



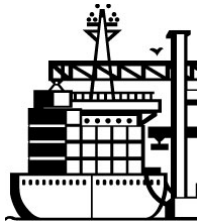
SURF & TURF

Legal News in Transportation & Logistics

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

May 2004

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Salty Traffic Laws: from Counting Whistles to Hugging Narrow-Channel Banks

BY STEVEN W. BLOCK

The day-to-day issues most maritime law practitioners face deal not with legislation, agency rule making, and the battle against terrorism, but with mishaps and misunderstandings that plague an industry whose very nature is – lets face it – often dangerous and commercially unpredictable. Accidents happen, parties to contracts have divergent interpretations of their business deals, folks get hurt, and regs get violated.

Navigable waters, to which admiralty law is subject, isn't just a wet highway when it comes to the law. You can't just pick up Coast Guard authority to operate ocean freighters like you can a driver's license at the local DMV. Navigating waterways is far more complex than driving down a highway. While a highway traffic collision can be tragic, a maritime accident can be devastating for entire communities and industries.

The intricacies of safe maritime navigation, a long and rich evolutionary history of waterborne transportation, developing technology, and other factors have produced codified sets of navigation rules. Some apply to international transit, others to inland, and still others to certain bodies of water, but all have the force and effect of federal statutes. A couple of court decisions recently came down which explain how salty traffic laws are adjudicated. They also explain why we wouldn't want freighter captains to be awarded licenses the same way as those who pilot SUVs.

These cases involved collisions between tugs operating pursuant to the Inland Regulations for Preventing Collisions at Sea, 1972 33 U.S.C. § 2001, *et seq.* The first one addressed a floating casino, the *Miss Belterra*, which was working its way down the Mississippi near St. Louis. On its way up the river was towboat *Elizabeth Ann*. But also headed upriver was a third vessel, *Eileen Bigelow*.

The problem was confusion as to who was talking to whom when pilots tried to coordinate passage. A navigation reg mandates that vessels must communicate their intentions when approaching each other in narrow waterways. Before the days of marine radios, a vessel would sound its whistle once to indicate passage port to port, and twice for starboard to starboard. *Miss Belterra's* pilot asked for

a two-whistle passage, and heard *Elizabeth Ann's* master concur. Apparently, however, *Elizabeth Ann's* operator thought he'd been talking to *Eileen Bigelow*.

Was the ensuing bang up the result of a simple misunderstanding? Not quite. It also turns out that *Miss Belterra* was sailing without running lights. Moreover, the casino wasn't close enough to its starboard bank, as is required during narrow channel operations. For that, the casino's owner got tagged with 10% responsibility for damages to both vessels. The trial court found, and the court of appeals agreed, *Elizabeth Ann's* pilot was "inattentive." This was especially so given that he apparently blew a chance to avoid the collision after seeing *Miss Belterra*.

In another recent collision case, two tugs met under unfortunate circumstances in Arthur Kill, a narrow waterway dividing Staten Island, New York and New Jersey. This time, the vessels collided after both allegedly violated a smorgasbord of navigation regs. These included failure to sound emergency whistle blasts; improper speed; failure to reverse engines to avoid collision; and failure to operate appropriately close to a bank in a narrow channel. But one of the two vessels had no lookout (call it a "Legal Lookout," because they're required by law), who might have prevented the whole mess in the first place. Per the court, the other vessel's no-no's were committed only in the hopes of avoiding a more serious head-on collision.

While volumes have been written about vessel navigation and the law that governs it, a few legal principles regarding liability for operational infractions are particularly interesting. Here's a crash course:

Liability when two or more vessels are involved in a navigational mishap is allocated by percentage of fault as determined by the court. In other words, if one vessel is 20% to blame and the other 80% (and it's not often 100% to one vessel), then the total damages of both vessels are tallied up and apportioned accordingly.

The "Pennsylvania Rule" provides that if a vessel operates in violation of any maritime reg, it's not enough to say, "hey, my infraction didn't cause the problem." Rather, a vessel owner must demonstrate its violation *could not* have played a role in the accident, which is a much higher standard.

A vessel whose nose is clean until a mishap is imminent, and breaks a navigation rule trying to fix the situation, may be forgiven for the violation (known

as errors *in extremis*). The law recognizes that things can get pretty charged when a barge is about to slam into you.

Lastly, a vessel owner's liability may be limited to the value of its vessel plus pending freight, if the vessel owner didn't know about or was not legally responsible for the condition that caused an accident. Thus, if a vessel is sitting on the bottom of the Atlantic, its owner's liability might be nil. An old rust bucket's value might be a fraction of the damages it causes. Many "ifs and buts" qualify this doctrine, but it's one anyone involved in a maritime accident should be aware of.

Ref: *MO Barge Lines, Inc. et al v. Belterra Resort Indiana, Inc., et al*, 360 F.3d 885 (8th Cir. 2004); and *Hygrade Operators, Inc. v. the Tug Tachee*, 2003 WL 23309451 (D NJ).

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The Streamlining Federal Security Programs: How Customs Bundles Them Together

BY STEVEN W. BLOCK

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

Now that you've had a three-month dose of security program substance, it's time to take a look at how the Bureau of Customs and Border Patrol (CBP or, here, Customs) plans to implement the CT-PAT program, the Container Security Initiative, the 24-Hour Advance Vessel Manifest Rule, and related concepts. Briefly, the feds will use hi-tech data exchange and storage systems implemented by newly formed Customs sub-departments, and reconstitute interrelated functions performed by Department of Homeland Security agencies to guide America's international trade industry into an era of security. Warning: this stuff isn't for the acronymphobe.

The first implementation measure is also the most complex, innovative, challenging (some would say "daunting") and, yes, expensive. Customs has developed a mandatory, computerized system which

will be at the heart of an “Automated Commercial Environment” (ACE). Per Customs, ACE is designed to facilitate “interagency information sharing and real-time, cross-government access to more accurate trade information.” In addition to easy fluidity in information exchange, ACE encompasses the Automated Targeting System (ATS), which is technobabble for a computerized watchdog that barks when data indicates certain cargo might be suspect.

ACE was published on December 5, 2003 as part of the Trade Act of 2002, with different implementation dates for each mode of transportation. Water carriage procedures became automated on March 4, 2004. It is (or will be when the kinks are hammered out) a fully centralized program. Per ACE, data from shippers sent in compliance with the 24-Hour Rule (see March 2004 Legal Lookout article); from Customs personnel stationed in foreign ports pursuant to the Container Security Initiative (see February 2004 Legal Lookout article); from CT-PAT participants (see January 2004 Legal Lookout article); and from other sources will be compiled, processed and stored for immediate and/or future reference.

The concept is simple, but its details and execution are anything but. Data for ocean cargo must be transmitted 24 hours in advance of stowage (or at other advance times for other modes) by way of the Automated Manifest System (AMS). One must be blessed by Customs to become an AMS data transmitter. Customs brokerage information comes through the Automated Broker Interface (ABI) system, which again requires a Customs seal of approval. Rail, trucking and air transportation entities are subject to similar, but industry-specific, programs. Volumes could be (and have been – just check out Customs’ website) written about how the automation programs work. Affected players should plan accordingly. Notably, bonding is required and penalties will be assessed for noncompliance.

Software must be purchased, installed and learned for participation in these programs. As if international transportation administration weren’t harried enough already, players must now ensure the particulars of their hauls are properly communicated to Customs, lest fines, delays, loss of good standing and other repercussions result. And let’s not forget the source of much importer heartburn: confidentiality. It’s going to be tough for Customs to assuage the concerns of many trading firms whose success hinges on secrecy, but federal law – if properly activated – provides for proprietary information secrecy. The commercial practice of determining an ultimate

consignee after a vessel has sailed must be abandoned, or at least modified, so that advance consignee identification may be timely transmitted to the feds.

Another approach Customs has adopted toward easing the process is colloquially known as the “one face at the border” program. Now that numerous federal agencies have been combined and organized under the Department of Homeland Security, functions which previously required interaction with multiple uniforms bearing the Stars and Stripes soon will be tackled pretty much by one officer. In other words, Customs plans to be your one-stop shop for cargo transit.

The idea is to speed things along and avoid interagency line tangling by having immigration, agriculture and customs (i.e., security, trade compliance and duties) issues all handled by one person familiar with a transport’s particulars. This should save time and resources for all concerned, given that Uncle Sam’s enforcement agencies don’t have to reinvent the wheel each time a given container calls for scrutiny.

The concept of “one face” isn’t literal, there will be agricultural specialists stationed next to Customs officers should specialized expertise be needed. If an immigration problem materializes, the U.S. Citizenship and Immigration Services (USCIS, formerly INS) boys are waiting to spring from the back room.

Separate administrative branches will be established for passenger and freight processing. It will take a while for the new roles to be learned and put into practice, but Customs hopes the new approach will be fully up and running this year.

With the world (and international trade in particular) becoming more streamlined and mechanized, Customs’ approach to security program implementation shouldn’t be much harder for us to swallow than what we otherwise would expect. Sure, there are some specifics that might cost a few bucks and take some getting used to. However, the downsides of those implementation measures – and federal security programs in general – are well worth their cost if they avoid another terrorist tragedy.

Ref: the Customs & Border Protection agency’s website at <http://www.customs.ustreas.gov/> and 19 CFR 4, 103, 113, 122, 123, 178 and 192.

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Hot Recent Cases in Motor Carrier Law

BY STEPHEN L. DAY
AND STEVEN W. BLOCK

State's limitation of access to roads for interstate truckers is highway robbery

American Trucking Associations v. Whitman, 2004 WL 601659 (D. NJ 2004)

New Jersey noticed an increase in traffic accidents caused by truckers hauling interstate cargo. Statistical studies showed that truckers running to and from points outside the Garden State caused congestion and safety problems – supposedly more so than those on local moves. New Jersey's Department of Transportation responded by designating categories of transportation operating within the state, one of which was double-trailer and 102-inch semi's. Those classes of truck, when passing through Jersey, were restricted to certain routes. Of course, the allocated routes were less desirable (i.e., more costly) to navigate. Restricted trucks could venture onto other roads only for fueling, repairs, lodging, etc.

The American Trucking Associations heeded its aggrieved members' call, and sued the Garden State in the U.S. District Court for the District of New Jersey. The state's actions, alleged ATA, amounted to an impermissible restriction on interstate commerce, which is a serious no-no under the Commerce Clause of the U.S. Constitution' Article I. New Jersey responded by pointing to precedents wherein local government enjoys leeway to regulate safety issues, particularly in the highway traffic arena.

However, that deference had been granted only when state laws do not discriminate "either on their face or in effect." Because that was exactly the case here, the court ruled that the route-restricting regs in question must be heavily scrutinized (and not subject to deferential review). The court agreed that Jersey's regs served a legitimate local purpose. However, after reviewing a number of statistical studies the

state had submitted in support of its case, the court concluded there were less discriminatory options available to achieve the desired ends. The court enjoined further enforcement of the regs as violative of the Commerce Clause.

The ongoing debate about owner-operator "employee" status: what about workers' compensation premiums?

OOIDA v. New Prime, Inc., 2004 WL 603821 (Mo.App. S.D. 2004)

The Owner Operator Independent Drivers Association (OOIDA) took up its members' cause in this dispute between a number of drivers and their carrier "employer," New Prime. The drivers had entered into lease-purchase agreements with an outfit called "Success Leasing," and were under contract to New Prime (Success and New Prime were affiliated companies, if not "alter egos" of each other). The New Prime contract provided that the drivers had to foot the tab for workers' comp coverage, which could be obtained "through New Prime or a Prime affiliate." The premiums were deducted from the drivers' pay.

The drivers sued to recover those premiums as illegally collected under Missouri's workers' comp laws. New Prime moved to dismiss on the ground those laws do not provide for a private cause of action. However, it wasn't strict enforcement of workers' comp laws the drivers were after; rather, they sought reimbursement of illegally acquired monies under equitable theories. The carrier motion was denied.

Next, New Prime sought dismissal alleging the drivers were owner-operators excluded from workers' comp guidelines. True, a California case (*Abillo*, reported here last issue) suggested this might be the case. But Missouri's law read differently (and far more broadly). Most importantly, undermining their owner operator status claim, the Success lease clearly indicated that the drivers would not acquire an ownership interest in their trucks during the period of the lease. Especially given the relationship between New Prime and Success, the employer was aware of this. The carrier's second motion was denied.

... but what about employees of owner operators? State law rules!

C. Brown Trucking v. Rushing, 2004 WL 302266 (Ga. App. 2004)

A similar issue from Georgia, this time dealing with the employee of an owner-operator under lease to a carrier. The owner-operator didn't enjoy workers' comp and other niceties of an employer/employee relationship. But his driver/employee did (at least in the Peach State). Georgia's statute on the subject was detailed, going through various categories of workers exempted along with "their employees." Owner-operators weren't included in that laundry list. Their employees, therefore, presumptively weren't meant to be excluded.

Accordingly, the carrier is the statutory employer of the owner-operator's employees, even though it's not the owner-operator's employer. The court went so far as to find the carrier's actions "unreasonable," and awarded the employee driver his attorneys' fees to boot.

Alleging a bill of lading is enough to keep an action in federal court

Nippon Express v. Mitsui Sumitomo Ins. Co., et al, 2004 WL 856582 (N.D. Ill 2004)

Nippon issued a bill of lading for shipment of a container of Sony PlayStation games from Tokyo to Illinois. To transport the freight, Nippon hired carrier Hanjin, which promptly issued its own bill of lading identifying Nippon as shipper. Hanjin made separate arrangements with rail carriers BNSF and Norfolk Southern to transport the cargo from Tacoma, Washington to Illinois. Norfolk Southern hired carrier Jam Trucking to dray the freight to ultimate destination. Of course, the games never arrived.

The whole mess went to the federal district court sitting in the Northern District of Illinois under Nippon's declaratory relief action. Sony's insurer wanted a Prairie State court to preside, and brought a motion to dismiss the federal action for lack of jurisdiction. The theory was that Carmack and its federal jurisdiction provisions didn't apply, because a through ocean bill (originating in a foreign country) governed the transport.

The only problem was that Nippon, in its complaint for declaratory relief, alleged that the railroads had issued their own separate bills of lading. Never mind that no such documentation ever surfaced (and their existence was actually denied); the allegation is enough (in this court, at least), to keep the matter federal.

Cop's Level II inspection of a truck finds pot – legally

U.S. v. Mendoza-Gonzalez, 2004 WL 769747 (8th Cir. 2004)

A driver pulled into a weigh station in Iowa, his stash of marijuana and amphetamines hidden under the sleeper berth. A police officer discovered log book violations and elected to do a Level II inspection as authorized by FMCSA regs. After checking all equipment, the cop asked the driver if he could search his personal belongings. The driver said "yes, I have nothing to hide," but asked that the cop be careful not to awaken the driver's brother who was "sleeping" in the sleeper berth.

The officer looked into the berth and found a marijuana scent (and no sleeping brother). The berth's required occupant restraints were not visible, which sometimes is the result of their being tucked under the mattress. The cop lifted up the mattress and there, lo and behold, was a shoe box full of dope. The driver, charged with possession with intent to distribute, claimed the search violated his Fourth Amendment rights.

The Eighth Circuit, reviewing the scope of a Level II inspection, found that safety restraints were validly the subject of the cop's look-see. Since the cop could validly lift the mattress, whatever he found there was fair game and admissible evidence.

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UPCOMING EVENTS

Attorneys in the Betts Patterson Mines' Transportation & Logistics Practice Group are regular speakers at conferences and seminars throughout the country. Upcoming events include:

2004 Annual Meeting of the Association for Transportation Law, Logistics and Policy

Stephen Day and Steve Block will attend the 75th Annual Meeting of the ATLLP on June 26 – June 30, at Jackson Lake Lodge, Grand Teton National Park, Wyoming. Mr. Block will moderate two panel discussions, "Effects of Changing Rules Governing Ocean Shipping, Both on Land and in the Water," and "Balancing Security and Efficiency – The Latest from the Front Lines."

Mr. Block, the Program Chair, will become President Elect of the ATLLP at the meeting.

For additional information, please see <http://www.atllp.com>.

2004 Annual Meeting of the Transportation Lawyers Association

Steve Block will attend the 2004 annual meeting of the Transportation Lawyers Association on June 1 – June 5, at The Breakers Hotel, Palm Beach, Florida.

For additional information, please see <http://www.translaw.org>.

CONTACT INFORMATION

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