



SURF & TURF

Legal News in Transportation & Logistics

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- 1 **The 24-Hour Rule: the Early “Heads Up” to Customs About Inbound Freight and Its Impact** BY STEVEN W. BLOCK
- 2 **The Container Security Initiative: Pushing Out the Front Lines in the War on Terrorism** BY STEVEN W. BLOCK
- 4 **Hot Recent Cases in Motor Carrier Law** BY STEPHEN L. DAY and STEVEN W. BLOCK
- 6 **Upcoming Events**
- 6 **Contact Information**



The 24-Hour Rule: the Early “Heads Up” to Customs About Inbound Freight and Its Impact

BY STEVEN W. BLOCK

(This is the third of a four-part *Legal Lookout* series addressing federal security regulations and programs.)

As if international trade’s deadlines and other timing concerns weren’t challenging enough already, now America’s importers – and the transportation service providers who service them – have another concern in their scheduling equations. Effective December 2, 2002, ocean carriers and non-vessel operating common carriers (NVOCCs) must alert the Customs & Border Protection agency of the Department of Homeland Security (Customs) about specifics of all inbound cargo 24 hours before it is loaded onto a vessel. The program is entitled the “24-Hour Advance Vessel Manifest Rule,” and is dubbed the “24-Hour Rule” in waterfront parlance.

In May of 2003, Customs enacted additional regs specific to the process, including when, how hard,

and by whom violators’ hands will be slapped. The agency also stepped up enforcement efforts,

although only a small number of fines have been issued thus far. Program procedures are continually being revised and amended. Carriers and NVOCCs actually get in trouble with the feds, but shippers, consignees and others should darn well expect to be impacted if their bad practices cause headaches for transportation providers.

The 24-Hour Rule requires carriers and NVOCCs to transmit to Customs a cargo manifest detailing all U.S.-bound cargo (yes, that includes cargo not intended for stateside offload but which will be laden on vessels stopping here). The manifest has to be specific, which means carriers and NVOCCs must require from shippers and forwarders detail about their freight’s nature. In other words, not only will cargo descriptions like “freight all kinds” not cut it, terms such as “foodstuffs,” “apparel” or “chemicals” won’t do the trick either. Nor will Customs be happy with blank shipper descriptions, a forwarder listed as the shipper or consignee and, perhaps most problematic, the consignee being designated as “to order.”

If an “invalid” cargo description comes through, or a manifest otherwise causes concern, its U.S. port of destination will issue a “Do Not Load” message to the

relevant carrier and/or NVOCC. Communication will be largely through ports' administrative arms. Those ports approved under Customs' Container Security Initiative (see February 2004 *Legal Lookout* article) must be able to receive and transmit data electronically; others will be allowed to work by paper. Data is accumulated, digested and assimilated at the National Trading Center, and incorporated into America's overall security program. Fines for violations run from \$5,000 to \$10,000.

We're talking national security here. Customs is developing a systematic process to minimize terrorist threats by making it harder for bad guys to get their wares into the U.S., and easier for Uncle Sam's law enforcement authorities to take timely and effective corrective action. If data is insufficient for the purpose, the 24-Hour Rule would be meaningless. For those reasons, industry must look at manifest reporting requirements as an inconvenience justified by the purpose it serves.

But what does it mean in practice? The initial confusion and uncertainty in international trade circles haven't fully dissipated. There still are many wrinkles in the process left to iron out, but we're moving in the right direction. The most voiced issue regards confidentiality. Theoretically at least, confidentiality is protected by federal law (Customs has a program whereby shippers and importers can apply for specific confidentiality). However, many players in international trade simply aren't comfortable with the notion of their buyers, suppliers, and cargo descriptions floating around between NVOCCs, carriers, ports, and government agencies, all in newly established, international electronic communication. Customs is aware of these concerns and, as part of its program of indoctrinating its security programs, is working on ways to quell them.

Another serious issue regards mandatory advance notice of American consignees' names and addresses. Under current practice, where much inbound cargo ultimately will end up just isn't known until well after a vessel sails. Commercial issues often aren't resolved before a two-week ocean voyage commences, and many international importers have grown accustomed to having that extra time to decide where they want their freight delivered. Customs will work with the trading community on these and similar issues, but this is one that hasn't fully been resolved to everyone's satisfaction.

Also integrated into 24-Hour Rule administration is Customs-Trade Partnership against Terrorism

certification (C-T PAT, see January 2004 *Legal Lookout* article). Being C-T PAT certified doesn't excuse a player from compliance with manifest reporting requirements, but it does mean your cargo is less likely to be tagged by a "Do Not Load" order, and penalties for an occasional slip up will be smaller for C-T PAT members.

Other modes of transportation are subject to similar requirements. Air carriers have four hours before arrival to report about their freight (or "wheels up" for hauls solely within North America). Rail imports must report two hours before arrival; and truckers get up to an hour before crossing the border. Exported cargo also is subject to certain reporting regs.

Inconvenient and problematic? Sure. But the 24-Hour Rule is another necessary brick in the wall America is erecting to protect herself from terrorist threats. International trade has endured many challenges for centuries. Obstacles created by this one are neither unjustified nor insurmountable.

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

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The Container Security Initiative: Pushing Out the Front Lines in the War on Terrorism

BY STEVEN W. BLOCK

(This is the second of a four-part *Legal Lookout* series addressing federal security regulations and programs.)

The war on terrorism is just that: a war in every sense but the most traditional. Foreign invaders are trying to besiege and conquer us, to take what's rightfully ours, to attack us right here in our homeland. We want to keep them out. To do so, we are designing and putting up barricades, technological fortifications to defend ourselves.

But just as concrete bulwarks supported by cannon can be breached, allowing invaders immediate entry into protected territory, so can instruments of terror

defy defensive measures installed at U.S. ports. Once that's happened, the repercussions might be as destructive as were those when the British broke our lines at Bladensburg, and burned Washington in 1814.

How do we reduce the likelihood of a 9-11 style repeat of the Bladensburg tragedy? In January 2002, the U.S. Customs & Border Protection agency of the Department of Homeland Security (Customs) took the first steps toward measures unavailable in 1814. Customs began moving the war's front lines away from our shores, making U.S. port security not the first point of resistance to would-be attackers, but the last.

With the Container Security Initiative (CSI), efforts to thwart entry into the U.S. of weapons of mass destruction (WMDs) begin on foreign shores. Now developed into a multi-faceted, coordinated security and enforcement effort, Customs defines CSI in terms of four core elements:

1. Establish security criteria for identifying high-risk containers based on advance information.
2. Pre-screen containers at the earliest possible point.
3. Use technology to quickly pre-screen high-risk containers.
4. Develop secure and "smart" containers.

With the vast majority of cargo entering the U.S. by sealed container, attention to the cans has grabbed Customs' attention as a – if not the most – significant element of security enforcement. The idea is that suspicious containers never make it onto a U.S.-bound vessel, and ships containing suspicious cargo are kept out of U.S. waters. Screening technology should be utilized to the maximum extent possible. While criteria for retrofitting the six million containers that enter our country annually to make them "smart" haven't been established, the idea is to install state-of-the-art IT sensors and tracking systems in them, make them tamper proof, and prevent bad guys from having access to them.

CSI aims to prevent potential WMDs from ever landing here. That pre-screening activity must be conducted abroad. But how do we get foreign countries to warm up to the idea of potentially disruptive port procedures to protect America?

We make it worth their while. Uncle Sam isn't the only guy worried about terrorism. Many of the world's largest 20 ports (which export 2/3 of U.S.-bound freight) are in countries also proclaimed to be targets of terrorist groups. American security technology, along with the fruits of our security research and development, are available to those willing to work with us.

It's a "you scratch my back – I'll scratch yours" kind of thing. You let us station a handful of specially trained CSI personnel in your ports to monitor and implement pre-screening security programs; and we'll welcome your analogous guys stateside for similar roles. You let us scrutinize your procedures and equipment; and we'll share with you our observations and suggestions for making your system more secure. You help us protect our homeland, we'll help you protect yours.

Moreover, U.S. bound cargo originating in foreign ports not blessed as CSI compliant likely will be more heavily scrutinized on this side of the pond. That means potential delays upon arrival, which should be a disincentive to shippers running their freight through ports not teamed up with us. Of course, most countries peddle their wares here in unparalleled volumes. A terrorist attack in the U.S. accomplished by ocean container transit likely would freeze international water carriage indefinitely, a result that would devastate the international trade community as a whole. A country whose CSI non-compliant port originated a WMD that went off in America could pretty much kiss good bye its U.S. trade relations.

And besides, CSI procedures, if implemented properly, shouldn't be costly or disruptive. The "host country" gets to determine who ultimately pays for additional screening processes, so port budgets won't necessarily be strained (in the U.S., the importer picks up the tab). Most containers spend considerable time sitting on piers in foreign ports – time when CSI pre-screenings could be conducted without any additional delay. Pre-screened cargo is less likely to be delayed stateside, and ultimately will arrive at final destination sooner than it otherwise would.

While Uncle Sam doesn't sport in for the costs of pre-screening equipment used at foreign ports under the CSI program, sharing of technological data (including recommendations about reliable equipment manufacturers) is a reason foreign ports should be interested.

Like most security programs, CSI isn't premised on Uncle Sam muscling rules down his trading partners' throats. But he doesn't have to. The world's trading community has predictably responded with favor to CSI, because it's in everyone's best interests to fight the war on terrorism from all fronts.

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

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Hot Recent Cases in Motor Carrier Law

BY STEPHEN L. DAY
AND STEVEN W. BLOCK

Is GES a broker or a Carmack-liable forwarder? Only the facts will tell.

Lumbermens Mut. Casualty Co. v. GES Exposition Services, 2003 WL 23272964 (N.D. Ill. 2003)

Shipper ARI booked, through intermediary GES, transport of its cargo of computer equipment from a trade show in Nashville back to its facility in Carrollton, Texas. GES placed the haul with carrier Swift, which damaged the cargo in transit. ARI collected from its insurer Lumbermens Mutual under a cargo policy. Lumbermens promptly sued GES and Swift in subrogation.

GES moved for summary judgment, proclaiming it was a transportation broker not liable under Carmack. The Northern District of Illinois agreed brokers aren't liable for cargo lost or damaged through no fault of their own, but found an unresolved factual issue as to whether GES had held itself out to GES as a forwarder or a broker. What an entity represents itself to be, as opposed to how it "labels itself," controls (the court doesn't much get into other factors distinguishing brokers from forwarders). If GES is a forwarder, then it's liable like a carrier would be under Carmack.

The court did allow GES the defense of limited liability even if the intermediary can't take refuge

behind a Carmack shield. The GES contract provided for a \$1,000.00 limitation of liability, which the court declined to find "unconscionable" (despite Lumbermens/ARI's urging). This was based partly on both GES and ARI being "corporate repeat players," something akin to calling ARI a "sophisticated shipper."

Swift tried to escape through the back door by claiming its tariff made it a beneficiary of ARI's insurance policy, such that Lumbermens's was precluded as a matter of law from subrogating against the carrier. That failed because no shipping record actually incorporated Swift's tariff. Thus, the shipper wasn't on notice of, or subject to, the tariff's terms. Of course, *had* Swift used a Uniform Bill of Lading (NMFC), Section 3 (d) still would not provide benefit of insurance to Swift because the insurance policy, as do most, removed this refuge.

Complete federal preemption means state-law stated claims "morph" into a Carmack action

United States Aviation Underwriters v. Yellow Freight System, 296 F. Supp 2d 1322 (S.D. Ala 2003)

Here's another subrogated insurer trying to get its payment back from a motor carrier which damaged insured freight in an interstate haul. This time, a damaged jet engine was the subject of a lawsuit – originally filed in Yellowhammer state court but removed to the U.S. District Court for Southern District of Alabama – against carrier Yellow. The court was hit with cross motions for summary judgment which addressed admissibility of opinions from laymen regarding scientific topics and other expert testimony issues, as well as sufficiency of evidence to substantiate a Carmack claim. The court also rather summarily dismissed the carrier's bill of lading-based "benefit of insurance" assertion, again because the involved policy forbade it.

The more interesting issue involves the insurer's crafting its claim solely in terms of state and common law theories, a common tactic often designed to avoid removal. With the court and all parties in agreement that Carmack preempts these theories, should the matter be dismissed? The court explored this by analyzing whether Carmack supremacy amounted to "complete preemption" or only "defensive preemption" of state and common law claims. In the former instance, the improperly pleaded claims would automatically convert to their properly pleaded, Carmack-ian form. In the latter case, the complaint would be dismissed.

The court ruled Carmack completely preempts state and common law. It looked to a recent U.S. Supreme Court decision addressing the National Bank Act (“NBA”). Because both the NBA and Carmack are specifically stated to provide the “exclusive cause of action” available to a claimant, there can be “no such thing” as a state law claim addressing relevant theories, and preemption is complete (as opposed to merely allowing optional removability). Moreover, Carmack’s legislative history “removed all doubt” as to whether the statute provided for exclusively federal dominion. Courts increasingly are finding that Carmack fully preempts all cargo-related state claims. It’s a good idea to plead your case correctly, but, per this case at least, erroneous pleading shouldn’t mean much.

And while we’re on the subject of preemption. . .

Glass v. Crimmins Transfer Co., 2004 WL 112630 (C.D. Ill 2004)

This time, household goods shippers were upset when a carrier allowed their furniture to become mold damaged while in storage prior to an interstate move. Very upset, actually; so much so that they had doctors ready to testify about psychological maladies. On summary judgment, the U.S. District Court for the Central District of Illinois took a look at preemption issues in this context.

Courts can, and often do, allow shippers (especially household goods shippers) to pursue separately actionable tort claims against carriers who ruin their stuff. The typical scenario is particularly egregious. It also involves tortious acts outside the carriage itself. In other words, courts that allow shippers to sue for emotional distress focus on behavior apart from activity integral to the carrier’s transportation efforts.

Here, the emotionally distressed shippers were bummed out only because their furniture was ruined. Allowing them to pursue their claims against the carrier in this instance would be tantamount to expanding the carrier liability for cargo damage Carmack allows. That, the court could not do, so the tort claims were ruled preempted.

If you charge your drivers for workers’ comp premiums, they’re employees (in the Golden State, at least)

Albillo, et al v. Intermodal Container Services, 114 Cal.App. 4th 190, 8 Cal.Rptr. 3rd 350)

Dig out your old *Motor* copies; we reviewed the arbitration of this case back in March 2000. One of the issues addressed in this class action dispute was whether carriers’ collection of workers compensation premiums from their owner-operators (pursuant to California statute), impacted the nature of the independent contractor relationship. The plaintiff drivers had bought liability insurance through carrier-administered policies (the arbitration panel found that not violative of insurance brokerage laws, which wasn’t disturbed by the court). The lease agreement also mandated the workers comp premium payments, but decreed that those payments did not “create an employment relationship.”

The arbitration panel found that collection of workers comp premiums may have made the drivers “employees” for workers comp coverage, but didn’t make them employees for any other purpose. Therefore, there was no violation of federal owner/operator leasing provisions. The court disagreed. Carriers may not require owner operators to pay for workers comp coverage, and simultaneously enjoy the benefit of those drivers not being full-fledged employees. In California, you can’t enjoy the benefit of limited liability for hurt workers without those same workers being your employees for all purposes.

The carriers’ actions in collecting workers comp premiums violated California labor statutes, but whether or not the violation amounted to a fraudulent business practice (with all its nasty repercussions) is an unresolved factual issue that the arbitration panel must further explore.

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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 be presenting at 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.

Steve Block to Speak at Security Seminar

Steve Block will be presenting at the seminar, "Freight Transport Security Issues in Washington," on April 28, 2004, in Seattle. The topic of Mr. Block's presentation will be "New Security Law and Programs." For detailed program and reservation information please call (888) 678-5565.

CONTACT INFORMATION

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