



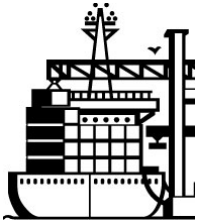
# SURF & TURF

*Legal News in Transportation & Logistics*

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

*September 2003*

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## **Eradication of NVOCC Tariff Requirements? OTIs Pound on the FMC's Door.**

BY STEVEN W. BLOCK

Here come our friends in the middle! Yes, ocean transportation intermediaries (OTIs) have had quite enough of the "deregulation" purportedly graced by the Ocean Shipping Reform Act (OSRA) four years ago. If this is the era of deregulated shipping, ask OTIs, why are we more controlled now than we were four years ago?

It's really the non-vessel operating common carrier (NVOCC) segment of the OTI industry at issue here – those "carriers to shippers and shippers to carriers" who buy up space on vessels and resell it to their own customers. OSRA freed the steamship lines from the century-old yoke of virtually mandatory common carriage, the tariff system whereby carriers had to offer "one price fits all" freight rates to shippers regardless of their volumes and desirability as long-term partners. Remember it?

Now, the vast majority of ocean shipping contracts are tailor made to the parties' particular circumstances, and are legally kept under the vest. OSRA's nixing of "me-too" rights – empowering any shipper to demand the same terms a carrier has given another customer – removed another huge road block to customized service contracts.

Word on the waterfront is that NVOCCs missed the OSRA boat. The OTI industry may have thought OSRA would never pass, and intermediaries didn't do such a good job protecting their interests during the half decade of horse trading prior to OSRA's passage. In any event, NVOCCs remain largely subject to mandatory common carriage in their customer relationships. They live and die by the tariff. Any separate deals struck with OTI customers must be aired to the public, and are subject to other shippers applying index fingers to sternums and saying, "me too."

When President Clinton signed OSRA into law on October 14, 1998, the jaws of some 1,000 National Customs Brokers and Forwarders Association (NCBFAA) members involved in NVOCC operations simultaneously dropped. The new law's passage also precipitated a number of OTI efforts designed to mitigate OSRA's negative impacts on intermediaries. Some headway was made on such matters as OTI ability to form shippers associations.

But the root of the problem remains firmly imbedded in OSRA's statutory soil: NVOCCs still must operate pursuant to tariffs that are expensive and an administrative pain in the neck to deal with. Operationally, many NVOCCs have kept within the strict letter of the law simply by modifying their tariffs *ad hoc* to reflect essentially customized agreements with individual shippers. It's arguably become a silly (and costly) game intermediaries have to play.

Well, NCBFAA has stepped up to the plate, asking the U.S. Federal Maritime Commission (FMC) to even the playing field between NVOCCs and actual carriers. NCBFAA recently petitioned the FMC to issue a new reg abolishing NVOCC tariff requirements. Alternatively, the intermediary organization asks the feds to allow NVOCCs to publish "range rates" in their tariffs. These would include service descriptions and two rates – a ceiling and a floor between which a customer's actual price would be negotiated.

In its petition, NCBFAA makes largely historical and pragmatic arguments, pointing out how the tariff system is antiquated. Originally designed to counter ocean carriers' antitrust immunity and to prevent them from discriminatorily getting in bed with certain shippers (thereby imposing business hardship on others), a mandatory tariff system for OTIs never made sense. OTIs don't hold Sherman Act get-out-of-jail-free cards, and can't keep carriers from contracting with any class of shippers.

Shippers hardly ever look to OTI tariffs anyway, preferring to shop around by phone, fax or e-mail until the best deal is quoted. The services intermediaries provide usually extend to numerous aspects of the transportation process in addition to ocean freight rates. These must be incorporated into the final tab. Thus, OTIs continued adherence to mandatory common carriage is an anomaly that prevents intermediaries from efficiently performing their tasks.

Curiously enough, NCBFAA's petition was filed almost concurrently with a similar one from United Postal Service (UPS). NCBFAA wants clearer skies for the forest of its intermediary membership, while UPS is a huge oak tree seeking sunshine for its own unique circumstances. UPS swallowed transnational intermediary Fritz a few years ago, incorporating the latter's NVOCC activities into UPS' global strategy. The gist of UPS' petition centers around a description of its enormous integrated operations, including plans for future development of its ocean intermediary arm. In making a "virtue of necessity," UPS argues it

cannot proceed efficiently shackled by mandatory common carriage. It portrays itself as one of the big boys of ocean transportation; much like any of the consolidated carriers. Don't worry, FMC, UPS is good for its debts and obligations under service contracts.

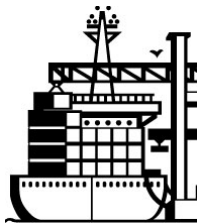
Both petitions cite OSRA provisions empowering the FMC to issue and enforce interpretational regs, which arguably include the right to exempt a class or particular player from certain statutory terms. The rub, not addressed in either petition, is that Congress specifically bounced a proposed statutory term during OSRA's negotiations that would have dropped the NVOCC tariff requirement. It's one thing for a regulatory agency to issue interpretational regs; it's quite another for the FMC to thumb it's nose at Congress by essentially reversing the legislature's decision. The petitioners may put have a different view of that issue, but it's certainly one they'll ultimately have to deal with. The range rate proposal may be procedurally less complex, but it begs the question of whether a range rate is form over substance. Isn't specificity and certainty what a tariff is all about?

Per standard practice, the FMC has requested public commentary on the two petitions (hurry, the periods end this month unless extended). This will be followed by the usual study, investigation, and additional argument from the petitioners (as well as anyone else who speaks up). No question, OTIs bear the biggest downside of OSRA. Given the crucial role intermediaries play in the ocean transportation process, something should be done to fix the situation. Hopefully, these two petitions will, at least, make progress.

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Ref: NCBFAA and United Postal Service petitions to the Federal Maritime Commission, available from the FMC by request at (202) 523-5760.

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## A Crash Course: What Happens When Vessels Hit Things

BY STEVEN W. BLOCK

A federal district court sitting in the Northern District of Illinois recently decided a case addressing so many points of maritime law, it almost reads like a law school hornbook. That also makes the decision excellent fodder for lawyers who write legal columns.

When two vessels run into each other, it's called a "collision." When a vessel hits a stationary object, "allision" is the legal moniker of choice. In sorting out who gets to pay how much for what, courts treat the two circumstances pretty much the same, although liability presumptions can differ.

### *The Bump. Oops!*

Here, tug *Morgan* was pushing four barges up the Calumet River in Chicago. This tug steered and controlled its tow by affixing them together with a series of winch-driven lines. The barges' direction, as well as their positioning, were controlled by those lines being tightened, slackened or held steady. Apparently, one of *Morgan's* winches was out of kilter, causing it to fail when the tug's captain tried to tighten it up. Consequently, the port-forward barge strayed out of control.

Yes, a City of Chicago-owned bridge was coming up, about 100 feet dead ahead. Despite the bad winch, *Morgan* and her barges appeared to be safely within the bridge's two piers. Besides, the piers' inner faces were designed to withstand occasional bumping by the gunwales of catawampus boats. The cable wires which controlled the bridge's opening and closure ran along the riverbed and up the structure along the piers' inner faces, but they were safely ensconced in recesses. Moreover, a wooden rub rail protected the cables from an unlikely, but possible, direct impact. *Morgan's* captain killed his engines, but thought he had everything under control. Holding his breath as his tug passed under the bridge, the skipper heard no sound of a problem.

Unbeknownst to the *Morgan's* crew, the unsecured barge had struck one of the cables, damaging the bridge's control system to the tune of some 625 grand. The wooden rub rail, noted by the Coast

Guard in the bridge's certification documents, had disintegrated due to lack of maintenance.

### *A tour of three states.*

Maritime law's principles all have catchy little titles. In this case, the court looked at three such doctrines, the Pennsylvania, Oregon and Louisiana Rules, in deciding who was liable for the bridge's repair costs. Incidentally, these doctrines are named after vessels that happened to have state names, not out of some reverence to the Keystone, Beaver and Pelican States.

First stop, Pennsylvania, the namesake of a maritime law doctrine that says, "defendant vessel owner, if you violate a Coast Guard reg or other law designed to prevent a variety of mishap, then your violation is presumed to have caused that mishap." It's not enough to show the reg violation didn't cause the accident; rather, you have the steep burden of proving your infraction *could not* have even contributed to it. That's usually a pretty tough standard, but one *Morgan's* owner met. The tug hadn't run afoul of any navigational rules, and running a vessel with broken winches apparently doesn't cross any regs. Would the Windy City have to prove its case the old-fashioned way, with a preponderance of the evidence that the accident was *Morgan's* fault?

The next rules at play were Louisiana and Oregon. These two work pretty much identically, but in slightly different circumstances. The Oregon Rule provides that if a vessel operating under its own power knocks into a fixed object, then the accident is presumptively the vessel's fault. Hey, that just doesn't happen unless the vessel goofed up somehow. The Louisiana Rule says the same thing, only about drifting vessels. It wasn't clear whether *Morgan* was under power at the time of the allision, but it didn't really matter for purposes at hand. By the way, not all courts administer these rules, at least not in the same ways.

Hoping to avoid near automatic liability, *Morgan's* owner tried to argue the mishap was unavoidable, and therefore not within the Louisiana or Oregon Rule's domain. The court didn't buy it, realizing that thousands of boats had passed under the bridge without incident for half a century under a wide range of conditions. Moreover, the vessel admittedly was running with malfunctioning gear, and apparently could have taken evasive action. Thus, the tug shoulders some of the blame, and therefore at least

some of the tab, without the Windy City having to discern and prove exactly what happened.

The court also addressed admiralty's New-for-Old Rule, which says a liable defendant doesn't have to pay the full costs of replacing the plaintiff's damaged old property with more expensive new stuff. Nothing really suggested the damaged cables, though fifty years old, had deteriorated in value. Also, repair efforts were shown to have been effected economically.

*The Denouement, or How Maritime Law Divvies up Liability in Collision/Allision Cases.*

Just because *Morgan* and her owners are liable by operation of law doesn't mean the bridge's owner isn't culpable. Maritime law embraces the general legal principle of "comparative fault" whereby courts make wrongdoing defendants pay the Piper only to the extent their no-no's justify it. If the plaintiff is also legally in the wrong, any award against the defendant gets docked accordingly. In this case, the court found Chicago equally to blame for the allision for letting the wooden rub rail rot away. True, the rub rail's absence didn't actually cause the allision, but it did turn an otherwise innocuous tap into a big-buck claim. Thus, *Morgan's* owner has to pay only 50% of the bridge's repair tab.

Had the tug suffered damage (it apparently didn't, or at least the owner didn't make an issue of it), half the vessel's repair costs would have been chargeable to Chicago, a sum which would have been deducted from the bridge repair costs in Chicago's ultimate award. That's actually the more typical way these collision/allision cases work out.

Maritime law's inter-working system of industry-specific rules is designed to hold wrongdoers' feet to the fire while ensuring an equitable result. If you're doing something wrong or operating defective equipment, you could lose out even if someone else's blunder brings it to bear.

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Ref: *City of Chicago v. M/V MORGAN*, 248 F.Supp. 759 (N.D. Ill. 2003).

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**Hot Recent Cases  
in Motor Carrier Law**

BY STEPHEN L. DAY  
AND STEVEN W. BLOCK

*We have an interesting development in the long running OOIDA cases, reported faithfully here as they arise. An issue in the first two cases is whether the ICCTA damages provision can be applied to leases existing prior to the creation of the damages provision in ICCTA, and two federal Courts have weighed in on that issue.*

**ICCTA 's damages provision  
isn't impermissibly retroactive**

*OOIDA v. Arctic Express, et al*, 2003 WL 21645754 (S.D. Ohio 2003)

A number of owner operators, upset with their lessor, Arctic Express, about allegedly unrefunded escrow deposits (collected by Arctic for maintenance but not applied), sued the carrier in the U.S. District Court for the Southern District of Ohio. To show federal jurisdiction, they pointed to the Interstate Commerce Termination Act's creation of private rights of action, designed to free Uncle Sam from the burden of attending to every pissant dispute remotely involving a truck. Carrying the drivers' banner was the Owner-Operator Independent Drivers Association.

But at least some of the escrow payments had been collected before ICCTA took effect. Thus, thought the carrier, the ICCTA-created private right of action couldn't apply here. Unless a statute specifically says so (or there are other grounds for inferring it), federal statutes are not assumed to have retroactive effect. Arctic brought a motion seeking dismissal of OOIDA's claim on jurisdictional grounds.

In its opinion, the court goes through a little history lesson about how the Interstate Commerce Commission used to attend to such issues, and how we've seen some revamping in the past eight years of motor carrier regulatory functions. In days past, an aggrieved owner operator couldn't go to the mat with his lessor; he had to get the ICC to do it for him.

But the fact remains a driver always could indeed get recourse for circumstances like those in the Arctic case. All ICCTA did was let drivers step into the ring

directly with their motor carriers. No new substantive rights were created. Thus, Arctic's jurisdictional dispute was form over substance, and its motion was properly denied.

**WAIT, it is, and CANNOT be applied, at least in the 8th Circuit**

*OIDA v. New Prime, Inc.*, 2003 WL 21982912 (8th Cir. 2003)

Two OIDA owner operators sought class certification in an action against carrier New Prime. A trial court denied their application, ruling that ICCTA didn't provide a private right of action for leases that terminated before ICCTA took effect. This OIDA case was based on 49 U.S.C. 14704(a), which hadn't been enacted when the subject leases were made. The court found that, before ICCTA, only the ICC could bring cases to enforce the "Truth in Leasing" regs. This retroactive application isn't permissible and, in this Court's view, the ICCTA private right of action can only be applied to leases entered into after ICCTA's effective date.

The appeals court also agreed with the lower court finding that certain withheld funds should be treated under the reg's escrow fund provision.

**...but the Motor Carrier Act still supplants the Fair Labor Standards Act for interstate drivers, no matter how much bread is involved.**

*Jones, et al v. Centurion Investment Associates*, 2003 WL 21463748 (N.D. Ill. 2003)

Centurion Investment Associates is a wholesaler of bread selling product in various states. It employs truck drivers to haul bread, and the trays it's cooked on, between an Indiana bakery, warehouses and retail outlets in other states such as Illinois. Basically, the bread goes out; the trays go out and come back empty. Certain drivers never actually leave the Prairie State, as product is transported to warehouse stations all within Illinois.

Centurion drivers, feeling their employer had slighted them some overtime and back pay, sued Centurion under the Fair Labor and Standards Act ("FLSA"), 29 USCA § 201 *et seq.* Centurion moved to dismiss the claim, brought in the Northern District of Illinois, on the ground that the Motor Carrier Act exempts drivers in interstate commerce from FLSA. The plaintiff

employees countered by stating, palms up, they never left Illinois on the highway.

The court dismissed the claim, finding that the drivers' intrastate activity still amounted to interstate commerce under the principle of "practical continuity of movement." Even though the drivers' leg of a haul was purely intrastate, it was part and parcel of an essentially multi-state transportation scheme. The trays were crossing state lines before being loaded with new product and deposited into a warehouse. The drivers' labor therefore potentially impacted interstate commerce, and had to be treated as part of an overall scheme accordingly.

And yes, the trays count as "goods in commerce" even though they weren't actually sold, despite the drivers' compelling argument that they were really the equivalent of transportation containers such as bottles or pallets (held in early ICC decisions not to be "goods").

**Artsy folks are business people too!**

*Martino v. Transgroup Express*, 2003 WL 21511922 (S.D.N.Y. 2003)

This is a limitation of liability case with an artistic flare. Art dealer Martino booked shipment of a painting worth some three million bucks with forwarder Transcon, who contracted with carrier Transgroup to make the haul. The painting got banged up in transit, reducing its value by half a mill. Martino sued both forwarder and carrier.

Both defendants pointed to limitation of liability clauses in their documents. Martino had hired Transcon many times in the past, and had actually turned down the forwarder's offer of transit insurance. Martino's only argument was that no one told him (or his representatives) about the limited liability and, hey, I'm not really a businessman who should be held to know these things. The Southern District of New York wasn't impressed, finding that the language was sufficiently prominent in the bill of lading. Art dealers have as much obligation to read their contracts as anyone else.

**Is a subcontracting carrier liable under Carmack?**

*Rankin v. Allstate Ins. Co.*, 336 F.3d 8 (1<sup>st</sup> Cir. 2003)

Household goods shipper Rankin hired Right on Time Moving & Storage (ROTMS) to move his stuff from

California to Maine. ROTM subbed the job out to SI Trucking. Some of the cargo was damaged, some was lost, and Rankin was left very unhappy. He settled with ROTMS for a portion of his claim, but his beef with SI – including a claim for emotional distress - and insurer Allstate wound its way to the First Circuit Court of Appeals, after the District of Maine granted defendants' motion for summary judgment. SI had defaulted early in the game.

The insurance dispute centered on prompt evocation of an arbitration clause and undue delay under Maine law – points the court found created an issue of fact not properly decided on summary judgment. Dismissal of the claim against Allstate was reversed and remanded.

Rankin's Carmack and contract claims against SI also was sent back down the hill. The District of Maine found that Rankin hadn't alleged a separate cause of action against SI beyond what was alleged against (and settled with) ROTMS. Despite the default, the district court refused to award damages against SI. The appeals court ruled that, true, both carriers' liability is coextensive, such that Rankin wouldn't be able to recover from both an amount cumulatively above his loss. But the ROTMS settlement wasn't for the cargo's full value, and didn't release SI either. SI could be held liable for the difference. Of course, the amount of damages itself is another question of fact needing more attention. SI's liability for emotional distress was not affected.

**Is a motor carrier liable  
when its sub runs someone over?**

*Serna v. Pettey Leach Trucking*, 2003 WL 21758397 (2<sup>nd</sup> Dist. Cal. 2003)

Shipper Harrison Poultry hired carrier Pettey Leach Trucking ("PLT") to haul a load of poultry (a regulation-exempt, agricultural commodity) from Georgia to California. PLT issued a bill of lading naming itself as carrier, and subbed the load to Sky Transportation. The Sky driver negligently collided with a motorcyclist, killing him. The widow and estate sued Sky and recovered a million bucks, and sought further recovery from PLT.

Should a carrier that subs a load be vicariously liable for third-party bodily injury and property damage caused by the actual wrongdoer? Apparently yes, at least in the Golden State. The court first dismissed the commodity exemption as determinative. It's the cargo that's exempt, not the truck, even though the

exemption took the truck outside of FMCSA's registration dominion. Importantly, the exemption has no bearing on safety regulation, which is at issue when someone gets hurt on the road.

After running through a series of California state cases, the appeals court reversed the trial court's contrary ruling. When engaged in an aspect of a regulated activity which potentially impacts public safety, vicarious liability for the misdeeds of subcontractors is appropriate. Responsibility becomes nondelegable, per the California court.

**Is an American broker liable  
when a Mexican carrier gets robbed?**

*George Weintraub & Sons v. E.T.A. Transportation*, 2003 WL 22023907 (S.D.N.Y. 2003)

This broker liability case is noteworthy and fun for its Mexican twist and use of old-timey words and phrases. Otherwise, it's nothing new. Shipper George Weintraub & Sons ordered some men's apparel products from a Mexican supplier. The supplier hired freight forwarder Schaefer to arrange transport. Schaefer went through U.S. broker E.T.A., but it's not quite clear how or why. E.T.A. booked the load with a Mexican motor carrier.

The load was stolen south of the border, and Weintraub wanted E.T.A. to pay up. Basically, the clothier had no case. There was no relationship, indeed barely any communication, between E.T.A. and Weintraub. E.T.A. issued no bill of lading, never took possession of the cargo, and was not a carrier that could have subbed the load to the actual carrier. Weintraub's claims against E.T.A. were dismissed.

**A carrier's got to make its intentions clear**

*Security Insurance v. Old Dominion Freight Lines*, 2003 WL 22004895 (S.D. N.Y.)

RJR engaged carrier Old Dominion (ODL) under a long term contract to haul a load of cigarettes from North Carolina to Montreal, CD. ODL ran the load from Winston Salem to Greensboro NC, where its subcontractor Concord took over for the leg to NY and across the border. Canadian Customs had the load taken to a warehouse and stored pending customs clearance. The stogies were stolen from the warehouse, and RJR filed a cargo claim with ODL.

Some two years later, RJR's insurer traced the RJR claim against the carrier. ODL advised it had given the load to Concord, such that the claims file had been transferred to Concord two years prior. The insurer brought suit. ODL defended on several fronts. First, ODL said the claim was filed too late, more than two years after declination of the claim provided to RJR. No! said the court. ODL didn't decline the claim, it only made an ambiguous statement that it had sent it to its sub-contractor.

Next, ODL asserted that Canadian Customs prevented it from delivering the load. The contract provided that the loss was subject to warehouseman's liability, and not Carmack, under

these circumstances. No! said the court. Canadian Customs only interrupted the load; it didn't make delivery impossible. But, said ODL, the loss, at a minimum, was caused by an "act of public authority," one of five carrier defenses under Carmack. No again! said the court, Canadian Customs wasn't the cause the loss, it was the theft.

ODL was left to pursue its cross claim against Concord, and the court facilitated that part to be heard in Canada.

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### UPCOMING EVENTS

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

#### **Steve Block to Speak at Council of Logistics Management Conference**

Steve Block will be speaking on a panel at the Council of Logistics Management's annual conference in Chicago on September 21-24, 2003, as part of the program track entitled "Legal Integration of the Supply Chain Management Process." For additional details visit <http://www.clm1.org/conf2003/index.asp>.

#### **WCIT Breakfast Roundtable Discussion with Steve Block**

Steve Block will present "Ocean Shipping, Security & New Federal Guidelines: What Successful Shippers and Forwarders Need to Know" at a breakfast roundtable sponsored by the Washington Council on International Trade in Seattle, on October 23, 2003. For additional details see [http://www.wcit.org/resources/10-23-03\\_Betts-Patterson\\_reg.htm](http://www.wcit.org/resources/10-23-03_Betts-Patterson_reg.htm).

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