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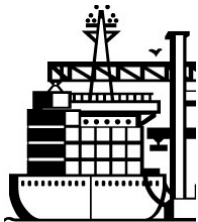
SURF & TURF

Legal News in Transportation & Logistics

A bimonthly newsletter published by the BPM Transportation & Logistics practice area

August 2005

1. **NVOCC Service Contracting: the Intermediary Industry Seeks Full Equality in Contractual Freedom** BY STEVEN W. BLOCK
2. **Urban Hazmat Rail Transit: Balancing Risk and Industrial Necessity** BY STEVEN W. BLOCK
4. **Hot Recent Cases in Motor Carrier Law** BY STEVEN W. BLOCK
7. **Contact Information**



NVOCC Service Contracting: the Intermediary Industry Seeks Full Equality in Contractual Freedom

BY STEVEN W. BLOCK

The February 2005 *Legal Lookout* article proclaimed that the wait was over; that non-vessel operating common carriers had (virtually) been set free; that the shackles of (most) anticompetitive restrictions the Ocean Shipping Reform Act of 1998 (OSRA) had left on NVOCCs were unlocked; and that the species of ocean transportation intermediary which operates as carriers to actual shippers and shippers to steamship lines could now (pretty much) operate like everyone else in the liberated age of deregulated international carriage.

Well, folks, it now appears we're getting close to nixing those parenthetical qualifiers which for some six months now have left ocean-shipping waters somewhat unsmooth. Per a January 19, 2005 U.S. Federal Maritime Commission (FMC) decision – issued after prolonged and intensive scrutiny by government, law and industry concerns – NVOCCs are now able to enter into volume and time-oriented service contracts with ocean carriers. This

allows the intermediaries to enjoy the same market forces and economies of scale other shipping players have capitalized on for over six years. NVOCC participation in custom-made service contracts, labeled in the regs as “NVOCC Service Agreements” or “NSAs,” has been a bit slow in the uptake, as intermediaries haven't yet hit their stride in operating contractually (as opposed to tariff-based common carriage). While NVOCC-shipper contractual relationships may never reach the 90-95% level of shipper-carrier service contracting, experts opine that we're still in the early stages, and that NSAs will become normative in coming years.

But FMC's emancipation of NVOCCs wasn't complete, and smaller intermediaries currently are making some persuasive arguments before the U.S. District Court for the District of Columbia that a remaining inequity of yesteryear be lifted. Under the revised regs, shippers' associations whose memberships include an NVOCC may not enter into NSAs with NVOCCs. This, urge the aggrieved shippers' associations, isn't fair.

Shippers' associations are non-profit shipper pools designed to give their members bargaining power in the volume-hungry world of ocean transportation. They often open their doors to NVOCCs who can increase their volumes – and therefore their bargaining leverage – significantly. In carving out this exception, FMC attempted to avoid an antitrust implication suggested by an earlier federal court

decision that held NVOCC-to-NVOCC agreements might be antitrust-exempt as defined by the Shipping Act of 1984 (which OSRA attaches to and modifies). The problem arises from legislative history that shows Congress clearly rejected NVOCC antitrust immunity as an OSRA consideration. If an NVOCC could contract with another NVOCC simply by joining a shippers' association, FMC reasoned, then it essentially might be skirting Congress' antitrust restrictions. This conceptual ambiguity results from the fact that NVOCCs by definition are concurrently carriers and shippers.

Plaintiff the American Institute for Shippers' Associations ("AISA"), which is comprised of smaller shipping co-ops and is supported by other shippers' groups, feels that the earlier precedent is based on distinguishing premises. More importantly, AISA points to a very recent federal court decision out of the U.S. Court of Appeals for the Fourth Circuit (issued *after* promulgation of regs allowing NVOCCs to enter into NSAs) that eviscerates the notion that inter-NVOCC contracts produce antitrust immunity under relevant circumstances.

If you ask AISA and its allies, they'll point out that (1) FMC has long recognized that it is powerless to regulate shippers' association membership; (2) the Shipping Act defines the term "shipper" to include NVOCCs, thereby precluding FMC from tinkering with the concept; (3) mechanisms remain in the more tightly-managed NSA regs to avoid the negative implications of price fixing antitrust laws are designed to combat; (4) the current regulatory regime is unfairly biased against smaller NVOCCs who have greater need for leveraged bargaining power; and (5) explicit Congressional intent of market force control would be furthered by elimination of the restriction. And hey, an NVOCC member wouldn't be an actual party to a shippers' association's NSA, would it? An individual member, at least theoretically, doesn't control the terms of an association's NSA. So what is FMC worried about?

What industry concerns might be harmed by NSAs between carriers and shippers' associations containing NVOCC members? Certainly associations that don't have NVOCCs in their ranks might like to avoid the added competition, and some carriers have always been nervous about the monopsony that might result from their customers having too much bargaining power. Perhaps larger NVOCCs might like to see smaller intermediaries hampered by inability to effectively contract with carriers. But from legal, regulatory and public-policy standpoints, antitrust concerns don't trump the industry benefits

transportation players and the shipping consumer would derive by shippers' associations contracting freely with carriers.

Given the complexities of shipping law and economics, it isn't surprising that years must pass before all of OSRA's kinks are attended to, much less ironed out. Should AISA succeed in its suit against FMC, the evolutionary process of shipping regulation will be moving in the right direction.

Ref: American Institute for Shippers' Associations v. Federal Maritime Commission, pending in the U.S. Court of Appeals for the District of Columbia Circuit under Docket No. 05-1036; and *Gosselin v. United States*, 2005 U.S. App. LEXIS 11144 (4th Cir. 2005).

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Urban Hazmat Rail Transit: Balancing Risk and Industrial Necessity

BY STEVEN W. BLOCK

Railroads regularly transport various hazardous materials (hazmats) through urban areas. As common carriers, they're actually required by law to do so whenever hazmat shippers make a reasonable service request. Recently, a number of city governments have expressed concern about terrorist threats hazmat-laden trains invite. They're afraid an attack on one of these trains could result in large-scale contamination that might devastate urban areas.

The District of Columbia enacted an ordinance that would prohibit trains from hauling recognized hazmats, as well as the railroad cars designed for such freight, within 2.2 miles of the U.S. Capitol. DC felt that U.S. Department of Transportation (DOT) regulatory requirements didn't do the trick in protecting against a hazmat disaster, and that DC didn't have any real chance of getting DOT to change its tune. Some 8,500 rail cars of toxic chemicals go through DC each year. One government study showed that a terrorist attack on a train hauling certain hazmats could kill 100,000 people lounging on the National Mall in half an hour.

Earlier this year, railroad CSX Transportation instigated legal action in the U.S. District Court for the District of Columbia which is fascinating to transportation regulatory lawyers, but confusing, irritating and perhaps boring to most everyone else. The issue, however, is of vital importance to America's industrial transportation infrastructure and internal security system.

CSX, which owns the tracks that run through and around Washington, asked the court to put the quietus on DC's hazmat ban. What's a choo-choo to do, CSX asked, when one set of federal laws requires it to do one thing, but a city ordinance says something else? Besides, rerouting train tracks would be difficult and cost prohibitive, forcing commerce to suffer significantly as a whole.

The district court didn't buy CSX's arguments. DC's ordinance, as originally enacted, was only temporary until Congressional review and new federal legislation addressing urban hazmat transit could be adopted. The court noted that CSX could simply pass along rerouting costs to its customers, and that other modes of transportation probably would undercut CSX's hazmat business anyway. The judge's heart was in the right place; he offered to broker a settlement deal between DC and CSX, after publicly asking President Bush to get the feds to share security information with DC's reps so that they could haggle out the issues productively.

No one was happy with the court's ruling, and up it went to the U.S. Court of Appeals for the District of Columbia Circuit. The Court of Appeals, to most of the railroad industry's delight, reversed the district court, stopping DC's hazmat ban in its tracks - at least for the time being.

The decision isn't quite one on the merits. Rather, it's a procedurally required determination that CSX "likely will prevail" after the district court takes another look at the issues subject to the appellate pronouncement. The court ruled that this is a federal regulatory issue, one which should be analyzed by federal transportation specialists charged with taking care of the public. DC should take its concerns to DOT and Congress, not unilaterally enact law that conflicts with federal regs. DC's ordinance has been banned pending upcoming proceedings.

The Court of Appeals also bought the railroad industry's argument that DC's ban, if left unchecked, would prompt a "patchwork" of similar ordinances to crop up all over the country. A number of cities, notably Cleveland and Baltimore, already are moving

forward with similar ordinances. While public safety is a paramount concern, we can't just paralyze U.S. industry. The Association of American Railroads notes that the instance of train mishaps with hazmat contamination repercussions is infinitesimal, and a much smaller threat than that posed by trucks. Because rerouting the entire U.S. track network to accommodate city government concerns isn't realistic, more expensive and riskier trucking likely would replace railroad carriage if bans on urban hazmat transit were upheld. The National Industrial Transportation League notes that transport of hazmats is a component of ensuring safety and national security as well, and that crippling transit of them poses its own risks.

The district court proceedings will be pending for at least several months, and most specialists agree the losing side probably will take the matter to the U.S. Supreme Court. That process might take years, and we're dealing with an issue that could have imminent consequences. Industry players are hoping to get transportation regulatory agencies, such as the Surface Transportation Board, to take jurisdiction over the issue. By whom, how, and to what extent DC's ordinance ultimately will be adjudicated is far from clear.

So while the DC hazmat ban is a fun topic of debate at transportation lawyer cocktail parties, we really need a national policy on this issue ASAP. That policy should be formulated by transportation, security, and legal specialists from government and industry. The court system's adversarial process, refereed by a well-intending but industry-inexperienced judge, is not conducive to serving the public's best interests. The problem solvers should be sitting at a round table.

Ref: *CSX Transportation, Inc. v. Williams*, 406 F.3d 667 (C.A.D.C. 2005)

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Hot Recent Cases in Motor Carrier Law

BY STEVEN W. BLOCK

Carrier isn't its owner-operators' insurer, but must be truthful in leasing

Tayssoun Transportation, Inc. v. Universal Can-Am, Ltd., 2005 WL 1185811 (D. Tex 2005)

Carrier Universal Am-Can, Ltd. ("UACL") entered into a lease with owner-operator Tayssoun, whereby the latter agreed to provide equipment and drivers to the former. The lease provided that UACL would procure cargo insurance for shippers whose freight moved in Tayssoun trucks, although Tayssoun would foot the insurance-premium tab. Tayssoun drivers hauling for UACL got into a number of mishaps causing cargo damage to the tune of 868 grand. UACL refused to pay Tayssoun some 369 grand in commissions, refundable escrows and other entitlements, claiming the cargo claims exceeded the sums owed.

Tayssoun sued UACL in the Southern District of Texas, alleging the carrier had violated various provisions of the Texas Insurance Code when it "sold" the owner operator insurance it didn't provide. Tayssoun also alleged that UACL had violated common carriage rate-charging provisions, and that the owner operator could pursue a private right of action under federal Truth-in-Leasing regs regarding matters at issue.

In a lengthy opinion that will be interesting to those concerned with transportation insurance, the court found that the Texas Insurance Code's provisions were inapplicable because UACL wasn't "in the business of insurance." In other words, UACL wasn't an insurer, and Tayssoun wasn't UACL's insured as contemplated by the statute.

True, the carrier promised to provide insurance to and had collected premiums from Tayssoun. In practice, the carrier remained self insured with insurance coverage available only after a \$1 million deductible. But the court observed that, in drafting the lease, both parties were really concerned about compliance with FMCSA regs mandating carrier insurance coverage. Those same regs bless the variety of coverage UACL had obtained. This finding

compares interestingly with Texas' conclusion a few years ago that intermediaries may be deemed to be in the insurance business.

Tayssoun's rate-charge allegations were misplaced and dismissed because, well, this wasn't common carriage. No tariff was involved.

But federal Truth-in-Leasing regs are applicable, and UACL apparently violated them by not doing what it promised in the lease. UACL urged there was no private right of action under those regs, pointing to ICCTA's specified rights of action which would be duplicative (and potentially time barred). The court disagreed, concluding that the Truth-in-Leasing regs would be meaningless if private parties couldn't sue under them (in light of the ICC's demise). Moreover, House committee reports demonstrated the law was intended to be privately actionable. Summary judgment wasn't appropriate, however, because factual issues remained about Tayssoun's damages.

ICCTA's broad definition of "transportation" deprives carrier of freight charges

Emmert Industrial Corp. v. Artisan Associates, Inc., 2005 WL 913129 (D. Or. 2005)

In May 1996, Artisan Associates, as an agent of General Motors, hired carrier Emmert to move substantial freight from Japan to various points in the U.S. Artisan's contract with Emmert provided that the latter would be the "primary" carrier in a series of related transportation projects spanning several years. Emmert personnel traveled to Japan to arrange complex engineering elements of the carriage, and effected transport of the heavy freight (metal stamping machines weighing over 100,000 lbs.) during subsequent months.

Freight charges for this haul approached \$5 million. Apparently, Artisan's payment to Emmert was some 570 grand short. More apparently, GM wasn't happy with Emmert's services, and directed Artisan to use another carrier for the remaining loads.

For reasons not clear in the opinion, Emmert didn't sue Artisan for some five years. The District of Oregon, at Artisan's urging, noted provisions of the Interstate Commerce Commission Termination Act at 49 USC §14705(a) and (g) that impose an eighteen-month statute of limitations on freight-charge collection actions. Emmert felt its engineering services in Japan were pre-transportation, and therefore weren't subject to ICCTA. On Artisan's

motion for summary judgment (continued to allow Emmert every opportunity to explore and brief the issue), the court dismissed the carriers' claims. "Transportation," as ICCTA defines it, is a broad term which includes, yes, engineering undertaken prior to arranging transit. Emmert also had sought damages related to GM nixing its contract, but the court found the term "primary carrier" insufficient to obligate the shipper to use Emmert exclusively.

Massachusetts may tax passenger traffic, so long as it's the "traffic," and not the "passenger," paying the tab

Jalbert Leasing, Inc., et al v. Massachusetts Port Authority, 2005 WL 1288108 (D. Mass. 2005)

The Massachusetts Port Authority ("Massport"), which runs Boston's Logan Airport, hits passenger bus carriers with a fee (read "tax") for each run a bus makes to and from the airport. As the amount of this fee inched its way north, affected carriers became increasingly distraught. They finally brought their beef to the District of Massachusetts in a matter of first impression that might have reaching implications.

ICCTA provisions at 49 USC §14505 proscribe states from charging a fee or tax on "a passenger" in interstate transit. The carriers felt Massport was doing just that when making them pony up for runs of airport-bound or arriving passengers. The court took a look at the Constitution's Supremacy Clause and the doctrine of "express exemption," both of which the carriers felt illegalized the fees. Finding that the tax's nature was outside the scope of what Congress meant to avoid, the court found it perfectly kosher.

Massport collects the fee not from passengers, nor even on the basis of how many passengers ride busses. Rather, each and every bus pulling to Logan's curb must pay the pot, even if it arrives or leaves empty. True, the costs probably get passed along to passengers, but any number of such state-imposed costs get the same treatment – legally. The statute's language should not be read more broadly to extend a federal preemption.

Relevant provisions of §14505 were designed to legislatively nix a Supreme Court decision that defined the issue precisely. A similar statute regarding airline traffic was ascribed preemptive effect in another case, but that law contained the important verbiage "directly or indirectly," which was missing from §14505. Moreover, the court

"declined the invitation" to import an aviation statute's legislative history into trucking law.

The court recognizes, but doesn't deal with, the fact that this decision essentially blesses state toll roads at airports. What else might it mean for revenue-seeking states?

A trial brews in Duluth: district court finds questions of fact regarding intermediary's role in transport

Just Take Action, Inc. v. GST (Americas) Inc., 2005 WL 1080597 (D. Minn. 2005)

Duluth-based shipper Just Take Action, Inc. bought beer fermenter tanks from a brewer in New York, and hired GST to get them to Minnesota. GST engaged carrier Central Transport, Inc. ("CTI") to make the haul. GST apparently issued some sort of bill of lading to the shipper, although it wasn't signed or completely filled out. Just Take Action never had a chance to declare the freight's value. CTI thought GST was its shipper, and its bill of lading to GST incorporated a tariff which limited CTI's liability to peanuts. The tanks arrived damaged, and Just Take Action just filed an action in the District of Minnesota against both transportation companies.

GST and CTI filed concurrent motions for summary judgment. GST claimed it was a broker not liable beyond its own negligence or breach of contract. In an analysis which reveals this court's lack of confidence in transportation law principles, the court denied GST's motion on the ground questions of fact remained as to whether GST was a broker or a "motor carrier." GST quite clearly seems to have been a freight forwarder (subject to virtually the same liability regime as a carrier) under the facts presented, its admitted issuance of a bill of lading being that transportation species' *sine qua non*.

Just Take Action had asked GST to procure "full coverage" for the freight, a service it looks like GST didn't provide. In this regard, the court called GST the shipper's "agent," another conclusion of dubious accuracy. The court found issues of fact sufficient to defeat summary judgment as to the shipper's breach of contract and negligence claims against GST regarding insurance.

Similarly, the court wouldn't let CTI off the hook based on the carrier's limitation of liability. Issues of fact remain as to whether Just Take Action got adequate opportunity to declare its freight's value.

This presupposes, of course, that GST was a broker (or might have been), and that CTI's shipper was Just Take Action. The court did correctly find that Carmack preempted state and common law claims against the carrier.

The Ninth Circuit reads attorney-fee statute literally, and therefore (too?) broadly

Campbell v. Allied Van Lines, et al, 2005 WL 1331224 (9th Cir. 2005)

Household goods shippers the Campbells hired a couple of carriers to move their stuff interstate. It arrived damaged. Without invoking the arbitration provisions of 49 USC 14708's "Dispute settlement program for household goods carriers," the Campbells took the carriers to court. A jury awarded them the value of their damaged property and emotional damages. The district court tacked on another 15 grand in attorneys' fees pursuant to the statute that was, uh, not exercised by the shippers.

The carriers appealed the attorney-fee award, urging that it is designed only for those shippers who bow to Congress' encouragement of less burdensome arbitration. A majority on a Ninth Circuit appellate panel disagreed, and affirmed the fee award. Nothing in §14708's language says that attorneys' fees are awardable only if arbitration is undertaken. Per the court's reasoning, the statutory language merely prevents unsuccessful shippers from recovering their litigation costs during arbitration. The "plain meaning" rule mandates that a statute's precise language cannot be ignored. Hmmm.

A lively and persuasive dissent almost audibly retorts to the majority, "Come on!" Labeling the majority's approach "unnatural literalism," the dissent urges that Congress could not possibly have intended §14708 to grant household shippers unfettered entitlement to attorneys' fees. Though perhaps a bit imprecisely worded, the statute is designed to foster arbitration. It would be unreasonable to assume Congress meant to impose fee awards for court actions in this context.

This precedent should be borne in mind by counsel and litigants to household goods claims, especially in the Ninth Circuit's western states.

Maine law affecting interstate delivery of tobacco products goes up in smoke

New Hampshire Motor Transport Association, et al v. Rowe, 2005 WL 1319540 2005 (D. Me. 2005)

Maine, justifiably concerned about an increase in its teenagers' cigarette smoking, sought to limit underage access to stogies via the internet. Apparently, youngsters in Maine were purchasing cigarettes on line for home delivery, thereby skirting age verification by local retailers. Maine enacted a statute that imposed a number of requirements on motor carriers delivering tobacco products into the Pine Tree State. A number of trucking associations banded together and sued, seeking to have the new law eradicated as violative of the Federal Aviation Administration Authorization Act of 1994 (the "FAAA"). The plaintiffs pointed to the FAAA's preemption of state laws that regulate interstate commerce.

Maine's statute would require delivering carriers to check for packages to see if they contained cigarettes, and learn the age of any tobacco purchaser. It also imposed a number of other requirements on carriers and tobacco product sellers before shipping products into the state.

The District of Maine initially disfavored the claim, focusing on leeway FAAA grants states on enforcing contraband laws, as well as the statute's general good intentions. But in a recent decision, the court reversed course, and struck down two of the statute's three sections. FAAA's preemption is broad, prohibiting states from enacting any law that would be "related to a price, route, or service" of a motor carrier in interstate transit.

The court considered a number of U.S. Supreme Court and lower federal court decisions, noting the broad interpretation ascribed to various FAAA terms when applied to language similar to the statute's. Recognizing the impediments interstate transportation would encounter if states enacted differing requirements, the court ruled that Maine may not require carriers to verify qualifying specifics of a consignee. Forcing retailers to use only carriers that offer certain services is also verboten. Retailers may be required, however, to verify a purchaser's age before effecting a sale.

As demonstrated by this well-thought-out opinion, transportation deregulation has not supplanted the need for uniformity.

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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 using:

Steven W. Block	sblock@bpmlaw.com
Dana A. Henderson	dhenderson@bpmlaw.com
Maury A. Kroontje	mkroontje@bpmlaw.com
Jody K. Reich	jreich@bpmlaw.com

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