SURF & TURF

Legal News in Transportation & Logistics

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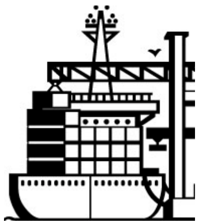

The Railroad Competition Act of 2005: Fine Tuning Capitalism to Help Remotely Located Railroad Shippers

BY STEVEN W. BLOCK

Rail transit's inherently limited routing renders it a unique mode of transportation. Oceans and skies are boundless; roads run virtually everywhere. But trains go only to and from those limited places where at least one railroad has seen fit to invest big bucks laying track and conducting operations. Notwithstanding that limitation, rail carriage is the most practical and economical mode for many segments of America's agriculture and heavy industries.

Transportation capitalism has been shaped and formed through an evolutionary process of deregulation in all modes aimed at allowing market factors to do their natural thing. But the law of supply and demand, when left to its own forces, can have some pretty inequitable effects on shippers who have only one service option.

"Captive shippers," i.e., railroad customers whose geographical location or particularized transportation needs leaves them essentially at a single carrier's mercy, present an example of our economic system's downsides. Often remotely located agricultural or mining concerns, captive shippers have long complained about the effects of no railroad competition in their regions. Unchallenged freight rates are higher per rail/mile – often significantly so – than in areas where carrier competition forces rates down. This imposes disadvantages on out-of-the-way shippers as compared to their competitors who happen to do business in more heavily traveled locales.

The problem has been compounded with mergers of Class I railroads, the big boys of train carriage which haul most interstate freight. In the days of pre-deregulated transit, over 40 Class I railroads operated trains – often in coordination with each other – over the vast network of tracks that criss-cross the nation. But with the business advantages offered by leveraged economic freedom over the past two decades, coupled with liberally granted government approval of carrier marriages, only four Class I's now service America's rail shippers.

The U.S. Surface Transportation Board (STB), the federal agency that replaced the Interstate Commerce Commission with regard to most railroad regulation, attends to the intricacies of railroad economics. Among numerous other things, STB serves as a forum for shipper/carrier rate disputes. Legislation and STB regulatory rule making has been aimed at alleviating captive shippers' economic plight, but this specially-challenged transportation

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consumer and its trade organizations have been less than satisfied with the actual results.

Renewing stalled legislation that commenced in 2003, Congress is now considering The Railroad Competition Act of 2005 ("the Act," which is co-sponsored by numerous representatives and senators). The idea is to structure a system providing resources and procedural mechanisms to ensure railroads don't price gouge their option-challenged patrons.

A big part of the problem, urge captive shippers, is that STB has issued some bad decisions over the past decade, effectively denying them a fair economic shake. If passed, the Act would both direct and empower STB to engender railroad competition and do everything possible to ensure captives are quoted and charged reasonable rates. Envisioned is a whole new methodology for determining reasonableness, taking into consideration railroads' actual operating costs in the formation of a new rate standard.

The Act would provide a specialized forum for aggrieved captives to complain about unreasonable rates by way of STB-sanctioned arbitration (as opposed to the multi-million dollar litigation they've had to endure when suing allegedly rate-extortionist carriers in court). Proposed law would require railroads to charge captives reasonable rates and maintain good service, including supplies of enough cars to meet varying needs (a cause of another captive-shipper headache). In squabbles over what's "reasonable," train operators could still rebut by pointing to the higher cost of servicing remote areas; how railroad profits lag behind those of all other modes; and how the Act would be "re-regulation" of the railroad industry in an era premised and guided by decreasing government oversight.

The Act contains provisions whereby STB could declare a state or smaller area essentially a carrier-competition disaster area with urgently needed attention to captive shipper freight rates. These could be remedied by appropriate action and/or targeted federal investment. The idea is something akin to legislated competition in a sector where natural economic forces are missing.

The Act also would empower STB to eliminate "paper barriers," created typically when a Class I prevents other carriers from providing more efficient service. For example, two smaller railroads operating through a Class I's terminal or other asset might be prohibited by paper barrier from joining their operations and offering shippers otherwise unavailable service options. The bill earmarks $35 billion for railroad infrastructure improvement (hiked up ten times from what was proposed in the Act's 2003 version).

Lastly, a government think tank would be commissioned to study deregulated railroad economics, and a watchdog for heavily concerned agricultural captives would keep an eye on developments from a post within the U.S. Department of Agriculture.

The much-celebrated deregulation of transportation is not without its downsides. Paralleling our economic system as a whole, individualized treatment for transportation consumers in unusual circumstances must be made for the good of American industry as a whole. The Act is a fine-tuning process that, if passed, will correct the rare circumstance where market-driven forces yield potentially undesirable results.

Ref: The Railroad Competition Act of 2005 is available at http://thomas.loc.gov/cgi-bin/query/z?c109:S.919.IS:

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Ocean Transportation Intermediary Liability: Baseless Finger Pointing Costs a Shipper Big Bucks

BY STEVEN W. BLOCK

Shipping regulatory law may have lumped together non-vessel operating common carriers (NVOCCs) and freight forwarders for administrative purposes, but the distinction is alive and well when it comes to intermediary liability. The U.S. District Court for the Southern District of New York recently decided a dispute between an ocean shipper and its intermediary which focused on a number of issues significant in today's ocean carriage environment.

In March 2001, shipper General Carbon hired Navtrans to arrange transit of a cargo of impregnated activated carbon from New York to some point overseas (the court's opinion doesn't say where). Navtrans, typical of many players in the business, wears both freight forwarder and NVOCC hats through different legal entities under its umbrella,

several of which apparently were involved here. Navtrans apparently co-brokered the freight to NVOCC Rose Containerline which, in turn, supplied a container and booked transit with steamship line Hapag-Lloyd.

No, impregnated activated carbon isn't mineral in a big-bellied, family way. Rather, it's a processed product used industrially for moisture removal. The problem is that introduction of moisture at certain points in the manufacturing process renders this commodity flammable. Apparently, this shipment's carbon hadn't stabilized before it was stowed on a vessel. Yes, the cargo went up in flames, damaging other freight and Hapag-Lloyd's vessel.

General Carbon settled a number of claims (to the tune of seven figures), and sought from Navtrans reimbursement, known as "indemnification" in the legal world. Navtrans counterclaimed against General Carbon to recover its attorneys' fees, pointing to a clause in its bill of lading to General Carbon which gave it the right to do so.

In ruling on this mess, the court first struggled with the Navtrans role at issue: was the intermediary a freight forwarder, an NVOCC, or both? To be sure the issue was covered, the court analyzed both, and decided that regardless of the hat Navtrans was wearing, it wasn't liable here.

Freight forwarders essentially are travel agents for freight. They're no more liable to their customers for other providers' no-no's than are vacation-planner intermediaries who book space for tourists in hotels or on cruise lines that later provide disappointing service. U.S. freight forwarders are liable only for their own negligence or breach of contract – the typical scenarios involving placement of freight with incompetent carriers or failure to pass along shipper instructions accurately.

NVOCCs, on the other hand, take on much greater responsibility. They issue bills of lading to their shippers (thereby becoming carriers of record), and then receive bills of lading from actual carriers (becoming steamship lines' shippers of record). If something goes wrong in the voyage, innocent NVOCCs can be liable to the same extent as the carrier that caused a loss.

Navtrans had no way of knowing the carbon was volatile, and prevailing law saddles shippers with complete responsibility for advising all concerned that their freight is hazardous (regs dealing with this now are even more rigorous, and General Carbon probably would've been in some serious hot water with the Department of Homeland Security had this incident taken place post 9-11). Hazmat shippers are "strictly liable" for mishaps resulting from their failure to alert transportation providers about their stuff's potential menace, meaning there are some pretty daunting legal presumptions against them when something goes wrong.

The court flat-out rejected General Carbon didn't know its product was dangerous. General Carbon pointed to a product information sheet it had given Navtrans that said something about impregnated activated carbon potentially causing skin burns. The court snubbed that argument with an almost audible "come on!" Warning about epidermial abrasions is a "far cry" from adequate notice about a compound that could blast a vessel, its crew and freight to smithereens.

General Carbon tried to argue that Navtrans the NVOCC was Hapag Lloyd's shipper of record, such that the intermediary bore primary responsibility for the mishap. That theory was novel, if not interesting, but it ignored the fact that Navtrans' bill of lading provided that General Carbon must indemnify Navtrans for losses brought on by the shipper's fault.

Even though freight forwarder liability is far rarer and more difficult to prove, General Carbon crafted an argument that Navtrans the travel agent should pay for this loss. The shipper urged that its freight forwarder had failed to fulfill its affirmative obligation to identify hazardous freight; failed to "process" the product information sheet, whatever that means; and was negligent in failing to secure an appropriate (moisture proof) container. The problem with those arguments is that freight forwarders aren't charged by law or industry practice with any such obligations, and the court refused General Carbon's invitation to expand freight forwarder liability. Thus, Navtrans, whether NVOCC, freight forwarder or both, isn't liable here. On the contrary, General Carbon gets to pay its intermediary's costs and attorneys' fees for causing the fiasco in the first place.

Shippers, you have to know your freight, and advise intermediaries and carriers if it's hazardous. The roles and liability of ocean transportation intermediaries, while sometimes subject to unusual circumstances which require detailed analysis, have become fairly well defined in current law. Absent particularized contractual arrangements, courts are not likely to pass off shipper wrongdoing onto intermediaries' shoulders.

Ref: *Scholastic, Inc. v. M/V Kitano*, 2005 WL 742839 (SDNY 2005)

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Hot Recent Cases in Motor Carrier Law

BY STEPHEN L. DAY AND STEVEN W. BLOCK

An incorporated bill of lading limits a carrier's liability, but to how much?

American Home Assurance Co. v. CSX Lines, Inc. v. Wall Street Systems, 2005 WL 735041 (SDNY 2005)

Pfizer, insured by American Home, booked transit of a cargo of drugs from Puerto Rico to Memphis. The freight was housed in 2,156 boxes, which were bundled onto 44 skids, which was placed into one container. CSX, a water carrier, apparently had a standard bill of lading which included limitation of liability provisions and a Himalaya Clause extending CSX's rights and defenses to other service providers (i.e., truckers). The parties' carriage was effected pursuant to a contract which incorporated the bill of lading, but said nothing about limitation of liability. Trouble was, CSX never actually issued its bill of lading for this haul.

The freight was stolen while in trucker Wall Street's possession, obligating American Home to pay Pfizer well into seven figures. The subrogated insurer sued CSX, which brought Wall Street into the fray. Both carriers sought to limit their liability under the bill of lading by way of motions for summary judgment.

American Home urged that the bill of lading's limitation of liability provisions weren't binding because, hey, no bill of lading was ever issued. The court didn't buy it. The governing contract didn't say a bill of lading actually had to be issued for each load, and the parties' course of dealing showed both understood that CSX's standard documentation would apply. Moreover, Pfizer must've understood CSX's (and therefore Wall Street's) liability was limited; otherwise it wouldn't have gone out and purchased cargo insurance.

Unfortunately, it wasn't quite so clear to what extent the carriers' assets were covered. Under the incorporated terms, liability maxed out at 1,000 bucks per, well, something. It wasn't clear what. The insurer argued that each of the 2,156 boxes was a "unit" for limitation purposes (which would yield a limitation amount well above the lost freight's actual value), but the court didn't buy that either. The parties couldn't possibly have contemplated a limitation of liability amount that high in light of the freight rates CSX charged.

So what's a "unit"? A skid or a container? The court can't answer that on summary judgment (pointing to case and water-transit statutory law that goes both ways). If this matter goes any further, the award will be no more than $44,000, a small fraction of the loss.

Freight charge dispute doesn't get you into federal court

Central Transport International v. Sterling Seating, Inc., 356 F.Supp.2d 786 (E.D. Mich. 2005)

Interstate carrier Central Transport sued shipper Sterling Seating in Michigan state court to recover unpaid freight charges, and Sterling removed the action to federal court. The Eastern District of Michigan ordered the shipper to show cause why federal jurisdiction derived from a claim like this.

Two reasons, said Sterling. First, the Interstate Commerce Commission Termination Act ("ICCTA") provides for federal preemption over state regulation of interstate trucking. If a Wolverine state court adjudicated this matter, a state essentially would be governing matters reserved to federal governance. Second, Central Transport's freight charges were taken from a "tariff," which precedents provide are subject exclusively to federal law.

Wrong on both counts, replied the court. While ICCTA provides for federal jurisdiction over a wide variety of interstate trucking regulatory issues, collection of freight charges isn't one of them. Congress could have said so if it meant otherwise. Moreover, the carrier's "tariff" wasn't "filed" (which probably renders the term "tariff" a misnomer in relevant regard). This wasn't household goods or noncontiguous domestic transit freight (for which tariff-based freight charges are mandated), so

common carriage principles didn't apply. Back to state court we go!

A jurisdiction and Carmack double wammy

Coughlin v. United Van Lines, two separate opinions currently available at 2005 WL 704305 and 742710 (C.D. Cal.)

Here's a pair of decisions from a single dispute that address motor carrier issues in a format approaching a law school exam. Interstate household goods shipper Coughlin's stuff allegedly arrived damaged. Ms. Coughlin also wasn't happy about having to pay carrier United Van Lines freight charges. She sued United in California state court, and the carrier removed the claim to the U.S. District Court for the Central District of California.

The shipper sought to have the case remanded, but this time Carmack dominion kicked in providing federal jurisdiction. The court also ruled that United's "tariff" was subject to federal jurisdiction. This is confusing and probably erroneous. Household goods tariffs aren't "filed," which might otherwise be a basis for federal jurisdiction for these kinds of freight charge disputes (just ask Sterling Seating). In any event, the district court kept the case.

In response to United's motion for summary judgment, the court correctly applied Carmack's preemption of Coughlin's negligence and breach of contract claims (both of which sound in state and common law). The case was dismissed, although the shipper and her now-educated counsel presumably can re-file with proper allegations.

Restrictions in UPS' tariff are better than gold

Soomekh v. United Parcel Service, Inc., 7 Misc.3d 1002(A), 2005 WL 729523 (NY Dist.Ct. 2005)

Mr. Soomekh's friend walked into one of those outlets that process UPS shipments, and booked transit of a box of gold coins worth about three grand from California to New York. One of countless UPS "Authorized Shipping Outlets," the independent vender apparently gave or made available to the shipper UPS' "tariff" (had enough of that word yet?), which prohibited shipment of coins of "unusual value." Mr. Soomekh, the consignee, claimed his coins never arrived. He sued UPS.

Apparently representing himself, Mr. Soomekh opposed UPS' motion for summary judgment. He claimed these weren't *really* coins because they weren't "Trading Coins." Rather they were just memorial coins. Hmmm.

More persuasively, Mr. Soomekh urged that the clerk didn't refuse the shipment after inspecting it. Lastly, UPS' aggrieved customer claimed that the outlet was UPS' agent (or "relation" in the his own word), such that the carrier should be responsible for its error.

UPS urged that only shippers (and not consignees) could bring freight claim lawsuits. The court disagreed, finding that governing Carmack principles allow consignees to take carriers to the mat. But that's where Mr. Soomekh's legal successes ended. UPS' tariff is binding, and coins of "unusual value" such as memorial coins were precluded as acceptable freight.

Logo liability is dead on Wall Street

Ross v. Wall Street Systems and Gulf Ins. Co., 400 F.3d 478 (6th Cir. 2005)

Owner operator Conway was under lease to carrier Wall Street. Complying with federal law, Wall Street procured insurance coverage (confirmed by a MCS-90 filed with the Federal Motor Carrier Safety Administration). Wall Street terminated its lease with Conway by sending the required written notice, but Conway hadn't gotten around to returning Wall Street's placards. The insurance coverage, provided by Gulf, was still active because the 35-day post-withdrawal time period had not yet expired. The Conway truck was involved in an accident that injured Ross.

Ross sued Wall Street and Gulf, citing logo liability theories expressed in some older precedents. These basically say a carrier is on the hook for its lessors' accidents unless and until the carriers' placards, i.e., its logo, are actually removed. The court found logo liability no longer valid law, and ruled that Wall Streets' letter to Conway sufficient to end the lease (no exhaustive effort to retrieve the placards was necessary). Moreover, the fact that Gulfs' policy was still in force for certain purposes didn't create any greater rights on behalf of a claimant who had no rights against the insured in the first place. Ross can go only after Conway.

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