

SURF & TURF

LEGAL NEWS IN TRANSPORTATION & LOGISTICS

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

June 2007

TAKING OUT REGULATED TRANSPORTATION'S LAST HOLDOUT: STB NIXES MOTOR CARRIER BUREAUS' ANTITRUST IMMUNITY

By Steve Block

Decades ago, carriers of all modes fought for and obtained antitrust immunity. A number of factors went into the reasoning, but immunity from collective rate setting was accepted as a necessary set-off from the mandatory "one-price-fits-all" price setting scheme imposed by common carriage. Through the 1970s, carriers in the transportation industry's ocean and trucking modes were on perilous waters and shaky ground respectively. World economics stressed international trade's primary locomotive, and railroad transit's domination of surface carriage called trucking's future into question. Put simply, we had to take care of the carriers.

Many consider carrier antitrust immunity the last holdout of regulated transportation, sort of a leftover vestige of an obsolete agenda designed to ensure all shippers have free and equal access to the transportation that is essential to competition. Among other economic considerations, we didn't want larger and more powerful shippers getting preferential shipping deals from carriers, thereby thwarting smaller and newer shippers' capacity to enter markets and compete. But to make it work, we had to grant carriers their own economic Ace-in-the-Hole, i.e., the ability to collectively influence - some would say manipulate - the market for transportation commodities.

The system's benefits included establishment of freight classification systems, most notably the one administered by the National Classification Committee (NCC), that allow most motor carriers (including NCC) currently operate in the States.

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They establish freight commodity classifications and rates. Ratings are ascribed to different types and their customers to easily research issues surrounding transit of freight. Eleven STB-approved motor carrier "bureaus" of cargo; the higher the rating, the more each bureau carrier will charge to haul it. Industry factors such as increasing fuel and insurance costs are added into the group's freight charges systematically. A shipper or its forwarder can see what is entailed by - and ultimately how much will be charged for - shipment of various categories of freight, at what times of year, between what points, etc. Carriers essentially have gotten together and blessed centralized databases for this purpose.

Well, all of this is about to change, at least for the motor carrier industry. All modes of transportation have been deregulated - albeit in different ways and to different extents - and common carriage is no longer mandated. Over the past ten years, most motor carriage has been accomplished by contract, with parties free to negotiate the specifics of their deals. Taking deregulation of the transportation industry "the next step," the U.S. Surface Transportation Board (STB), on its own initiative, recently eradicated the antitrust immunity that enables NCC and other rate setting bureaus to classify cargo and set freight rate pricing as a group. By its order dated

Taking out... (Continued)

May 4, 2007 (effective 120 days hence), STB enacted what it feels is Congress' primary policy intent of placing trucking in the realm of ordinary American business.

In its decision, STB explains that railroad transit no longer threatens trucking's stability. Since carrier antitrust immunity was adopted in 1980, the interstate highway infrastructure has been developed substantially, internet communication simplifies information exchange, and modern practices with advanced technology embrace trucks every bit as much as trains. Most importantly, Congress has long made it clear that its primary interest is creation of a market-driven, competition-oriented trucking industry.

STB's decision will allow certain classification activities to continue (these are subject to another federal statute). However, carriers will face the Sherman Act if they classify cargo or set rates as a group. Yes, even classification of freight can get a carrier group in trouble if done in a way leading to collective rate setting. STB heeded the cry of shipper advocacy groups that the "classification process is being used as an indirect form of collective ratemaking and is often manipulated to protect carrier revenues." However, STB's decision does not categorically eliminate freight classification programs.

Needless to say, the bureaus and many of their carrier constituents are upset about the development. In opposing STB's proposed decision, the carrier industry chimed in about the benefits collective rate setting has brought us (the decision's appendix contains a nice summary of carrier and bureau arguments). They point out that carriers are free to discount collectively-set rates (and often do), demonstrating that competition isn't adversely impacted. But STB countered this and similar arguments by professing concern about smaller or "disadvantaged" shippers, i.e., those not in a position to negotiate better deals. Any other benefits of the current system don't need antitrust immunity to continue or be effective. STB also didn't feel the "truth-in-rates" approach, adopted some years ago to allow

consumers access to information producing set rates, was doing the trick.

Can eradication of ocean carrier antitrust immunity be far off? Congress and certain shipper groups have made noise about subjecting steamship lines to the same rules everyone else plays by since the Ocean Shipping Reform Act was enacted in 1999. While international transportation is subject to different concepts and concerns, Uncle Sam pretty much protects only foreign entities by granting immunity to ocean carriers. We might see the salty side of transportation reconsider its position on this point shortly.

As STB's lengthy decision demonstrates, this politically charged issue is subject to strong pro and con arguments. Because the industry has operated so long in an artificial economic environment (who can remember life before NCC?), it's somewhere between exciting and scary to ponder where this development will take us. Without doubt, however, huge changes are afoot from the perspectives of shippers, carriers and intermediaries operating in the trucking industry.

Ref: Surface Transportation Board Decision, STB Ex Parte No. 656 (Sub-No 1), "Investigation into the Practices of the National Classification Committee," available at <http://www.nitl.org/STBExparte656.pdf>.



THE PROBLEM WITH DAISY CHAINS: THE NUMBER OF INTERMEDIARIES IS DIRECTLY PROPORTIONAL TO DIFFICULTY IN DETERMINING LIABILITY

By Steve Block

A recent decision from California's state Court of Appeals demonstrates some legal complexities that are wont to result when several transportation intermediaries line up to execute a transaction. The courts don't go through much analysis of the parties' legal relationships, but we can still see how the liability analysis gets thrown for a loop. The case also shows that fault for loss during storage of freight is subject to interpretation.

Danmar is a non-vessel operating common carrier ("NVOCC") that operates through freight forwarder Danzas (as its "agent") to handle the forwarding and customs brokerage aspects of designated hauls. Shipper Sensory Science Corporation engaged the two to arrange transport of a cargo of VCRs from Korea to Los Angeles. The freight would be received and held by Gateway Transportation West ("Gateway") in its L.A. warehouse pending distribution orders from Sensory Science.

Danzas issued a through bill of lading from Korea to Gateway's warehouse. Danzas engaged Gateway, apparently in the capacity of a transportation broker, to arrange the container of VCRs' drayage from the port of Los Angeles to Gateway's facility. Gateway, in turn, hired motor carrier Container Connection of Southern California for that purpose. If you had to break out pen and paper to get this straight, you're not the only one.

There was no written contract between Danzas and Gateway, but the two did operate under a series of standard operating procedures that prohibited Gateway from storing freight anywhere but its own warehouse, and from accepting freight unless it could store it. When CCSC arrived to deliver the cargo, Gateway

refused it on the ground it didn't have sufficient space to accommodate it. Consequently, the transportation broker/distributor instructed CCSC to store the container at its own yard. It sounds like CCSC reluctantly agreed to do so, pointing out to Gateway that it would have to park the container outside its yard; that it would charge Gateway for the storage; and that it would issue a warehouse receipt (containing a warehouseman's limitation of liability clause) for the service. Gateway gave CCSC the nod. Of course, the container - worth some 383 grand - was stolen.

Danzas settled with Sensory Science, starting a melee of half a dozen parties urging legal positions based on liability (primary, secondary and otherwise); legal designation of status; limitation of liability; insurance coverage; and probably other issues that didn't make it into the opinion. Was Danmar liable for the whole shooting match? After all, it did issue a through bill of lading and ostensibly failed to monitor its "agent" Danzas. Should Danzas have settled with Sensory Science when no one's liability had been established? In other words, was it trying to recoup an unwarranted payment? Was trucker CCSC's warehouse receipt valid? Wasn't it Gateway who violated Danzas' agreed procedures, and purportedly didn't do much to make sure the cargo was taken care of?

The parties presented their cases under the principles of equitable indemnity, of which there are two varieties. Implied contractual indemnity can result from breach of a contract provision putting one party in the position of liability to another. The breaching party can get stuck holding the bag. That wasn't the case here, at least per the trial court's ruling. Rather, the court based its decision on tort-based equitable indemnity, which derives from duties of care that two or more parties violate and for which they are jointly and severally liable. The court divvied up liability 45% to CCSC, 45% to Gateway, and 10% to Danzas.

The problem... (Continued)

CCSC appealed on several grounds, including its treatment by the trial court as a motor carrier (instead of a warehouseman); CCSC's warehouse receipt being ruled ineffective in limiting its liability to relative peanuts; the fact that Danzas' payment to the shipper "without regard to legal liability" (i.e., Danzas ostensibly paid off Sensory Science to preserve a business relationship) should not be recoverable from a third party based on equitable indemnity; and perhaps most significantly, evidence showed that, hey, CCSC wasn't negligent in causing the loss.

It would have been interesting to see how the Court of Appeals would have ruled on these various points. However, in reversing the trial court in CCSC's favor, the Court of Appeals reached only that last point. CCSC wasn't negligent. It really had no choice but to accept the freight under circumstances it made clear were undesirable. CCSC didn't know the freight consisted of "a highly stolen cargo." True, CCSC didn't have guards, guard dogs, surveillance equipment, etc., but those aren't essential to a showing compliance with the requisite duty of care.

The opinion's drafting makes the Court of Appeals' ruling sound a bit overreaching into a trial court's fact determining province. Nonetheless, this case might serve as effective support for future trucker or warehouseman defendants caught in similar predicaments. It also shows how the number of players increase the complexity of liability exponentially, and how the paperwork's importance grows with the number of players.

Ref: *Danzas AEI Intercontinental, et al, v. Container Connection of Southern California, Inc.*, 2007 WL 1559813 (Cal App. 2 Dist).

HOT RECENT CASES IN MOTOR CARRIER LAW

By Steve Block

Separate communications and documents aren't enough: you gotta check the box!
Walters v. DHL Express, 2007 WL 1431869 (C.D. Ill. 2007)

Plaintiff Walters arranged for his ex-wife, Choate, to ship five boxes of personal stuff (CDs, DVDs, clothing, papers, photos) interstate with DHL. Choate signed a DHL bill of lading that limited the carrier's liability to \$100 per package or actual value unless a box was checked next to "shipment value protection" and a dollar amount inserted. Choate didn't check the box.

But before DHL fetched the freight, Walters called DHL requesting insurance coverage. He was told to speak with the DHL driver when he arrived, which Walters did, whereupon he was told to fax an authorization letter to DHL requesting coverage. Again Walters followed instructions to the T. Of course, the freight was delivered damaged and short.

DHL sought to limit its liability, and moved for summary judgment. The Central District of Illinois federal court agreed, and dismissed the claim. The bill of lading's integration clause rendered Walters' calls and fax inadmissible parole evidence, an argument Walters - for reasons unknown - declined to even address in his briefing. The court further found that a fax cannot modify a bill of lading that contains all essential elements of a contract of carriage. Choate was Walter's fully authorized agent; the shipper could have protected himself by instructing her to check the box. Lastly, the shipper could have used DHL's automated system to request full coverage, an option he failed to take - again for unknown reasons.

Hot Recent Cases (continued)

Consumer fraud claim doesn't trump Carmack's dominion, and booking agents aren't liable for freight damage.

Berryman v. Wheaton Van Lines, Inc., 2007 WL 1296762 (D. N.J. 2007)

Shipper Berryman sued carrier Wheaton when her household goods arrived damaged after interstate transit. She booked the haul through Davi & Valenti Movers (DVM), and paid an additional amount for insurance coverage and selected a full replacement value liability option on Wheaton's bill of lading. She originally filed in New Jersey state court, but the carrier removed the matter to the Garden State's federal court, and soon moved to dismiss the shipper's state and common law claims.

These included the usual mispleaded allegations, such as breach of contract, breach of the covenant of fair dealing, and negligent infliction of emotional distress. Tucked in the list was a claim for breach of New Jersey's Consumer Fraud Act. Berryman apparently saw the light, and fought only to keep the latter state-law allegation alive. Drawing on decisions that preserve causes of action independent from the actual cargo loss, the plaintiff shipper urged that Carmack doesn't preempt a consumer fraud claim based on failure to procure or provide insurance. The court looked to a number of other decisions (and the absence of any counter-authority), to conclude that this type claim, which is encompassed by bill of lading terms, still falls under Carmack's dominion.

No biggie for plaintiffs' claims against Wheaton; she can just refile alleging Carmack. But she'd also sued DVM. The court dismissed claims against the booking agent with prejudice, finding it to have operated for a disclosed principal and had not entered into the contract on its own behalf. Moreover, Carmack says carriers are responsible for the acts of their agents.

Dealer's choice: a plaintiff shipper's selection of venue holds when two locales are proper. *Lamex Foods, Inc. v. Blakeman Transportation, Inc.*, 2007 WL 1456010 (S.D. Tex 2007)

Minnesota-based shipper Lamex booked transit of a cargo of pork loin ribs from Houston to Grand Prairie, Texas through Fort Worth broker Blakeman with carrier Morning Express. No bill of lading or other shipping documentation was issued. The spare ribs were stolen in Houston, and the shipper sought to recover some 129 grand. Lamex sued in the Southern District of Texas, which sits in Houston.

Blakeman sought to transfer the matter to the Northern District of Texas. That court has venue over Grand Prairie (where the freight was supposed to be delivered), was where most witnesses and documents were located, and was the venue specified in Blakeman's Terms and Conditions (which sit quietly in some file cabinet).

Going through a nice summary of venue issues in the transportation context, the court denied Blakeman's motion to transfer. First of all, the court noted, the absence of shipping documentation incorporating Blakeman's Terms and Conditions renders their venue selection clause irrelevant. The court did note that such clauses typically are enforceable.

Public and private factors determine whether a plaintiff's venue selection is proper. Convenient access to evidence and witnesses, availability of compulsory process, travel costs, other practicality issues are private factors. The defendants urged persuasively that most convenience and accessibility points supported North District of Texas venue, and the difficulty imposed on a Minnesota company in either venue was equal. But the court found that defendants hadn't demonstrated that "all relevant witnesses" were in northern Texas. Moreover, there were few crucial documents (e.g., no shipping documentation), and what there was could be sent by email or discussed by phone.

Hot Recent Cases (continued)

Public factors include such concerns as court dockets, local interest in the subject matter, familiarity of the forum with applicable law, and conflict of laws issues. The court found the two subject venues equal in that analysis.

Pleading essentials of a Carmack claim isn't necessary.

Atlantic Mutual Insurance Co. v. ACH Food companies, Inc., et al, 2007 WL 1668068 (C.D. Ill. 2007)

Shipper Victory Wholesale Grocers purchased a cargo of corn oil for shipment from Illinois to its facility in Colorado. The supplier, ACH Food Companies, retained forwarder Arnold Logistics, and Victory engaged motor carrier Jones Trucking. The oil was stolen, and Victory's subrogated insurer filed suit against Arnold Logistics and Jones.

Plaintiff alleged Carmack liability against both defendants, but apparently didn't allege in its complaint that Arnold Logistics was a freight forwarder or carrier, or that the bill of lading identified Victory as the buyer, seller or other interested party. The court agreed these elements were necessary to a successful Carmack action (and that a plaintiff must ultimately prove them), but couldn't find any basis to dismiss a claim as defective for failure to specifically plead them. Thus, while many a complaint has been nixed for failure to allege Carmack, at least one court has confirmed that nothing beyond an allegation of Carmack jurisdiction is necessary.

A package left on a deliverer's front porch trips up the FAAAA.

Kuehne v. United Parcel Service, Inc., 2007 WL 1828802 (Ind. App. 2007)

Pam Kuehne mail ordered a home spa, which UPS delivered and left on her front porch. Ms. Kuehne was unaware of the delivery, and tripped over the package when she left her home. She sued UPS for the resulting personal injuries in Indiana state court, alleging state and common law theories of recovery.

UPS sought to dismiss Ms. Kuehne's claims, asserting that the Federal Aviation Administration Authorization Act and Carmack Amendment preempted the state-law claims. The court denied UPS' dispositive motion.

True, FAAAA has been held to have broad preemptive effect inasmuch as it specifically trumps state laws that relate to "price, route or servicing of motor carriers." But previous decisions involved freight loss or allegations that would affect the general processing of transportation. Here, we had a personal injury claim - traditionally the realm of state law - on an issue that would impact only how a carrier leaves freight. Unlike other areas in which FAAAA preemption has been enforced, that statute does not provide personal injury claimants a remedy. Thus, the court could not conclude that Congress meant to make a federal case out of this type claim.

Whether mandatory insurance and failure to provide equipment violates the Norris-LaGuardia Act is a question of fact.

Owner-Operator Independent Drivers Association v. Supervalu, Inc., 2007 WL 1576120 (D.Minn. 2007)

The Norris-LaGuardia Act, 49 USC 14103, prohibits requiring or coercing truckers to allow others to unload their trucks when they want to do so themselves. Supervalu, a grocery retailer, implemented a program requiring its freight to be palletized, and mandated that truckers carry insurance higher than the statutory minimum if they wanted to "lump," or unload, their trailers. When carriers arrived at Supervalu's docks, they were not provided specialized equipment needed to lump. Supervalu had contracted exclusively with a service to provide lumping at its docks.

Truckers, backed by OOIDA, saw this as a violation of Norris-LaGuardia, and sued to enjoin the practice. Both sides moved for summary judgment. The court addressed the motions piecemeal.

Hot Recent Cases (continued)

The insurance coverage requirement is not *ipso facto* a violation of the act. Questions of fact remain as to whether the requirement was reasonable and in keeping with industry standards. In other words, higher risk at this shipper's facility might justify more insurance. Supervalu nixed the higher coverage condition before litigation began, but a violation still could be found. Similarly, whether or not Supervalu's failure to provide offloading equipment may or may not be reasonable under the circumstances, and only the trier of fact can make the call.

The court agreed with Supervalu that nothing suggested the shipper would "harass or retaliate against" the drivers, and refused to issue preliminary injunctive relief on that ground. The court tossed out OOIDA's claims for monetary restitution, finding

Contact Information

For comments or additional information on the articles in this issue please contact the authors either by phone at (206) 292-9988 or by email.

Steve Block
sblock@bpmlaw.com

Dana Henderson
dhenderson@bpmlaw.com

Stacia Hofmann
shofmann@bpmlaw.com

Jody Reich
jreich@bpmlaw.com

For additional articles or background information on each attorney please see the Betts Transportation & Logistics' Web page at bpmlaw.com/tl.