

# SURF & TURF

LEGAL NEWS IN TRANSPORTATION & LOGISTICS

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## ANTITRUST IMMUNITY: WITH HIGHWAYS NOW SUBJECT TO THE SHERMAN ACT, CAN THE SEAS BE FAR BEHIND?

By Steve Block

Shortly after implementation of the Ocean Shipping Reform Act of 1998 ("OSRA"), with international shipping circles hailing a new era of deregulated (or, perhaps, "re-regulated") ocean transportation, legal lookouts focused their collective scopes on that last great regulatory horizon - carrier antitrust immunity.

Remember? It was 1999-2000, large ocean shippers were entering into volume-intensive, long-term service contracts; smaller shippers were buddying up in shipper associations to gain greater bargaining strength; rates were coming down; and - with APL and Sea-Land being sold to foreign concerns - Uncle Sam no longer had much of an international fleet to protect. "In these waters, how does carrier antitrust immunity fit the program?" protested certain shipper and intermediary circles.

The steamship lines' leg up originally was adopted as part of the Shipping Act of 1916. It was a negotiated advantage to carriers forced to operate essentially under mandatory common carriage. Our merchant fleet wasn't particularly impressive in those days, and huge financial investments were needed to launch a steamship line that operated strictly by tariff. By throwing carriers the antitrust-immunity lifebuoy, America's shipping industry was nurtured from its infancy. As other modes of freight transportation developed, legislation granting flying and rolling carriers got similar treatment.

But the tide has changed. Drastically. With deregulation; the rise and fall of U.S.-owned ocean shipping concerns; America's emergence as

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the world's biggest importer and commodity consumer; other transportation modes (most notably, the deregulated and more costly airline industry) doing just fine without a Sherman Act cloak; and generations of litigation over carrier abuse of its unique privilege (well, almost unique - Major League Baseball enjoys the same luxury), is antitrust immunity now sort of like, well, unjust enrichment? A needless protection of foreign enterprise that services (some would say "preys upon") unparalleled American demand?

The western world is moving away from the concept. European and Canadian shipping groups have determined that carrier pricing agreements destabilize freight rates and foster distrust between shippers, carriers and intermediaries. The European Union has nixed antitrust immunity (effective October 18, 2008), and enunciated its intention to urge the world to do the same so that all ships operate on an even keel. True, Asian and Australian players appear content with the status quo, notwithstanding the South Koreans' recent investigation into allegations of abuse. In any event, it would not appear as problematic for Uncle Sam to jettison carrier antitrust immunity in the current era, as he no longer would be the only kid on the high seas making carriers play by the same rules as everyone else.

## Antitrust immunity... (Continued)

On the other hand, rates have steadily declined since OSRA's passage, service options have improved, and vessel sharing arrangements seem to work well. Just ask the World Shipping Council, representing the worldwide carrier industry in the U.S. Take away immunity, carriers argue, and you might encourage even more mergers, which would reduce competition and hike up rates. OSRA did prohibit carriers - through their pricing discussions and otherwise - from taking any action whose effect would limit a participant's ability to enter into service contracts with shippers. If it ain't broke, don't fix it!

Perhaps a clue about where steamship line antitrust immunity is headed lies in what Congress has done before, and what the Surface Transportation Board ("STB") - a sister agency of the Federal Maritime Commission ("FMC") - recently did on the trucking side. Five days after OSRA's enactment on May 1999, a bill entitled the Free Market Antitrust Immunity Reform Act was introduced to the Senate. A revised bill under the same title was submitted in 2001. Heated testimony was heard, the bill stalled, and revived interest contributed to enactment of the Antitrust Modernization Act of 2002, which created the bipartisan Antitrust Modernization Commission ("AMC"). The AMC's statutory tasks include a study and analysis of numerous U.S. antitrust issues including ocean carrier immunity.

FMC is charged with enforcing America's international shipping regulatory laws. It traditionally has supported OSRA's sanction of carrier antitrust immunity in keeping with the negotiated deal shippers made with the carrier industry during OSRA's negotiations (although not with a unified voice; at least one FMC commissioner has spoken against the special deal steamship lines get). FMC urged its positions to the AMC last year.

On April 3, 2007, the AMC issued its final report and recommendations, which is far too complex to analyze in any detail here. Without categorically condemning immunity, the AMC's

report to Congress makes clear its skepticism about the value and necessity of carriers enjoying special treatment. Industries that in bygone eras were regulated with antitrust immunity components were deregulated with too little attention to what's left, or should be left, of antitrust regulation. In other words, the new era of business regulation involved complex statutory and regulatory re-writes that didn't pay enough attention to competition regulation. The context is broad, but steamship lines appear to be a paradigm of what AMC concludes needs further Congressional attention. The report does note that ocean shipping rates have declined, and service improved, as a result of the competition deregulation created. However, it concludes that immunity should be granted rarely (only when specific circumstances justify it), and subject to monitoring and "sunset clauses." Congress gets to study and digest the AMC's report and get back to us.

But look what the trend is. Our western trading partners have nipped carrier antitrust immunity in the bud. STB, interpreting Congress' intentions in the context of business operations trends in the trucking industry, recently declared that motor carriers can't operate under common classifications that are tantamount to price setting mechanisms, as this was not Congress' intention. Ocean carriers have a 90-year history of misbehavior, playing their rate-setting Get-Out-Of-Jail-Free Card far more liberally than FMC thinks they're supposed to. Ambiguities render enforcement difficult and expensive at a time when "less government" is the buzzword.

The issue requires some detailed attention, as certain practices - such as vessel sharing and other interactive processes between carriers - should not inadvertently be illegalized in the name of antitrust immunity eradication. But all indications are that the last vestige of early Twentieth Century practices will be moth balled. Keep your eye on the horizon to see when and how.

**Ref: Antitrust Modernization Commission's Report, available at [http://www.amc.gov/report\\_recommendation/toc.htm](http://www.amc.gov/report_recommendation/toc.htm).**

## ICCTA'S EIGHTEEN-MONTH STATUTE OF LIMITATIONS FOR COLLECTION OF FREIGHT CHARGES APPLIES TO CLAIMS AGAINST BROKERS

By Steve Block

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When writing a new rule book to guide carrier and shipper relationships, Congress recodified various federal statutes, adopted certain regs and common law, and modernized the legal hodgepodge that had left surface transportation a mess for decades. All this came together with enactment of the Interstate Commerce Commission Termination Act (ICCTA) in 1995.

ICCTA, at 49 USC 14705(a), preserved the Interstate Commerce Act's eighteen-month statute of limitations for motor carriers who wish to seek recovery of freight charges from their shippers. The Ninth Circuit recently took a look at the circumstances in which that statute of limitations applies.

Shipper General Motors had a number of cargoes consisting of metal stamping presses which were seriously heavy and difficult (i.e., expensive) to haul. GM hired transportation broker Artisan Associates to arrange the transports, which originated in Japan and were destined to various states. Artisan, in turn, engaged motor carrier Emmert Industrial Corporation to haul the freight, and entered into a contract with the carrier confirming the global arrangement. Emmert sent reps to Japan to take specs, and undertook a study to determine proper routing for the stateside surface transit.

Emmert delivered two of the cargoes, and billed Artisan about \$4.9 million in freight charges. At that point, GM decided it didn't want Emmert hauling its freight anymore, and directed Artisan to find another carrier. Artisan complied. Artisan also disputed Emmert's billing for the

two delivered shipments, and paid the carrier only about \$4.2 million.

Some six years later, Emmert sued Artisan, claiming breach of the brokerage contract and seeking recovery of freight charges it would have earned for the canceled hauls, as well as recovery of the underpaid freight bill. Artisan moved to dismiss, asserting that ICCTA's eighteen-month statute of limitations controls. The U.S. District Court for the District of Oregon agreed with Artisan, and dismissed all of Emmert's claims on summary judgment. The carrier appealed to the Ninth Circuit.

Part of the reason Artisan won so handily in the lower court was that Emmert didn't argue ICCTA was inapplicable as a matter of law. When the carrier briefed that argument to the Court of Appeals, an issue arose as to whether the court would even consider it. Exercising its discretion to consider a new argument that doesn't depend on a factual record developed below, the Niners agreed to consider it.

But the favor did Emmert no good. Affirming the time-bar defense, the court rejected Emmert's contention that 14705(a) applies only to tariff-priced invoices. The statute simply doesn't say that. To the contrary, it applies to "charges for transportation or services provided by the carrier," which is broad and easily could have been limited to common carriage freight charges.

Moreover, ICCTA was written at a time and with a purpose of promoting free-market contract carriage. Other ICCTA provisions use the term "charges" to mean invoicing for both tariff and contract hauls. Legislative history shows that ICCTA's intent is to create a federally uniform transportation system. Emmert's interpretation that tariff-based invoicing is subject to separate statutory terms is inconsistent with that purpose. And yes, invoiced costs for such services as sending reps to Tokyo and routing the shipments count as "transportation" services under ICCTA's broad definition of the term (found at 49 USC § 13102(23)).

## ICCTA's... (Continued)

However, passage of the executed transports' sesquicentennial does not bar Emmert's claim for lost future profits on the terminated contract. There, no transportation services ever were provided or invoiced. The district court had concluded the contract didn't give Emmert any "exclusive right" to move GM's freight, and dismissed the claim accordingly. The Court of Appeals, however, concluded it's not sufficiently clear from the developed factual record what rights Emmert has or doesn't have under the contract. Thus, the district court's dismissal of that element of Emmert's claim was erroneous, and the Ninth Circuit reversed and remanded it for further consideration.

The concept of "transportation services" is encompassing, and the modern surface carriage environment is not intended to carve out special (and therefore potentially confusing) rules for the relatively few transports conducted in common carriage post-ICCTA. Whether a shipper, broker or someone else owes freight charges, ICCTA governs and carriers have eighteen months to pull the trigger.

*Ref: Emmert Industrial Corporation v. Artisan Associates, Inc.*, 2007 WL 2296773 (9<sup>th</sup> Cir. 2007).



## HOT RECENT CASES IN MOTOR CARRIER LAW

By Steve Block

### Driving a rig to and from the depot implicates bobtail coverage.

*United States Fidelity & Guaranty Co. v. American Automobile Ins. Co.*, 2007 WL 2238532 (N.J. Super. A.D. 2007)

Owner operator Mattis, under lease to carrier WRJ, was allowed to drive his rig bobtail to and from the depot. One day, he was involved in an accident on the way home.

WRJ had truckers liability insurance coverage through insurer USF&G. By virtue of his membership in the Independent Truckers Association, Mattis had bobtail coverage through insurer American Automobile. When the estate of a man tragically killed in the accident sued Mattis, American denied coverage on the ground its policy doesn't apply when tractors are being used for business. USF&G provided a defense to the accident claims, and later sued American to recover its defense costs.

Affirming a trial court's granting of summary judgment to USF&G, a New Jersey appellate court reviewed a series of precedents from around the country and concluded that Mattis was operating his rig "for his own convenience" and at his own election. Insurance policy exclusions must be narrowly construed. One precedent proclaimed that whether a driver's commuting to work constituted business use of a truck is a jury contract not proper for summary judgment disposition, but that position was not intended to apply across the board.

Earlier ICC decisions tending toward coverage only apply when the challenge is by a claimant or an insured. Those decisions pointedly don't apply when two insurers are duking it out to see who gets stuck holding the bag. In other words, the feds are worried about protecting the public; they are not concerned with protecting insurers from each other.

## Hot Recent Cases (continued)

But with American on the hook, which of the two carriers, if either, is primary (i.e., has to pay through its own policy limits before the other carrier's policy kicks in)? Here, the policies' language controls. However, the USF&G policy provided that the driver's lease must require WRJ to provide coverage for the leased auto section of that policy to apply. It didn't, so American gets to stand first in the coverage line.

**Carrier has to fight hard for a chance to show a driver isn't its employee for purposes of unemployment benefits.**

*NOW Courier, Inc. v. Review Board of the Indiana Department of Workforce Development*, 871 N.E.2d 384 (Ind. App. 2007)

So you thought carriers getting out of employment benefits claims brought by their leased owner operators was a simple matter of pointing to federal and state statutes dictating they were independent contractors, right? That's not the case, at least not for one carrier in Indiana that terminated a driver's lease for allegedly making improper advances on a customer. Check this one out to see the confusing myriad issues that can arise in a driver's employment benefits claim.

Indiana processes worker unemployment compensation benefits claims through a Review Board. Apparently, a hodgepodge of factual circumstances and legal misunderstandings prompted the Review Board to conclude there was inadequate evidence to support carrier NOW's contention that the termination was for willful misconduct. The Board wouldn't allow NOW to supplement the record with the legal argument that, hey, this guy doesn't qualify for benefits under state or federal law *regardless* of the termination's cause.

The squabble devolved to whether this was a tax, eligibility or liability issue (i.e., the driver's eligibility to collect - which is within the Board's authority - or whether NOW was liable to pay - which is not), and whether NOW had made its points on time. Hmm.

The Court of Appeals saw this as a fundamental failure of due process, and remanded the matter for consideration of NOW's arguments. The state statute addressing owner operator exemption implicates both liability and eligibility, so both were before the Board. NOW made its legal argument as soon as it could. A whole lot of fighting for what seems to be such a simple point, but NOW appears to be in good shape.

**Court cautiously blesses parties' agreement to dismiss state claims because of Carmack dominion, joining jurisdictions that apply complete preemption.**

*Andrews v. Atlas Van Lines, Inc.*, 2007 WL 2409982 (N.D. Ga. 2007)

This case presented a common scenario, but with higher-than-usual court scrutiny that produced some potentially useful precedential authority. A household goods shipper sued Atlas in Georgia state court for allegedly damaging his household goods, asserting the usual array of state-law claims. Atlas removed to the U.S. District Court for the Northern District of Georgia, then moved to dismiss based on Carmack preemption.

Here's where the routine altered a bit. The shipper actually stipulated to the dismissal. The court, however, didn't rubber stamp the parties' harmonious voice, instead going through an elaborate analysis of whether it had subject matter jurisdiction even to bless the theory on which Atlas' motion was based. The opinion is worth a read just to see how Carmack's preemptive effect works from a jurisdictional perspective.

The court concluded the action had indeed been properly removed, notwithstanding the fact that the complaint, on its face, didn't state a federal claim. The court couldn't reach the issue on the "well-pleaded complaint rule," but Carmack's supremacy over interstate freight claims constitutes "complete preemption." The Eleventh Circuit hasn't considered that concept (neither has the U.S. Circuit has ruled regarding other statutes.

## Hot Recent Cases (continued)

In an abundance of caution, the court asked the plaintiff shipper to amend the complaint to specify Carmack, but complete preemption appears to be on solid ground in the southeast.

### Carrier not liable for inquiries caused by hazardous material left in its trailer.

*Lamb v. Scotts Miracle-Gro Company, et al*, 2007 WL 1959291 (E.D. Okla. 2007)

A J.B. Hunt driver picked up an empty trailer from a Texas Wal-Mart distribution center, inspected it with a flashlight, drove the trailer to shipper Standard Waste's facility, and loaded it with bales of paper. He then transported the load to Georgia Pacific's plant in Oklahoma, where the consignee's employees offloaded it. While sweeping dust and debris from the empty container, the employees became ill from sodium PCP which remained within the trailer.

The employees sued J.B. Hunt and others in the Eastern District of Oklahoma, alleging negligence and other tort theories. The carrier moved for summary judgment dismissal of the claims. J.B. Hunt's motion focused on the absence of any duty it owed to Georgia Pacific's employees. Inexplicably, plaintiffs' opposition to the motion didn't address duty, instead focusing only on causation. On that basis alone, the court concluded it could grant the carrier's motion.

The court addressed causation anyway, and found plaintiffs had submitted insufficient evidence that J.B. Hunt's cleaning practices contributed to the injury. Similarly, the court ruled no evidence suggested Standard Waste's paper was contaminated with PCP. Federal regulations dictate how this kind of freight must be secured, but there was insufficient evidence of a regulatory violation or, more importantly, that plaintiffs were a class intended for protection by those regs.

Plaintiffs pointed to the doctrine of *res ipsa loquitur*, urging basically that injuries of this sort don't happen unless the carrier did something wrong. However, the court found a lack of sufficient evidence demonstrating the carrier had exclusive control over the trailer at all times material. All in all, a bad day for the plaintiffs in a court that was requiring quite a strong factual showing before trial.

### Interstate carrier's household goods agent not liable for carrier's alleged no-no's.

*Moore v. La Habra Relocations, Inc.*, 2007 WL 2269818 (C.D. Cal 2007)

Household goods shipper Moore retained La Habra Relocations to book interstate transit of her household stuff. La Habra apparently isn't a transportation broker, but it was a disclosed agent of carrier Wheaton. Wheaton apparently refused to release Moore's freight until she paid an additional fee, prompting Moore to sue La Habra.

La Habra removed the action from a California state court to the Central District of California, where La Habra moved to dismiss based on Carmack. The court granted the motion.

In addition to some apparent procedural screw ups, general principal-agency law renders this action unsustainable. The bill of lading between Moore and Wheaton made clear La Habra was a disclosed agent for its principal Wheaton, and was not a party to the contract of carriage. The same analysis was applied as if La Habra were a broker.

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