



SURF & TURF

Legal News in Transportation & Logistics

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Higher Pump Prices Don't Fuel Transportation Company Profits, at Least Not Much

BY STEVEN W. BLOCK

It's no secret that everyone has felt the sting of higher fuel prices. What commodity's economic swings penetrate deeper into our wallets than the substance that powers transportation?

Gas station visits, air tickets and shipping charges are just the most direct and visible sources of fiscal vexation everyday folks endure. Look a little closer and you'll see that gas prices have driven up virtually every product's consumer cost. That head of lettuce didn't make its way from field to market on its own. Services are no exception; an electrician's overhead goes up with his travel expenses, and guess how he recoups that higher nut . . .

So why the angry hoopla over increased fuel surcharges collected by transportation providers and their intermediaries? Recent press has charged motor carriers and freight forwarders with taking advantage of the current international petroleum market to line their pockets with unjustified profits. Fuel surcharges have long been industry standard, allowing carriers room for adjustment of pre-agreed

freight charges to accommodate fluctuating operational costs. Transportation industry detractors complain that when oil prices spiked, say by "X," the trucking, rail, aviation and ocean carriers hiked up their rates by something like "X and a half." Or perhaps they just quote higher freight rates, and point to fuel prices in response to protests.

Can they do that? Is it legal to recoup by fuel surcharge higher operational costs only indirectly related to higher pump prices? Transportation rates were deregulated in the 1990s by a series of budget-slashing federal statutes. The U.S. Surface Transportation Board (STB), successor to the eliminated Interstate Commerce Commission with regard to most railroad and some trucking regulatory functions, umpires disputes over certain rate reasonableness issues. STB is adjudicating squabbles between shippers and rail carriers about certain related points. But yes, surcharges generally are fair game in this market-driven transportation environment and often insisted upon by carriers.

On the trucking side, this primarily is a less-than-truckload, or "LTL" issue. LTL carriers, which typically consolidate smaller loads at their own facilities for multi-stop deliveries, have higher overhead than truckers who simply pick up loaded trailers and containers and haul them to destination. LTL operating costs go up concurrently with increased overhead expenses for such things as higher power,

labor, spare parts and propane. Ocean carriers and airlines bear increased costs across the board. Says Steve Day, vice president and general counsel of Washington-based forwarder American Fast Freight: "Fuel surcharges are a matter of shipper accommodation to the impact of dynamic fluctuations of a wide variety of fuel costs to the service providers."

Intermediaries, such as freight forwarders and transportation brokers, get hit with carrier surcharges, and claim they're just passing along the burden to their shipper customers. Some of the larger middlemen have even had to hire additional personnel just to sort out fuel surcharges billed by the hundreds of carriers they use. Their typical practice is to tally up all surcharges, average them out to a per-haul value, and bill the shipper accordingly.

Well, almost accordingly, concedes one anonymous forwarder. His company's benefit may not be "X and a half," but there is a little profit kicker added in there. Surcharges his company hits up customers with do a bit more than compensate for fuel surcharges. Rather, they include a profit margin reflective of the added effort, risk and investment the company endures as a result of higher fuel costs. But that seems fair, doesn't it? Shouldn't more work and risk be reasonably compensated? Moreover, the transportation industry hasn't had a rate increase in some fifteen years, and it feels like it's time for a little raise.

So what does the future hold? Steve Day warns that "rapid and unpredictable spikes in fuel costs are not likely to go away. Transportation providers need their shipper customers to understand that rapidly rising fuel costs impact their businesses in a myriad of ways beyond merely putting diesel in the tank of a Class 8 tractor. Unless these additional 'non-diesel' costs can be recovered the ability of shippers and carriers to engage in long term contracting for services will be at risk." Sure, there's probably some abuse going on. However, the fierce competition of America's transportation industry, which has operated on razor-thin margins for decades, should take care of that as shippers acclimate to the new cost environment.

If fuel costs don't go down, we might also see a trend toward higher base freight rates. That probably would produce its own set of shipper complaints, but at least consumers wouldn't complain about hidden costs and unwarranted profits. Meanwhile, when considering whether carriers and forwarders are out of line, shippers and their agents might consider how

deeply fuel costs have impacted their own operations. For everyone, it's not just the gas tank that's more expensive to fill.



Railroad Law Uniformity: Federal Dogma Derails Conflicting State Doctrine

BY STEVEN W. BLOCK

Like most U.S. transportation law, railroad jurisprudence has always placed national uniformity on the lofty trestle of public-policy priority. The mesh of tracks criss-crossing our vast country form a seamless web of accommodation to mostly heavy-industry shippers, a network whose function is affected minimally (well, at least in theory) by state borders. A single, well-defined body of law applicable to all who administer and use America's railroads promotes and ensures a reliable infrastructure effectively implemented by federal authorities.

Conversely, the complex mess fifty separate and potentially conflicting sets of law might create is something Uncle Sam has striven to avoid for decades. Envisioned and blessed by the U.S. Constitution's Supremacy Clause (Article VI), uniformity has been a guiding precept in many fields of law from the very beginning. It is difficult to envision a subject more deserving of Supremacy Clause scrutiny than rail transit.

But national consistency is a task more easily revered than executed. Federal agencies, courts and doctrine couldn't possibly mind every little issue to which train operation gives rise. States have varying circumstances (economic, cultural, geographical), orientations, legal history and, yes, their own need for internal uniformity. This situation hinders that seemingly perfect world of U.S. railroad-law homogeneity. For example, states have different concepts of what constitutes negligence (and what it takes to prove it), as well as how much compensation the victim of someone's negligence should get. Should we really ask a state's residents to live differently when they approach a railroad track than they do in the grocery store?

Consequently, something between a turf battle and a juggling act has developed in case law addressing railroad liability. Typically, train companies and the feds vie with states and plaintiffs over what concepts

define an injured player's rights. The results over time have been a bit less than, well, uniform. However, a federal court in North Dakota's recent conclusions have received considerable attention in railroad circles as a rare and definitive statement on the issue. Railroad industry players hail the Peace Garden State decision as an authoritative precept on the subject; listen closely and you'll hear disgruntled "states rights" types dismiss it as an anomaly from a remote court. If nothing else, the court's ruling summarizes and analyzes nicely current law on the subject, and shows why railroad uniformity is so challenging.

In *Mehl v. Canadian Pacific Railroad*, the court addressed a derailment several years ago that prompted the release of potentially hazardous chemicals into the air where a class of plaintiffs lived. The plaintiffs filed a lawsuit alleging various claims under North Dakota law against the railroad, ranging from negligent inspection, construction and training to negligent railroad operations.

The court dismissed the plaintiff's claims, concluding that the Federal Railroad Safety Act (FRSA) preempts the state law concepts plaintiffs relied on. The FRSA is pretty specific. It goes so far as to empower states to make and enforce their own railroad safety law, so long as it (1) is necessary to eliminate or reduce an essentially local safety hazard; (2) is not incompatible with a law, regulation, or order of the United States Government; *and* (and that's an important "and") (3) does not unreasonably burden interstate commerce. The analysis does not, and cannot, include an "examination of the compliance with or adequacy of the federal regulation." A general qualifier is that states can promulgate safety regs that are stricter than Uncle Sam's, but cannot relax standards or nix them altogether.

Running through plaintiffs' list of grievances, the court found the FRSA addressed, and therefore preempted, each one. In some instances, the statute gives quite specific attention to a point (e.g., a federal reg addresses how tight a bolt must be screwed on a track). In others, the attention is more conceptual, but the court, citing to precedential authority, ruled that "a regulatory framework need not impose a bureaucratic micromanagement in order to substantially subsume a particular subject matter."

Ironically, the court considered the conclusions of a Minnesota court that had adjudicated claims wrought by this same derailment. Two states addressing the same incident was a recipe for the undesirable results uniformity is designed to redress, and that

circumstance brought the Supremacy Clause's ideals of national uniformity into clear focus. In reaching its conclusions, the court cited authority from some 20 different jurisdictions throughout the land. Not all of it is consistent (revealing ground for much future debate), but the uniformity paradigm is always a primary consideration.

Those whose activities involve trains should be mindful that law governing railroad operations, including potential resulting liability, is primarily a creature of federal regulation. Nationally uniform concepts can and often do fly right in the face of what we've grown to expect and love based on state and common law concepts. Nonetheless, we should embrace the concept that implementation of an effective railroad network entails a uniform approach which often shirks local (i.e., state or city) meddling for the greater good.

Ref: *Mehl, et al v. Canadian Pacific Railroad, et al*, pending in the U.S. District Court for the District of North Dakota (Northwestern Division) under Cause No. 4:02-cv-009; the Federal Railroad safety Act, 49 USC § 20106.



**Hot Recent Cases
in Motor Carrier Law**
BY STEVEN W. BLOCK

**Carmack doesn't apply to brokers, at least for
indemnity agreements in the Beaver State**

Intransit, Inc. v. Excel North American Road Transport, Inc., et al, 2006 WL 572125 (D. Or. 2006)

Shipper Wal-Mart retained transportation broker Intransit to book interstate transit of its freight to Texas. Intransit engaged carrier Excel North American Road Transport for the task. The Intransit/Excel agreement provided that Excel would indemnify the broker for losses resulting from any carrier mess up.

Wal-Mart rejected a cargo that allegedly arrived late, and took a set-off of some 29 grand against fees it owed Intransit for unrelated shipments. Down came the dominoes: Excel ignored Intransit's opened palm

asking for indemnity, prompting the broker to sue the carrier, which induced Excel to sue Wal-Mart for wrongful rejection. Wal-Mart closed the loop by cross claiming against Intransit for its defense costs. The whole mess was removed from Oregon state to federal court based on Wal-Mart's assertion that Carmack controlled the dispute. Wal-Mart later brought motions to determine jurisdictional issues.

The court ruled that Carmack didn't govern, and kicked the three-pronged action back into state court. While federal preemption governs cargo claims (including subrogation actions), that's not what really was going on here. This was a simple contract matter. Intransit, as a broker, was not Excel's shipper, and this court concluded nothing in Carmack's language or history suggests it was intended to apply to carriers' claims against shippers. Wal-Mart's claims were only for defense costs, and the concept that "even strangers to the bill of lading cannot escape the reach of Carmack" applies only to subrogation claims. Recognizing that other courts have held differently, the federal court dismissed the action for lack of jurisdiction.

. . . and similarly, a carrier can't take advantage of lower limited liability in forwarder's air waybills

St. Paul Fire & Marine Ins. Co., et al v. Schneider National Carriers, 2006 WL 522455 (SDNY 2006)

Shippers CDW Computer Centers and PC Wholesale booked interstate motor carrier transit with Schneider through forwarder AIT Worldwide Logistics. AIT issued the shippers four air waybills (its standard form) for the freight, each containing a \$100,000 limitation of liability and declared value notations totaling over 774 grand. Schneider and AIT operated pursuant to a "Transportation Contract" which included an aggregate \$750,000 limitation of liability. The freight was damaged to the tune of some 692 grand (post salvage) in an accident. AIT and its insurer paid the shippers that sum, and looked to Schneider for reimbursement.

Schneider refused to oblige AIT, claiming the broker hadn't been obligated to pay out more than \$200,000 per its own shipping documentation, and that if it had paid more, it did so as a "volunteer." In essence, Schneider was trying to take advantage of AIT's shipping terms with its customers, even though the carrier hadn't seen AIT's bills prior to the loss.

The Southern District of New York didn't buy it. Using that same "stranger" to the contract analysis,

the court concluded Schneider had no business trying to take advantage of a relationship it wasn't party to. A contractual analysis of AIT's air waybills showed that the carrier was neither an intended nor an incidental beneficiary. For a party to make a payment as a volunteer (for which indemnity might be unavailable), it must do so knowing there is no potential of liability (not the case here). Neither the air waybills nor the Transportation Contract limited the carrier's liability, and Schneider gets to pony up for the full loss.

The Interline Trust theory derails

In re Consolidated Freightways Corp., 2006 WL 903230

This case is big news for carriers who accept freight booked by intermediaries or other originating carriers whose financial health is unstable or uncertain. The Ninth Circuit recently rejected a premise truckers and railroads may have at least subconsciously operated under for decades, i.e., that freight charges other transportation entities collect for subsequent remittal presumptively belong to the carrier that, well, later earns them. And why wouldn't they assume that? When a forwarder collects fees from its shippers to pay both the intermediary's fees (for various services) and freight charges for one or more carriers, no one rightfully thinks the latter portion belongs to the forwarder for a minute.

The notion is that an intermediary or originating carrier holds such freight charges for the benefit of subsequent carriers is known as the Interline Trust theory. While addressed in various contexts throughout the land for some time now, its truest value – as a defense to bankruptcy creditor claims – only recently was put to the test. Consolidated Freightways' bankruptcy, adjudicated in the Central District of California, was met by a host of creditor carriers claiming that funds the bankrupt held but intended to apply as payment for other carriers' services shouldn't be considered part of the estate. Rather, they should be considered the intended payees' property not appropriately dispensed to bankruptcy creditors as a whole. The Ninth Circuit blessed bankruptcy and district court judges' decisions rejecting the concept.

In doing so, the Court of Appeals refused to expand federal common law addressing what constitutes a bankrupt carrier's estate. Noting that the Supreme Court specifically disfavors such expansion, the court considered that state law adequately defines property

interests such as those at issue, and the fact that someone goes belly up shouldn't change the equation. The fact that transportation is regulated and premised on national uniformity is of no moment, as no other interstate or federally-governed industry gets special treatment either. If Congress intended federal dominion to dictate an interline trust, then it could have so provided in the controlling statutes.

Truckers and railroads, watch who books your freight!!

Federal statutes governing motor carriage don't block local surety bond requirement

Worldwide Moving & Storage, Inc. v. District of Columbia, 2006 WL 954458 (D.C. Cir. 2006)

This case traces the efforts of the hapless Melvin Yates, principal of motor carriers M.Y. Enterprises (MYE) and, later, Worldwide Moving & Storage (Worldwide). Yates first got into trouble when DC-based MYE failed to fulfill contract obligations in five hauls. He pleaded guilty to five misdemeanor counts resulting from that activity. Based on his "misleading customers" in violation of DC's Consumer Protection statute, a local court required Yates to post a \$100,000 surety bond for the benefit of anyone he might later screw over.

Unable to land a bond, MYE filed bankruptcy, and Yates formed and started operating Worldwide, but still with no bond. The DC court started contempt proceedings, and Yates filed personal bankruptcy. Worldwide then went to federal court seeking to enjoin the DC court from enforcing its surety bond requirement on a federally licensed interstate motor carrier (claiming that federal statutes governing interstate truckers preempt potentially conflicting state law). The Court of Appeals for the DC Circuit affirmed the district court's dismissal based on lack of standing, after which a DC local court found Yates in contempt and barred him from operating a moving company in the district altogether.

The U.S. Supreme Court has held that the federal judiciary should not enjoin pending state proceedings except in extraordinary circumstances. The DC superior court proceedings were not so extraordinary. Here in particular, local interests were particularly high – a point that should always be considered. Moreover, the local court was fully empowered to adjudicate Worldwide's preemption issue. Add to that the fact that federal statutes Worldwide cited, such as Carmack and other provisions of the

Interstate Commerce Commission Termination Act, have no bearing on issues before the DC local court. Worldwide might have to operate under new ownership, if it does so at all.

NMFC members have no cause of action against classification poachers

Fulfillment Services, Inc. v. United Parcel Service, Inc., 2006 WL 1061892 (D. Ariz. 2006)

The National Motor Freight Classification 100 series is a collectively-made schedule of freight terms that NMFC-member carriers adhere to with statute-blessed (49 USC § 13703) antitrust immunity subject to conditions governing operations. NMFC members alleged that United Parcel Service (UPS) had been quoting NMFC rates to its shippers without being a member, thereby violating antitrust laws.

UPS, an NMFC participant until 1956, apparently continued referring its shippers to the NMFC classification for class ratings of their freight to determine if it qualified for Hundredweight Service Rates until July 2004. The plaintiffs, hoping to obtain class action certification, felt UPS was unjustly enriched by its utilization of the NMFC classification, and sought damages measured either by the freight charges UPS collected or, alternatively, the difference between NMFC-generated rates and UPS' last legally applicable rates.

If UPS undertook these alleged practices, it might very well have violated antitrust and motor carrier federal law. The question, however, was whether NMFC members get a private cause of action under § 13703(F) pursuant to § 14704(a)(2), the latter statute being designed for that purpose, to recover for such no-no's. The District of Arizona concluded they do not. Those statutes contemplated mandatory tariff filing as a premise for protecting the shipping public. Tariff filing has gone the way of the dinosaur in favor of a deregulated shipping environment wherein parties take up their transportation business quarrels like most other contract disputes. Thus, the statute's current purpose would not be served (indeed, it would be undermined), by a private cause of action here.

The Motor Carrier Act will continue to provide a private cause of action where it's designed to do so. This just isn't one of those cases.

Jury not free to award recovery amount other than uncontested freight value

Accu-Spec Electronic Services v. Central Transport International, et al, 2006 WL 995735 (W.D. Pa. 2006)

Shipper Accu-Spec sued carrier Central Transport and freight forwarder Logistics Plus when its cargo of expensive x-ray equipment arrived damaged. The shipper presented evidence that the freight's repair costs and other specified incidentals were \$45,371.02. Accu-Spec asked for another \$2,150.82 in costs it incurred to fly a representative of the machine's manufacturer for inspection, for a total of \$47,521.84. Liability appears to have been clear from the get-go.

For reasons not clear in the opinion, a jury awarded the plaintiff shipper \$21,000 from both the forwarder and carrier based on the freight damage and incidentals. The jury awarded specifically nothing for the representative's inspection expenses (apparently concluding that claim was unreasonable). Accu-Spec brought a motion to enter judgment as a matter of law in the amount of \$45,371.02 or, alternatively, a new trial.

In granting the motion, the Western District of Pennsylvania found that \$44,391.02 in special damages were substantiated by uncontroverted evidence of the exact costs of the freight's repair and incidentals. The jury had no option but to award at least that amount. The rep's costs and other portions of the claim were within the jury's discretion (it could find them unreasonable), and need not have been awarded. The motion to enter judgment in the substantiated amount was granted. Making its position clear, the court also granted the motion for new trial in the event an appeals court reversed the modified award.

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