



SURF & TURF

Legal News in Transportation & Logistics

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

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Trucker Hours of Service: The Wait Continues

BY STEVEN W. BLOCK

It's still not clear what will happen with rules governing truck drivers' hours of service. While it may sound like a motor carrier labor headache, this political hot potato could have far-reaching affects on our entire transportation infrastructure.

In 1995, Congress charged the Federal Highway Administration of the U.S. Department of Transportation (DOT) with revamping regs which limit the hours truckers may work. The Federal Motor Carrier Safety Administration (FMCSA) inherited the task in 1999 when DOT reorganized.

Hours of service rules have been on the books for over 40 years, but critics charged that legally mandated rest times, as well as when and how often they're taken, were medically inadequate. Strong evidence supporting the new science's conclusions was the timing of most commercial vehicle accidents. An alarmingly high percentage of them occur when drivers aren't well rested. This is despite the fact that, overall, trucking safety has improved dramatically over the past few decades. A study

conducted by the American Trucking Associations showed a large percentage of truck/car crashes were caused by the car driver's negligence.

FMCSA got cracking and came up with guidelines affectionately known in the trucking world as "the new rules." Following federal administrative procedure, FMCSA ran a notice of proposed rulemaking in the Federal Register in May 2000, heard extensive public comment, and promulgated the new rules in April 2003.

Everyone holds minimized traffic accidents as a paramount concern. Who's going to urge that his bottom line trumps public safety? There wasn't much vocal opposition to reduced hours of service, but it's not like economic factors were ignored either. While the new rules actually extend the driving hours a trucker can sit behind the wheel (from 10 to 11), they also create broader requirements for short and long-term time off between shifts, and impose a 34-hour "restart" break between seven or eight day work cycles. This means motor carriers, especially ones who run long haul, now need more drivers when there's already a driver shortage. That could spell higher wages, more training efforts and, potentially, a decline in service options.

If you study how larger trucking companies have situated their LTL terminals across the country, you'll see a pattern of geographic distancing that contemplates driver on-duty times which the new

rules prohibit. Now, the big boys might have to build new terminals in different locales, use driver teams or, again, hire more drivers from a limited pool of candidates. These options aren't well received in motor carrier accounting departments.

In addition to labor problems and financial issues motor carriers face under the new rules, the shipping public at large must pay some dues. If it costs truckers more to haul freight, guess whose freight charges rise accordingly. If an undermanned driver staff has to wait 34 hours to fill a cab, delivery of someone's can or trailer won't be promised for that much longer. Because surface transit connects with the vast majority of water carriage, the whole system could be impacted.

A number of transportation players dissatisfied with the new rules brought suit against FMCSA, complaining that the agency had failed to adhere to guidelines of the federal Administrative Procedure Act, 5 USC § 551 *et seq.* They claimed FMCSA, in its drafting and promulgation of the new rules, had been "arbitrary and capricious." This is a broadly defined, administrative law buzz word which basically means the government agency didn't jump all necessary hoops before issuing new regs. The U.S. Court of Appeals for the District of Columbia agreed, and wagged its finger at the trucking feds.

Specifically, Congress' mandate to DOT was to draft up new rules which accommodated various concerns, including driver health. Apparently, vehicle safety was the agency's only rationale and justification in designing the new rules. FMCSA thought the petitioners were drawing fine lines, given that driver health "permeated the entire rulemaking process." However, the court concluded the health issue couldn't just be in the background, given that it got high billing in Congress' list of concerns.

Of equal, or perhaps greater, significance, are the court's observations regarding the new rules' substance. The District of Columbia Circuit mentioned concern about the increase in maximum driving time, as well as an exception in the new rules to certain time restrictions for trucks with sleeper berths. The court also suggested FMCSA's failure to include rules regarding electronic on board recorders (the trucking equivalent of an aircraft's black box) was a no-no.

This isn't to say the court has knocked down the new rules altogether. FMCSA was allowed to keep the new rules in place for at least 45 days (pending its compliance with the court's administrative

requirements or request for additional time), and might gain more time through procedural maneuvering. Meanwhile, we can't be sure what hours of service rules ultimately will control truckers, and motor carriers aren't able to prepare themselves for the long haul. Some might say that the court's decision threatens to impose even more stringent terms than those currently in place.

The court can't make trucking rules (that's FMCSA's domain), but it certainly can find FMCSA in violation of Congress' directive for failing to comply with each element of it. FMCSA might have to keep working at the new rules until they slip past the court.

Highway safety is not a luxury. It's an essential we simply must find a way to afford. But we can't really get started sorting out the issues until the current uncertainty is resolved.

Ref: *Public Citizen, et al v. FMCSA*, pending before the United States Court of Appeals for the District of Columbia, No. 03-1165.

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The Latest Stage in the Bill of Lading's Evolution

BY STEVEN W. BLOCK

The bill of lading's evolving style and format reflect the progression of transportation as an industry, culture and technology-dependent business over thousands of years. That's fitting, inasmuch as the bill of lading's purpose since Roman times has been just that: to be an alter ego of the freight it documents.

Millennia ago, a carrier had a tough time being sure who a cargo's proper consignee was. An ocean shipment (the only mode available for long haul throughout most of history) could be en route weeks while any number of merchants bought and sold (i.e., "negotiated") ownership of the freight. But only the guy who produced a properly endorsed bill of lading from underneath his toga could get the goods, lest the carrier be held liable for misdelivery. And if the vessel owner didn't come up with *exactly* the freight

documented, the consignee could hold the carrier accountable (thus was born the cliché “fit the bill”). The bill of lading was the world’s first document of title, and has been ever since. It was far from a perfect system, but there probably weren’t many better ideas in an era of limited long-distance communication.

It’s no surprise that the history of international trade finance tracks closely that of shipping documentation. The letter of credit system’s genesis was the bill of lading, as banks realized that guaranteed payment for shipped goods whose delivery is reliably documented was a marketable financial product. To this day, international commercial transactions often are premised on issuance of precisely stated bills of lading.

As time progressed and organized systems of shipping law took shape, the bill of lading grew into a concurrent second role. In addition to being a receipt for freight which could be tendered in exchange for transported goods, the document became the written manifestation of the shipper/carrier contract. Shipping terms had become more uniform, and the invention of the printing press in 1436 enabled players to mass produce form documents. No, the early forms didn’t have the plethora of those tiny words on the back connoting shipping terms (although some of the contractual clauses we see today were already in use), but we were well on our way to commercially reliable consistency. Marine insurance was becoming the norm, loading and lashing practices were tried and true, and soon we even began seeing government regulation.

But it was technological advancement that prompted the bill of lading’s next evolutionary stage. With containerization, international legislation regarding liability, modernized business practices, and the massive volumes of modern-day shipping, the twentieth century saw bills of lading assume even more of a contractual role. Spin-offs emerged, such as “non-negotiable bills of lading” (which reduced carrier concern about misdelivery), and “waybills” (which are not documents of title and serve only as receipts and contracts, such that they need not be presented to the carrier for delivery). Service contracts in the era of deregulated shipping address many of the issues which once were the bill of lading’s exclusive domain, and intermediaries attend to many of the details for the sake of efficiency.

In the last ten years, computer and internet technology have occasioned the bill of lading’s latest significant evolution. Let’s face it, electronic data

transfer and the transacting of business by mouse click have revolutionized virtually every business sector. Transportation is an industry particularly conducive to enjoying keyboard conveniences. But what does the electronic bill of lading do to the essence of that most essential of shipping documents?

A few courts have taken a look at that issue, most recently a federal court in New York City which does a good job summarizing relevant law. It being relatively early in the electronic era, many issues have not yet received judicial, or even industry, attention. But this much we do know: electronic shipping documentation is a luxury players purchase by sacrificing a level of legal certainty. Everyone agrees that the advantages of electronic documentation are convenience, speed, and cost savings by way of obviated paper generation and storage. We can’t expect carriers and forwarders to print up hard copies of every virtual bill of lading used, as that would defeat the very purpose of the approach we agree is cheaper and more expedient.

But if we don’t have contemporaneous hard copies, how can litigating shippers and carriers demonstrate whether certain terms were really agreed to? For instance, how can a shipper prove it was not offered a fair opportunity to declare full cargo value (usually noted on a written bill of lading) when a carrier attempts to limit its liability for lost or damaged freight? The short answer to that, at least in highly influential and precedential New York (where many cargo claims are litigated), is that usage of a carrier’s electronic documentation system imposes a degree of responsibility on a shipper or forwarder to explore fully the carrier’s offered shipping terms. Carrier websites typically contain their standard bills of lading, the full-blown versions which include declared value terms and, usually, everything else of relevance. If you want to use the electronic short form version, fine. But you might spend some time surfing the rest of the carrier’s website to make sure you really know what you’re getting into.

In other words, if ease and expediency drive your business practices, take the initiative of exploring the full circumstances of those benefits. You might not want a court to do so for you.

Ref: *Ref: Delphi-Delco Electronics Systems v. M/V Nedlloyd Europa*, 2004 WL 963997 (SDNY 2004)

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Hot Recent Cases in Motor Carrier Law

BY STEPHEN L. DAY
AND STEVEN W. BLOCK

101 Transactions: A course of dealing leads to limited liability

Atlantic Mutual Ins. Co. v. Yasutomi Warehousing and Distribution, Inc., 2004 WL 1557277 (C.D. Cal. 2004)

Shipper Unirex Corp. shipped five containers of freight from Hong Kong to Vernon, California. The cargo crossed the Pacific to the Port of Long Beach; and four cans were trucked on to Vernon. Time apparently was short for the fifth container, so it was stored overnight in carrier Yasutomi's warehouse. Of course, it was stolen before a delivery run could be scheduled.

Yasutomi had hauled Unirex' stuff for quite some time, having issued 101 identical bills of lading denoting the same 50¢ per pound limitation of liability. In fact, four of the five bills of lading for this particularly booking contained that term. Yasutomi's only headache was that it hadn't issued a bill for the lost load. Unirex' insurer sued in subrogation, and the carrier sought to limit its liability based on the parties' prior course of dealing.

Carmack controlled the inland leg of this international transport, even though the surface haul was entirely intrastate. In such cases, a prior course of dealing will serve to place a shipper on notice of shipping terms, such that the absent documentation isn't fatal. Unirex' purchase of cargo insurance confirmed that Unirex knew its carrier's liability was limited. On partial summary judgment, the court held Yasutomi must pay no more than four bits per pound.

Tariff not good enough to afford shipper fair opportunity to opt for higher carrier liability

Emerson Electric Supply Company v. Estes Express Lines Corp., 2004 WL 1558525 (W.D. Penn 2004)

Emerson shipped a cargo of electronic equipment with carrier Estes Express from Texas to Pennsylvania. The players didn't discuss released value, limitation of liability, or tariffs. Nothing. Estes Express' "generic" bill of lading asked for a declared value, but Emerson, which was a sophisticated shipper, left the space blank. The bill of lading also incorporated Estes Express' tariff, which was readily available on line.

The tariff included those goodies needed for carrier limitation of liability, i.e., notice that a declared value must be supplied. Emerson didn't check out the tariff. Of course, the freight arrived damaged.

When litigation ensued, Estes Express moved for partial summary judgment regarding limitation of liability. The Western District of Pennsylvania analyzed the fair opportunity doctrine in the context of Carmack's designs and purposes. Going through a detailed, if somewhat convoluted, history of common and statutory cargo law, the court concluded that incorporation of a carrier's tariff containing limitation of liability terms typically does the trick, and normally would here. The problem was that Estes Express' tariff didn't offer shippers a choice between two separate rates. Thus, in this case, the carrier's tariff didn't suffice to limit the carrier's liability in any event. The Court did not, however, conclude that carriers as a general rule must offer a choice between limited and full value rates.

Limitation of liability: A less-than-happy LTL forwarder

Bullocks Express Transportation, Inc. v. XL Specialty Ins. Co., 2004 WL 1748934 (D. Utah 2004)

Shipper 3COM booked transit of five containers of palm pilots with surface forwarder Skyway Freight Systems from Salt Lake City, Utah to various delivery points. Skyway had an "LTL Contract Agreement" with carrier Bullocks Express, pursuant to which Skyway placed the transit. Thieves lifted the palm pilots from Bullocks.

The LTL Agreement limited Bullock's liability to peanuts unless freight were lost as a result of theft. But Bullocks' bill of lading, which also contained a limitation of liability provision, didn't treat loss by theft differently than any other variety of loss. Skyway did not declare a cargo value on that bill of lading.

In response to the claim of 3COM's subrogated insurer, the carrier moved the U.S. District Court for

the District of Utah for summary judgment, seeking to limit its liability. Bullocks claimed the LTL Agreement didn't apply because, hey, this wasn't LTL freight. The court found material issues of fact on that issue, mainly because it was unclear whether the parties *intended* the Agreement to control notwithstanding its title (the contract wasn't specifically limited to LTL hauls).

But what about Carmack? Even though the parties may have specifically contracted to impose full liability on the carrier in the event of theft, the court found that federal law preempted that term. The court reasoned that the bill of lading's released value and incorporation of the NMFC (of which both Bullocks and Skyway are members) brought this transaction within Carmack's dominion. Hmm.

The court also rejected the shipper's position that Interstate Commerce Act "terminal area" exemption precluded Carmack applicability, correctly ruling that "terminal" doesn't mean just the carrier's yard. Bullocks' liability is limited.

Leased operators aren't carrier's employees for purposes of workers comp in Tennessee

Honsa v. Tombigbee Transport Corp., et al, 2004 WL 1562363 (Tenn 2004)

Transway Corp. provided Tennessee-based carrier Tombigbee with "leased operator" drivers pursuant to their "service agreement." The term of the service agreement had expired, but Transway kept sending leased operators, who kept driving for Tombigbee. A few got hurt on the job.

The injured drivers sued Tombigbee seeking workers compensation benefits. The carrier defended the claims asserting that the drivers weren't Tombigbee employees. The service agreement specifically classified leased operators as Transway employees, and required Transway to procure workers comp coverage (apparently it didn't do so). The claimants pointed to the service agreement's expiration date.

Tennessee has a statute providing that leased operators aren't employees of the carrier, and that they must work pursuant to a contract. The fact that the service agreement had expired was irrelevant; Transway and Tombigbee had effectively entered into a new, unwritten contract with the same terms when they continued performing (as Volunteer State law mandates). Thus, the drivers must look to Transway for coverage.

More from the Beehive State: carrier can't force these OOIDA members into arbitration

OOIDA v. C.R. England, Inc., 2004 WL 1586771 (D. Utah 2004)

OOIDA, on behalf of a number of its owner operator members, brought suit against carrier C.R. England, alleging violations of federal truth in leasing provisions. The drivers' leases contained broad arbitration clauses. England moved to stay the litigation and compel arbitration.

OOIDA opposed the motion, urging that their claims are exempt from arbitration under the Federal Arbitration Act, which excludes claims of individuals who work "in interstate commerce." The court agreed and denied England's motion. True, the FAA's interstate commerce exception has been held inapplicable to personal injury claims when the drivers are a carrier employer's "statutory employees." But these were not tort claims, and the drivers' status as employees or independent contractors was not at issue here. Utah's state arbitration statute was inapplicable because the drivers were not pursuing state-law claims

Moreover, these claims would be prohibitively expensive to run through arbitration. The court suspected England was trying to take advantage of this, as it hadn't submitted any of its 2,591 previous driver claims to arbitration. The court also found England's arbitration clause unconscionable, as it was so procedurally "one-sided" as to be "effective only *against* the drivers." Lastly, as other courts have concluded, the owner operators need not first go through FMCSA administrative proceedings, as the truth in leasing regs provide a private right of action.

OOIDA may be on the hook for claims under its health insurance plan

Walker v. Inter-Americas Insurance Corporation, Inc., 2004 WL 1620790 (N.D. Tex 2004)

This recent case addresses mostly procedural issues in the context of a trucking company's claims for coverage against a health insurer, but it could have far-reaching effects on the Owner-Operator Independent Drivers Association. The OOIDA Member Medical Benefits Plan provides affordable health coverage to drivers by pooling their contributions and paying out eligible medical claims.

Inter-Americas Insurance Corporation runs the program pursuant to its "Administration Agreement" with OOIDA.

Here, the Northern District of Texas explored who was the principal and who the agent between OOIDA and the insurer. It ruled OOIDA is the principal, meaning the association could ultimately be liable under insurance coverage principals. OOIDA wasn't

a party, so the case's precedential effect isn't certain, but the stakes are potentially significant.

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UPCOMING EVENTS

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

Ocean Shipping Security and Programs: What You Need to Know

Steve Block will host a breakfast roundtable discussion addressing recent developments in transportation security, on October 21, 2004, in Seattle. The event is scheduled from 7:30-9:30 a.m., in the Heritage Room, at the Washington Athletic Club, 1325 6th Ave., Seattle, Washington. Continental breakfast will be served. Seating is limited. Please RSVP to Rebecca Regan at rregan@bpmlaw.com by Friday, October 17th.

The Transportation Forum

The Association for Transportation Law, Logistics and Policy, in conjunction with The National Industrial Transportation League, will present The Transportation Forum on October 6, 2004, in Washington D.C.

ATLLP is a national trade organization of transportation professionals. Betts attorneys Steve Block (ATLLP's president elect) and Steve Day (a past ATLLP president) helped organize the event, which will include presentations from numerous business, government and legal authorities.

CONTACT INFORMATION

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