to unprecedented issues.

The past few weeks have seen a good deal of activity in transportation security regulation. Proposed new programs and revisions to existing concepts reflect the ongoing experience of industry, law and government after four years of greatly heightened security concern. They seek to maximize efficiency, and minimize inconvenience and cost. At the forefront is a recent proposal by the Department of Homeland Security's Commercial Operations Advisory Committee ("COAC"), a sub-agency that "advises the Treasury on all matters involving the commercial operations of Customs." Something of industry's representation within the government infrastructure, COAC submits annual reports to Congress describing its operations and providing recommendations from those in trade's trenches. COAC is comprised of twenty members drawn from industry sectors affected by Customs' commercial operations. Membership considerations include "balanced political party affiliations."

COAC is proposing that the most elite CT-PAT members, those who gain distinction as compliant with the top end of Customs' stringent security guidelines, enjoy super-fast, minimum-hassle clearance through a "green lane" designated in their honor. CT-PAT members already have Customs' blessings as security-conscious and reliable international trade players. But to gain access to the green lane, a CT-PAT member would have obtain "Tier 3" status, meaning it must survive a rigorous Customs audit and undertake even higher standards of security in its practices than do garden-variety members. Especially for companies with large trade volumes, the green lane could be the road to, well, huge green savings. The proposed treatment for CT-PAT's *Creme de la Crème* includes remote and paperless entry filings; expedited drawback and other refunds; lower bonds; fewer or no inspections; penalty mitigation for oversights; expedited background checks; tax advantages; time to correct problems before seizure; and numerous other goodies. For more details about COAC's proposal, check out Uncle Sam's nifty PowerPoint slide show at the link below.

Customs won't commit to a time frame in responding to the green lane concept, as it first must undertake its own study. However, word has it that the green lane might be implemented in the relatively near future with at least some benefits being available soon.

COAC also developed and submitted draft (proposed) minimum security standards for trucking and water carriage for use by CT-PAT members. These standards include such measures as ensuring that one's business partners (perhaps those who necessarily have access to the CT-PAT member's equipment or premises) are compliant with the member's programs; enforceable restrictions against unauthorized access to freight; visual inspection of empty containers; and attention to container seal control. Drafts of COAC's proposed standards are available on the National Industrial Transportation League's website at the links below.

On the diplomatic and international front, the European Union is taking steps to revamp its own customs clearance procedures in the context of a program designed to accommodate the EU's many members. The EU's current Customs Code is a hodgepodge of numerous and confusing (if discernible) rules. Various electronic systems in use on the continent aren't compatible with each other. This environment impedes both efficiency and security. While the task is huge, the EU recently adopted two proposals to remedy these concerns. It might set up an electronic portal designed to facilitate expedited movement of freight submitted by companies with proven track records similar to COAC's green lane proposal. Details on the European programs are available at the link below.

Uncle Sam has decided to make maritime security more of a uniform, international diplomacy matter. The Secretary of State has been empowered to deal with foreign governments as part of the International Outreach and Coordination Strategy to Enhance Maritime Security (specifics of which are available at the link below). This program is the brainchild of the Secretary of State, with help from Secretaries of Defense, Commerce, Transportation, Homeland Security, the U.S. Trade Representative, and other U.S. government agencies. "Appropriate" private-sector entities and other organizations were invited to chip in. The idea is to get all relevant federal agencies lined up and on the same page, so that the battle against terrorism is fought with coordinated efficiency. Foreign players could then be brought into the loop, again to maximize efficiency and minimize the chance of cross purposes.

Stay tuned! The evolution of transportation security regulation is sure to see ongoing activity as existing concepts are refined, and new concepts are developed, based on the experience of industry, government and law.

References:

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Hot Recent Cases in Motor Carrier Law

BY STEVEN W. BLOCK

Broker or forwarder for jurisdictional purposes? It could be either, turkey.

National Turkey Growers Cooperative Association v. ATG Logistics Service v. Jennifer's Delivery Service, 2005 U.S. Dist. LEXIS (D. Neb 2005)

Shipper National Turkey Growers Cooperative Association entered into an oral transportation contract with ATS Logistics, trying to get a load of turkeys moved from Nebraska to Florida. The deal apparently was rather loosey-goosey, as the shipper wasn't sure whether ATS would be doing the actual carrying, booking it out to someone, or serving as a proverbial travel-agent freight broker. In fact, ATS placed the load with carrier Jennifer's Delivery Service. When the birds were lost on their way south, the shipper sued ATS in Nebraska state court. ATS, in turn, removed the case to Cornhusker federal court and impleaded Jennifer's.

In response to the plaintiff shipper's motion to remand to state court (based on lack of federal jurisdiction), a federal magistrate concluded that ATS acted solely as a broker in the subject haul, leaving no grounds for federal jurisdiction (Carmack doesn't hold dominion over brokers). After all, the shipper hadn't alleged in its complaint (first or amended versions) that ATS was either a carrier or forwarder; and ATS averred in its answer that it was no more than a broker. But when reviewing the magistrate's recommendation, the judge disagreed and denied the shipper's motion. Recognizing that the line between a carrier and broker "is often blurry," the court found the complaint encompassed alternative allegations as to ATS' status. Because the shipper could potentially demonstrate that ATS had held itself out as a carrier, the court ruled discretionary remand would be improper at this time. It wasn't critical to this court whether or not the complaint pleading specifically that APS was a carrier.

Worker's comp claim of owner-operator's driver gets dumped

Kerns Trucking, Inc. v. Whiteside, 2005 Ala.Civ.App. LEXIS 715 (2005)

Owner operator AG Enterprises leased a dump truck to Kerns Trucking, and supplied AG driver Whiteside. The lease provided that AG would attend to and remain responsible for employment issues. However, Whiteside's employment contract showed, or at least suggested, that Kearns was her employer. Angie Grimes, AG's owner, had become an employee of Kerns. Moreover, Whiteside filled out a job application which listed Kerns as the employer, and Kerns provided Whiteside its employment manual, apparently subjecting her to Kerns' employment policies. Lastly, Kerns' labels were affixed to the dump truck.

Whiteside was injured on the job, and sought worker's comp benefits under Kerns' coverage. Kerns resisted, claiming that Whiteside was AG's employee for purposes at hand. The whole mess went to an Alabama court.

The court ruled that Kerns was Whiteside's special employer for worker's comp purposes. Finding the case substantially identical to an earlier precedent, the Alabama appeals court reversed. Just the opposite, AG exercised requisite control over Whiteside such that it remained her true employer. The Yellowhammer legislature had specifically excluded carriers from classification as "special employers" of their owner operators' employees. The precedent had held that the owner operator's "mere delegation" of duties cannot alter that legislative intent, apparently even if formailzied under new employment relationships. Grimes' employment by Kerns was irrelevant, and she gets to take care of Whiteside's medical bills.

After delivery, a factory worker's injury is no longer the carrier's problem

Booth v. Quality Carriers, Inc., 2005 Ga. LEXIS 1268 (2005)

Carrier Quality hauled a load of cylindrical containers ("isotainers") from Georgia to North Carolina, having secured the drums. It neither noted nor corrected any isotainer equipment defects. Before departing with the load, the carrier's owner operator driver had performed a required pre-trip inspection. Some six hours after the freight had been offloaded in the

consignee's facility, a factory worker was injured by a valve that exploded when he connected a hose.

The injured worker sued Quality, claiming that Quality should have determined and corrected a problem with the valve as part of its inspection. The driver conceded he was not familiar with a discharge valve on the top of the isotainer, but a Georgia court didn't buy the argument, and dismissed the worker's claims. Quality owed no duty to the consignee or its employees. The consignee wasn't the freight's owner until after delivery. Thus Quality's negligence (if any, which the court seemed to find doubtful) didn't give rise to liability to the injured worker. Moreover, the facts suggested the worker was undertrained, not properly supplied with protective gear and/or himself negligent in the accident.

Oregon commercial tire salesperson is not exempt from state income tax

Gilroy v. Department of Revenue, 2005 Ore. Tax LEXIS 226 (2005)

How far does the interstate transportation industry exemption from state tax liability go? Not so far as a commercial tire sales rep would like. So says an Oregon tax court in response to a Washington-resident truck tire seller's complaint. Under federal law at 49 USCS § 14503, a taxpayer is exempt from state tax obligations if he is (1) a nonresident; (2) compensated by a motor carrier; (3) has duties in two or more states; and (4) is an employee within the meaning of 49 USCS § 31132. Vancouverite Gilroy met the first three criteria with regard to his business activities in cross-the-river Portland, but was he the right kind of employee?

After a telephone trial (how's that for efficiency!), the court concluded he was not. Section 31132 is designed for employees whose work activity "directly affects commercial motor vehicle safety in the course of employment." True, Mr. Gilroy's tire sales and even some other activities touched on safety. But his "primary duty" was to "maximize sales." The tasks he undertook for safety purposes actually were implemented through other employees. The Oregon court had previously ruled that "direct effect" implies "employees who use their hands in performing their duties." Thus, Mr. Gilroy must pay Beaver State taxes if he wants to sell tires there.

The job's not done until the product's delivered, at least for insurance coverage purposes

Secura Insurance v. Stainless Sales, Inc., et al, pending in the U.S. District Court for the Sixth Circuit under Cause No. 04-2000

This one's not specifically a trucking case, but we found it important enough to include here because its issue and holding could easily apply in the motor carrier context. Steel coil supplier Stainless, insured with commercial general liability coverage by insurer Secura, sold a series of coils to a Philippines-based buyer. Stainless had the coils trucked to Chicago for rail carriage by BNSF to Tacoma and onward ocean transport. The BNSF train derailed, costing Stainless its sale.

Stainless sued BNSF, and the railroad counterclaimed, alleging that an improperly packaged coil caused the derailment. Stainless turned to Secura for coverage on the counterclaim, asking the insurer to pick up defense costs. The insurer denied coverage, pointing to a policy exclusion for losses incurred based on "products-completed operations hazard." In other words, the insurer believed there was no coverage for losses to or caused by products the insured had completed. The Eastern District of Michigan and Sixth Circuit Court of Appeals disagreed. Basically, the product hadn't been "completed" until it was delivered. The courts made sure to point to insurance policy interpretational decisions addressing an insured's "reasonable expectation" under the purchased coverage.

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