SURF & TURF

Legal News in Transportation & Logistics

A bimonthly newsletter published by the BPM Transportation & Logistics practice area *October 2005*

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SAFETEA: The End of Licensing and Bonding Requirements for Surface Broker and Freight Forwarders?

BY STEVEN W. BLOCK

On August 10, 2005, President Bush signed into federal law the Safe, Accountable, Flexible, Efficient Transportation Act (SAFETEA – cute, huh?), a measure primarily designed to enhance highway transportation safety. But buried within SAFETEA's numerous roadway provisions is a section that, at a minimum, gives the U.S. Department of Transportation (DOT) the option of eliminating surface transportation broker and freight forwarder licensing and bonding requirements. Some in the know urge that SAFETEA's language is a Congressional mandate which already has nixed those requirements altogether. Others say we have to wait and see.

Surface transportation brokers are roughly the legal and functional equivalent of ocean freight forwarders, serving as "travel agents" for freight. Ensuring the monikers aren't semantically convenient and easy, surface freight forwarders are the analogs of ocean non-vessel operating common carriers, operating concurrently as carriers of record to their shipper customers, and as shippers of record to the truckers and railroads that actually haul freight. Notwithstanding the confusing lingo and differing regulatory regimes, most enterprises that specialize in booking freight run wet, dry and often sky-high operations, typically in coordination with each other. What hat they're wearing at any given time depends on how and with whom they're doing business.

Surface brokers and forwarders have long been subject to federal licensing requirements. They also must demonstrate to DOT (through its Federal Motor Carrier Safety Administration) that they have insurance or surety bonding so that aggrieved shippers have recourse should the broker or forwarder screw up. Like their salty cousins on the ocean side, these species of transportation intermediary have remained the most regulated players in surface transportation.

SAFETEA provides that DOT's Secretary "may" register an outfit as a broker or freight forwarder "if the Secretary finds that such registration is needed for the protection of shippers and that the person is fit, willing, and able to provide the service and to comply with this part and applicable regulations of the Secretary and Board." Some, including the Transportation Intermediaries Association (TIA), a national trade organization promoting the transportation intermediary industry, feel the new legislation isn't big news. At least not yet.

In their view, SAFETEA's terms regarding brokers and forwarders are merely a legislative directive that

DOT reexamine its regs, go through a notice of proposed rulemaking procedure (inviting public comment, etc.) if necessary, and decide whether continued intermediary licensing and bonding is all-in-all a good thing. They point out that DOT itself wrote and transmitted the provision to Congress with the intent that current intermediary regulation be reexamined, and not that it be slashed. Thus, TIA feels the new rules don't change anything unless and until DOT says so.

Other players aren't so sure. They've expressed the view that the absence in SAFETEA of regulatory provisions requiring licensing and bonding, coupled with language that leaves registration in the Secretary's discretion means that, hey, intermediary regulation is a dead dog. The same type statutory language deregulated motor carriers a decade ago with no need for regulatory agencies to bless Congressional intent. Says noted transportation attorney Fritz Kahn, "[i]f in the discretion of the Secretary, brokers and freight forwarders of general freight are again to be regulated, [DOT] will need to institute a rulemaking proceeding to compile a record enabling the Secretary to find that registration is required for the protection of shippers and to promulgate rules pursuant to which [DOT] would make a determination that an applicant is fit, willing and able to provide the service and observe the regulations' requirements."

In other words, DOT must affirmatively seek to reinstitute a regulatory regime under Congressionally-specified guidelines. If it does nothing, intermediaries need not sign up and jump through the feds' hoops. It is incumbent on DOT to attempt to effect change if regulation is to continue.

DOT is expected to explain its own understanding of SAFETEA's provisions regarding surface intermediaries, as well as the agency's intentions, in short order. That pronouncement is sure to engender dissent, which might even get nasty. Deregulation remains a national trend and battle cry, guiding the direction of transportation economics and policy. It is fitting that transportation regulatory regimes embrace the industry's increasingly intermodalized nature by removing mode-specific regulatory impediments. With differing requirements and processes imposed on players depending on mode, how can efficiency, and therefore consumer costs, be optimized?

On the other hand, a loosening or removal of Uncle Sam's regulatory yoke from surface intermediaries' necks might increase shippers' risk of uncompensated loss, and complicate enforcement of transportation security regs. Without reliability and security, how can the system work at all?

DOT must balance these concepts in the context of Congressional intent.

Ref: The Safe, Accountable, Flexible, Efficient Transportation Act, available at http://www.fhwa.dot.gov/reauthorization/safetea_bill.doc

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Hazmat Shipping: The Broadening Definition of "Offeror"

BY STEVEN W. BLOCK

Expanding transportation security concerns have increased the scope of activities subject to applicable federal regulations. It seems the more government agencies analyze potential threats and devise ways to combat them, the broader government concern grows about who and what should be regulated.

The Research and Special Programs Administration (RSPA) of the U.S. Department of Transportation recently promulgated new regs, to take effect October 1, 2005, clarifying who is subject to federal Hazardous Materials Regulations (HMR). The HMR imposes on those subject to them a complex program mandating specified packaging, marking, stowage, documentation, movement and security of hazmat cargo. Of course, many in our industry would just as soon not have to worry about HMR requirements, as those governed by the new definitional regs are subject to auditing, civil fines, criminal punishment, and other governmental intervention.

At first blush, one might assume that an "offeror" of hazardous materials in transportation is, gee, a shipper who owns dangerous cargo and hands it over – i.e., "offers" it –to a carrier for transport. While that's true, the definition is far broader, at least when RSPA's new regs take effect. Per RSPA's summary of its final rule, the new definition of "person who offers or offeror" when determining the scope of the HMR's applicability is:

> . . . any person who performs or is responsible for performing any pre-transportation function required by the HMR or who tenders or makes the hazardous material available to a carrier for transportation in commerce. A carrier is not an offeror when it performs a function as a condition of accepting a hazardous material to another carrier for continued transportation without performing pre-transportation function.

The agency's discussion about its rationale in adopting new provisions (available in the Federal Register) shows just how complex this issue is in the context of security concerns. By its nature, most transportation is a chain of sequential events. It typically commences with suppliers; moves through warehouses, drayage operators, longshoremen and/or other such specialists; proceeds through one or more modes of transportation (which often includes interlining or connecting carriers); then comes back through warehouses, drays, and other providers. Any number of participants in the transportation process might qualify as an "offeror" under the term's common meaning.

The most obvious confusion, one which the new rule tries to clear up, regards interlining and connecting carriers that hand off freight to each other as part of the same haul. The new reg addresses this concern by differentiating "pre-transportation" and "transportation" services, with only providers of the former being considered "offerors." A carrier that merely transships to another is performing transportation services, and wouldn't be subject to the HMR on a given load.

Providers are entitled to assume their predecessors in the chain have complied with the HMR, such that the hazmat security wheel need not be reinvented at each link in the transportation process. There may be more than one "offeror" in a transport, but just because you're handing off freight doesn't mean you're one of them.

That concept is subject to a prevailing caveat: if an interlining/connecting carrier or other player knows – or by reasonable effort and care should know – that an HMR reg has been violated somewhere in the process prior to its receipt of freight, then that player becomes subject to the HMR itself and responsible for violations its chronological predecessor may have committed.

But what exactly are "pre-transportation" services, and how are they distinguishable from transportation services? A number of hazmat shippers and carriers expressed concern to RSPA about this dichotomy. Industry practice varies by locale and sector. In some circumstances, shippers prepare bills of lading and other documentation; in others, carriers, intermediaries and/or others attend to those tasks. Sometimes shippers block and brace, sometimes carriers do, sometimes someone else does. With regard to essentially the same activity, an entity could be an offeror sometimes, and sometimes not. Indeed, the feds might make an argument that someone was performing pre-transportation services – documentation, etc. – for freight that was already in transit!

RSPA is "sympathetic" to this unrest. The agency recognizes players' concern that they not be held responsible for someone else's no-no's, especially when they have no control over the matter. But in response, RSPA does little more than point to the general concept that a player will held "responsible only for the specific pre-transportation functions it performs or is required to perform." Participants are not "jointly and severally liable," meaning in law-speak that two HMR violators will be liable only to the extent of their individual wrongdoing. A more simplified rule, says RSPA, just can't be applied.

The new definition of "offeror" of hazmat freight is of little comfort to the industry groups who voiced concern in its drafting. Broad interpretational and enforcement discretion is given with regard to the reg's underlying concept that no one gets blamed for someone else's violation if that someone reasonably didn't know about it. But to be sure, carriers, forwarders and others should do all possible to develop a record for each shipment showing they exercised reasonable care to ensure no HMR reg was violated – even by someone else.

Ref: Federal Register: July 28, 2005 (volume 70, No. 144) pp. 43638-43644; HMR, 49 CFR 171-180.

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Hot Recent Cases in Motor Carrier Law

BY STEVEN W. BLOCK

ICCTA doesn't get owner operator into federal court for personal injury claim

Crosby v. Landstar, et al, 2005 WL 1459484 (D. Del. 2005)

Owner operator Crosby, under lease to carrier Landstar, was injured when Landstar trailer equipment failed. Crosby sued Landstar *pro se* in the U.S. District Court for the District of Delaware, alleging federal jurisdiction based on 49 USC § 14704 of the Interstate Commerce Commission Termination Act. That statute addresses carrier liability for injuries resulting from a carrier's violations of the Motor Carrier Act, 49 USC § § 13101 *et seq*.

The court granted Landstar's motion to dismiss, finding that ICCTA's provision was not a blanket extension of Carmack – and therefore federal – dominion over personal injury claims. Crosby had not alleged any violation by Landstar of the Motor Carrier Act, and the bases of his claims were "more like negligence claims." Because Crosby was a First State citizen and Landstar a Delaware corporation, the case wasn't cognizable under the federal court's diversity jurisdiction either. The matter must be refiled in an appropriate state court.

A ticked-off federal court won't be bothered

Ducham v. Reebie Allied Moving and Storage, Inc., 372 F.Supp.2d 1076 (N.D. Ill. 2005)

Here's one worth reading if for no reason other than to see just how wittily a federal judge can express his frustration at a carrier's abuse of its customer. Shipper Ducham hired carrier Reebie Allied Moving and Storage to haul his household goods. Having agreed to a $16,635.45 freight tab, the carrier "hornswoggled" (there's a word you don't hear every day) Ducham by raising the bill three times to $25,564.67 after the shipper had tendered the freight. Equating Reebie's actions to "highway robbery" ("Bad pun intended," nyuck nyuck), the court addressed the carrier's "Petition for Removal" (itself the subject of another jab – the court noted sardonically that Illinois had abandoned the term "petition" in 1988).

But back to the case's topic of interest. Ducham sued alleging breach of contract, fraud, Illinois consumer protection violations, and other state law theories of recovery. Despite Carmack implications and defenses provided by federal law, Reebie's removal of the action from state court was improper. Just because federal law governs a case's subject matter doesn't mean the plaintiff is deprived of the right to pick his tribunal (absent specific statutory provisions to the contrary). True, Carmack may apply to a portion of this claim (though not all). But that alone doesn't give a federal court primary jurisdiction. A Prairie State court will get to decide this one applying federal law where appropriate.

Broker or carrier? More analysis of Carmack applicability.

Hewlett-Packard Co., et al v. Brother's Trucking Enterprises, Inc., et al, 373 F.Supp.2d 1349 (S.D. Fla 2005)

Shipper Compaq, through a forwarder, engaged Salem Logistics to arrange transit of a cargo of electronics products from Los Angeles to Miami. Salem, in turn, booked the freight with carrier Brother's Trucking. But what was Salem? It sure thought and wanted to be a Carmack liability-immune transportation broker. Everyone knew it wouldn't be using its own trucks, and it issued no bill of lading. But it did boast to its clientele (including the shipper a hand) how much control it exercised over trucks moving its freight, guaranteeing up-to-date equipment. When a Brother's driver left his truck unattended, Compaq's cargo disappeared, and Salem's status became an issue.

Salem felt it wasn't liable, having selected a reasonable carrier for the haul and otherwise not being at fault for the loss. In addressing Salem's motion for summary judgment, the Southern District of Florida focused squarely on how Salem presented itself to the world. Because enough was there for a jury to conclude Salem qualified as a motor carrier in its customers' eyes, the court denied Salem's motion.

Even if Salem were a broker, it still could be held liable on common carrier negligence principles. While Salem disavowed breach of any actionable duty to its shipper, the court disagreed based "on the general facts of the case." Salem apparently failed to follow its shipper's instructions regarding tracking,

communications systems and insurance. Thus, a reasonable fact finder could conclude Salem was negligent, and therefore liable even as a broker.

Pushing a shipper over the brink: Carmack doesn't preempt emotional distress damages

Schwarz v. National Van Lines, Inc., 375 F.Supp.2d 690 (N.D. Ill 2005)

This case should get the attention of household goods shippers and their insurers. Shipper Schwarz, an elderly widow, engaged carrier National Van Lines to move her stuff from Illinois to Oregon. The load disappeared, Ms. Schwarz went ballistic (in a big, medically certifiable way), and National apparently was callous to say the least. Evidence suggested National had jerked poor Ms. Schwarz around when she pursued her claim, broke promises to her, and didn't do much to follow up on an interline carrier whose background was somewhat suspect.

When National moved for summary judgment seeking to dismiss Ms. Schwarz' common law claims based on intentional and/or negligent infliction of emotional distress, it probably thought its case was slam dunk. But the Northern District of Illinois felt differently. While Carmack generally preempts state and common law theories of liability, its effects is not "all-inclusive." Specifically, Carmack doesn't supplant "claims involving a separate and independently actionable harm to the shipper distinct from such damage [to freight]."

The court basically concludes National's behavior with this shipper was sufficiently egregious that Ms. Schwarz could've sued the carrier even if she wasn't a shipper. National owed its shipper a duty of care as provided by tort law, one which could have been heightened by the power differential in the parties' relationship. A jury could conclude that duty was breached, and award appropriate damages. National's motion was denied.

One is left to wonder why the asserted egregiousness of National's tortious conduct was determinative as to whether the alleged tort was separately actionable. Had National been only a little rude in response to Ms. Schwarz' cargo claim, would that transgression be separately actionable?

Shipper and his lienholder can't be impleaded

Mayflower Transit, LLC v. Cambridge, 2005 WL 1868792

Carrier Mayflower somehow got in the middle of a mess created by a shipper whose household-goods cargo had been attached by the shipper's lien-asserting, property-attaching landlord. Mayflower received a copy of the landlord's writ of attachment, put the shipper's freight in storage, interpleaded its shipper and the landlord, and hoped to let those two fight it out in court.

The court goes through an interesting analysis of interpleader process in the carrier context before concluding that Mayflower couldn't unload this burden by suing its shipper and the landlord. Interpleader is only appropriate when the defendant "stakeholders" have defined interests in the property. The sheriff never perfected the writ of attachment by actually serving Mayflower with it (only a copy was sent), and the shipper's landlord disavowed actual interest in the property. Thus, the landlord wasn't a proper party to the action, leaving only one stakeholder defendant. Consequently, the interpleader action, which requires at least two potential stakeholders, was dismissed.

Nonetheless, this case suggests that interpleader might often by a viable and economically appropriate approach to situations where freight is the subject of attachment actions.

Insurance coverage for a snockered driver returning from his sister's house?

Minter v. Great American Ins. Co., 2005 WL 2010056 (5th Cir. 2005)

This coverage case shows just how complex issues peculiar to truck leases in the insurance context can be. Driver Largent was employed by JTM, which was under exclusive lease to carrier Hammer Trucking. Because of his personal circumstances, JTM let Largent keep his truck for transportation to and from home. One night he was directed to return his truck to Hammer's maintenance yard. He went to his sister's house to arrange a ride back from the yard, got drunk somewhere along the way, and was involved in a serious accident.

Great American was JTM's secondary insurer after a $1m primary layer covered by St. Paul The Great American policy contained a "permissive use"

provision intended to limit coverage to specifically authorized trucking activities. Great American felt that the trip to Largent's sister's house was not a permissive use, and it certainly wasn't permitted while the driver was tanked.

The Fifth Circuit partially reversed a district court's summary judgment dismissing JTM's coverage action. It found there were questions of fact as to whether a driver who'd generally been allowed to use his truck for personal transportation, and who'd been seeking a necessary ride home when he made the detour to his sister's, was undertaking an unpermitted use of his truck. Whether or not the driver's intoxication was sufficiently significant in the use analysis also is a question of fact. Thus, summary judgment was inappropriate.

The court also found that principles governing Great American's MCS-90 filing did not dictate the outcome. St. Paul was JTM's primary insurer. The virtually automatic coverage an MCS-90 filing conveys only applies upon demonstration that the second layer of coverage has kicked in (St. Paul had previously settled with the claimant). Therefore, the parties must try this one out.

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