

# SURF & TURF

LEGAL NEWS IN TRANSPORTATION & LOGISTICS

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## Attorney's Fees: When Can You Get Them Back?

By Steve Block

When disputing players consider hiring lawyers to fight out their cases in court or before arbitration panels, they typically ask, "how much in attorneys' fees and litigation costs is this going to cost me?" When they get the typically unpleasant news, their second question usually goes something like this: "If we win, can we get those costs and fees paid back to us from the bad guys?"

In most U.S. jurisdictions, the answer to that question usually is "no, at least not as a matter of law." Unlike Britain, whose common law legal system sired our own, the U.S. has never embraced awards of costs and fees to prevailing litigants, save some modest costs tacked onto the end of final judgments. Recognition that attorney fees are not recoverable dissuades (at least theoretically) the filing of low-dollar claims and allegations of dubious merit. It considers that opinions about the reasonable value of legal services are wide ranging, and saves courts the trouble of deciding how much any given case should be worth in terms of litigation costs.

But there are circumstances in which legislatures and the judiciary are compelled to award prevailing parties their costs and fees despite the general rule. A brief sampling of the class of successful plaintiffs whom the law often protects includes consumers against crooked merchants; employees against oppressive employers; victims

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of frivolous lawsuits; and innocent players dragged into lawsuits by one third party's wrongdoing against another.

American law still embraces freedom of contract. Business partners, including those whose relationship is governed by transportation documentation such as bills of lading and service contracts, may agree in advance that the winner of any legal dispute will get its costs and fees from the loser. Thus, we often see attorney-fee clauses in standard shipping contracts. A few particulars are worth noting here.

To be enforced, the attorney-fee clause must be clear and precise, demonstrating the parties' intent that it's applicable to the dispute at hand. If a fee clause is limited to actions to collect freight charges (which often is the case in carrier form documents), then an aggrieved shipper won't be awarded costs for litigating a freight claim. When addressing the prevailing party's rights, the term "may" before "be awarded his costs and attorneys' fees" empowers a judge to award the winner costs and fees, but does not *obligate* him to do so. On the other hand, the word "shall" before that term mandates a fee award (in most jurisdictions), leaving only the amount of the award at issue.

Most states and federal jurisdictions enforce one-sided attorney fee clause bilaterally.



## Attorney's Fees (continued)

In other words, if the clause says that the carrier shall be entitled to recover its litigation costs in the event it prevails, courts will award the shipper or forwarder its costs should the carrier not prevail. The idea is to keep big business entities from wielding too much power in the negotiating process.

You typically can't recover attorneys' fees from Uncle Sam, although there are some exceptions to this.

One of the most important things to remember is that many judges really don't like to award costs and fees even when they're statutorily or contractually obligated to do so. Only "reasonable" costs and fees are recoverable, despite the true amount a lawyer might have collected from his or her successful client. There are a number of hoops a successful litigant must jump through before recouping its fees, and judges often reduce fee claims based on noncompliance with governing rules. Just ask Maersk, which recently saw a federal court in Hawaii slash its recoverable fees after the carrier prevailed in a freight charge dispute. The shipping agreement contained a fee clause, and Maersk asked the court to award some \$100,000 in costs and fees related to the collection action.

The bills Maersk submitted for court review contained inked-out descriptions of attorney activity, and failed to assert what portion of daily billing was for what task. Maersk's attorneys sometimes billed for two attorneys when one would be sufficient. Some of the time entries Maersk's lawyers billed for were deemed excessive for the task. While the court rejected some of the shipper's arguments, it reduced Maersk's fee award by some 20%.

This instance demonstrates some of the difficulties of recovering attorneys' fees. Had Maersk's attorneys not redacted the task descriptions in its submitted invoicing, it might very well have violated the attorney-client privilege - in form or in substance - by divulging trial strategy or other secrets Maersk would rather not air. How can a court determine by reading a billing invoice whether a matter justified the labor of two attorneys, or how much

time an issue's complexities deserved? The judge's sense of what's "reasonable" controls, and judges vary greatly on this issue.

Be aware of attorney-fee clauses, particularly those in form contracts and bills of lading (including incorporated tariffs), and don't be afraid to negotiate them. Consider with counsel the potential impact of fee clauses in strategizing the defense or prosecution of a claim. Counsel will rarely agree to limit their costs and fees to what's awarded, so it's a good idea for parties to be aware of what might or might not be recouped. Learn a judge's or court's propensities regarding fee awards before proceeding. It's usually a bad idea to litigate solely for the purposes of recovering attorney fees, but after the smoke has cleared, a post-proceeding motion to the court is usually worthwhile.

Ref: *Maersk, Inc. v. Hartmann Metals Corporation*, 2007 WL 294223 (D. Haw. 2007)

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## Misleading Monikers of the Middleman

By Steve Block

Okay, so what exactly is a “freight forwarder”? A “transportation broker”? A “non-vessel operating common carrier,” a/k/a “NVOCC”? Do those sound like easy questions? Would you be surprised to learn there are at least four questions bundled into those three queries that are the source of some ongoing confusion and occasional heartburn in our industry?

Part of the the confusion derives from the term “freight forwarder” being defined one way in ocean transportation, and another way for surface and domestic water carriage. This is compounded by relatively recent statutory classification (for administrative purposes) of freight forwarders and NVOCCs cumulatively as “ocean transportation intermediaries.”

Not enough muddle? Most of these players wear different hats, operating as a freight forwarder here, a transportation broker there, and an NVOCC in the other place - often within related transactions. They can also function as “indirect air carriers” on the aviation side.

Want more? Labels foreign entities pin on their transportation middlemen usually don’t jibe with Uncle Sam’s preferences, such that U.S. case law involving foreign parties (much of which is scribed by judges not fully versed in transportation law concepts) can be a mess. Just take a look at the U.S. Supreme Court’s groundbreaking opinion in *Norfolk Southern v. Kirby*, where the High Court refers to an Australian company as a “freight forwarder” when the company clearly fits U.S. law’s definition of an NVOCC. Under Aussie law, the company was indeed a freight forwarder.

Not scratching your head hard enough yet? These entities are licensed and regulated by different federal agencies (the Federal Maritime Commission and the Federal Motor Carrier Safety Administration of the U.S. Department of Transportation) that set inconsistent hoops through which a player must jump to operate legally. And we won’t get into the Department of

Homeland Security’s plethora of evolving regs that apply to each entity.

The gastronomical upset follows when liability against a middleman is asserted by a disgruntled shipper or carrier. The difference between the various species of intermediary can be significant, and how a transportation facilitator holds itself out to the public can be a factor in determining how the law will treat it. If a company calls itself a “freight forwarder” to a surface shipper and its activities support that nomination, then it can find itself stuck holding the bag for a damaged freight claim, even if it really meant to say it was a “broker.”

A related point is that the law doesn’t countenance industry-created categories of service provider. You can call yourself a “transportation consultant,” “consolidation agent,” “shipper agent,” or any of several other legally undefined terms we’ve heard, but your self-proclaimed designation doesn’t control your legal rights and obligations. The law defines a player by the activities it undertakes, notwithstanding what that player might call itself.

So here’s the deal. An ocean freight forwarder is the legal (and roughly the operational) equivalent of a surface transportation broker. These entities do not issue bills of lading taking responsibility for the safe transportation of cargo. They are “travel agents for freight,” finding appropriate carriers for their shipper customers, putting the two together and sending them on their merry way. They typically are liable for their own negligence or breach of contract only; if they pass along incorrect shipper instructions or pair a shipper with an incompetent carrier, they can be on the hook. However, they usually walk when the actual carrier loses or damages the shipper’s stuff as a result of the carrier’s fault.

NVOCCs are largely the equivalent of surface freight forwarders. These entities are “carriers to shippers and shippers to carriers.” They consolidate cargo, issue bills of lading to their customers taking responsibility for safe

delivery, and are subject to cargo liability regimes in the event of a loss. They stand to make bucks based on fulfillment of their contracts with carriers, but often take the economic fall when they don't have the freight they've committed during a contract's term.

A third category of ocean transportation implementer is the "ocean freight broker," an unregulated (but defined) entity whose role is limited to sales for another entity.

The term "freight forwarder" has become part of the shipping industry's every-day vernacular, but whether you're a "freight forwarder" under the law depends first on what mode of transportation you participate in, and second on what you actually do. Similar pitfalls too numerous to list here await service providers who use a one-name-fits-all designation in their marketing and business activities. Entities in this business should understand the different roles they are playing; how those roles change with different activity, and the liability that potentially lies when changing hats.

*Ref: 49 USC § 13102(2), defining surface transportation brokers; 46 CFR 515.2(i), defining ocean freight forwarders; 49 U.S.C. § 13102(8), defining surface freight forwarders; 46 CFR 515.2(l), defining NVOCCs; 46 CFR 515(4)(d) defining ocean freight brokers.*



## Hot Recent Cases in Motor Carrier Law

By Steve Block

**No private right of action against classification poachers, but no right to defense attorneys fees either.**

*Fulfillment Services, Inc. v. United Parcel Service, Inc., et al*, 2006 WL 3330783 (D. Ariz. 2006)

In May of last year, we reported that the U.S. District Court for the District of Arizona had shot down the claim of National Motor Freight Classification (NMFC) members that UPS had improperly quoted rates from NMFC's schedule, UPS not being an NMFC member since 1956. The court found that whether or not UPS violated 49 USC § 13703(F), which grants classification participants antitrust immunity from antitrust liability, 49 USC § 14704(e) doesn't give them a private right of action against other entities who violate the former statute. The claim was dismissed for lack of subject matter jurisdiction.

Having won that battle, UPS wanted its attorney fees incurred in defending the unsuccessful claim. The carrier pointed to 49 USC § 14704(e), which provides: "The district court shall award a reasonable attorney's fee under this section. The district court shall tax and collect that fee as part of the costs of the action."

The unsuccessful plaintiffs urged that 14704(e) was designed to compensate successful plaintiffs, and not successful defendants. And, hey, the court already ruled it had no subject matter jurisdiction over the issue in the first place. The court agreed, finding no evidence that Congress intended to benefit prevailing defendants, which would be counterproductive to the statute's purpose of remedying disparate bargaining positions in such issues. UPS gets to pay its own defense costs.

## Hot Recent Cases (continued)

### Lack of licensing doesn't make driver his shipper's "employee"

*Sickle, et al v. Dosanjh, et al*, 2006 WL 3604351 (Cal. App. 3 Dist. 2006)

Owners of a peach farm hired driver Bhajan to haul their crops to a weighing station. Bhajan owned his own rig, but didn't have proper insurance, licensing and authority to run it. After delivery, he was involved in an accident in which another motorist was killed. The deceased's family sued the peach farm owners, asserting that Bhajan was their "employee" for purposes of *respondeat superior* liability.

Creative lawyering by plaintiff's counsel notwithstanding, a California appeals court affirmed summary judgment dismissing the plaintiffs' claims on the ground the driver was an independent contractor whose status didn't implicate master-servant concepts. Plaintiffs urged that Bhajan would be "illegal" as an independent contractor, but "legal" as an employee, such that the maxim "the law has been obeyed" must be activated. They also argued a "strong public policy" against allowing shippers to engage unlicensed truckers. The only remedy, in their eyes, was to legally render the driver an employee for purposes at hand.

Distinguishing a precedent which kind of made this point by holding an owner operator to the status of his motor carrier's employee, the court ruled that the peach farmers were not a carrier that should be held to this standard. More importantly, none of the elements of control, supervision, equipment ownership and other factors supporting an employee relationship were present here.

### Differing classes of employees are not sufficiently distinct for separate workers' compensation insurance coverage

*Zurich American Insurance Co. v. Broadway Moving & Storage, Inc.*, 2006 WL 3511359 (N.J. Super. A.D.)

Zurich was carrier Broadway's workers' compensation insurer, responsible for paying any workers' comp claim unless it was covered by another policy (as provided by a New Jersey statute). Broadway operated locally on its own but under Atlas Van Lines' authority for interstate hauls. Atlas required all its agent carriers to maintain workers' comp coverage for employees engaged in Atlas' transports.

Broadway did not include its interstate employees in the employee headcounts it submitted to Zurich for purposes of premium calculation, resulting in much lower payments to Zurich. The carrier claimed those employees were covered under a separate policy Atlas maintained. Zurich sued its insured in New Jersey state court to collect unpaid premiums, and the two parties cross moved for summary judgment. Broadway's motion was granted, Zurich's was denied, and Zurich appealed.

The Garden State's court of appeals reversed, finding questions of fact sufficient to defeat both motions. The interstate transit employees were Broadway's and not Atlas', or at least a question of fact remained as to the issue. Apparently, some drivers operated both locally and interstate, complicating the question. Moreover, it's not clear whether the other insurance policy would apply in each instance to a claim brought by an interstate driver, giving rise to additional questions of fact.

### Carrier's failure to comply with claims handling regs doesn't waive ninth-month written notice deadline

*One Step Up, Ltd. V. J.B. Hunt Transportation Services, Inc.*, 2006 WL 3408206 (SDNY 2006)

Shipper One Step Up's freight, hauled by J.B. Hunt from Miami to Sharon Springs, NY, arrived short. The shipper's submission, withdrawal and general shuffling around claims related to three different subject cargoes created some confusion based on J.B. Hunt's claims processing procedure. The carrier apparently failed to resolve the claims within 120 days or write the shipper every 60 days to advise the status as required by 49 CFR § 1005.5.

## Hot Recent Cases (continued)

The subject transports were effected pursuant to the National Motor Freight Classification's Uniform Straight Bill of Lading, which requires that claims be submitted in writing within nine months of the alleged loss. One Step Up didn't issue written notice of its remaining open claim. When the shipper sued in the Southern district of New York, the carrier moved to dismiss based on the enforceable time bar. The shipper claimed J.B. Hunt was estopped from taking that position, ostensibly because it had led One Step Up to believe the claims were being processed as submitted.

The court dismissed the shipper's action on J.B. Hunt's motion for summary judgment. No case law or statute supported the shipper's position, and nothing really indicated that One Step Up had been misled. The shipper and its counsel couldn't point to any communication or action by the carrier suggesting that the claim was being processed without a written notice.

### Trucker industry financial institution not subject to personal jurisdiction in a carrier's state

*B&J Transportation, Inc. v. Swift & Company, et al*, 2006 WL 3302685 (D. Me. 2006)

Carrier B&J Transportation's owner operator hauled shipper Swift & Company's freight interstate. Per Swift's practice, the shipper had its payment processor Cass Information Systems pay the freight tab. Apparently, Cass mistakenly remitted payment to trucking industry factor Transportation Alliance Bank ("TAB"), and B&J never got paid.

B&J sued Swift in the U.S. District Court for the District of Maine, but got dinged by 49 USC § 14705's statute of limitations. The carrier went after TAB alleging conversion, but a recent federal magistrate's recommended decision concludes that the Pine Tree State carrier cannot demonstrate the court's personal jurisdiction over Utah-based TAB.

Yes, TAB operates in numerous states, has a marketing agent for (but not located in) Maine, advertises in national trade journals and operates a website.

### A carrier narrowly escapes default judgment on broker's freight claim

*St. Paul Fire & Marine Ins. Co. v. Kiper & Son Trucking, LLC*, 2006 WL 3147701 (N.D. Ill. 2006)

Carrier Kiper & Son trucking allegedly lost a portion of freight broker Hub Group placed with it for transit. Hub's subrogated insurer St. Paul sued the carrier in the U.S. District Court for the Northern District of Illinois, issuing to its agent a Waiver of Service of Summons. St. Paul received no response, and filed a motion for default. Again, the carrier was silent, and a default was entered. That's when Kiper finally came alive, and began looking for ways to vacate the default.

The court, obviously irritated, snubbed most of Kiper's arguments. In trying to demonstrate the required "excusable neglect" behind its default, Kiper said it "was not formally aware" of the litigation for some time because its agent didn't pass along the notice. Maybe not "formally" aware, the court noted, but Kiper was aware. Moreover, a dud agent is his principal's responsibility. Kiper claimed its manager didn't talk English too good, but the court observed that Kiper was a highly regulated motor carrier licensed in Illinois responsible for being able to communicate with the world.

Ultimately, Kiper prevailed, demonstrating that the three business days between the time it finally got notice and the date of the default hearing was insufficient for it to secure counsel, and that it had tried to do so. The court found this evidence of an intent to defend, bolstered by the existence of a colorable substantive defense (witnesses who could attest to the freight's condition at the time of tender). The court begrudgingly vacated St. Paul's default.