



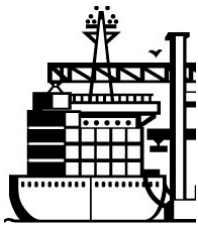
SURF & TURF

Legal News in Transportation & Logistics

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1. **Carrier Antitrust Immunity Revisited:
The Continent Abolishes It; Is Uncle Sam Next?** BY STEVEN W. BLOCK
2. **Hot Recent Cases in Motor Carrier Law** BY STEVEN W. BLOCK
4. **Contact Information**



Carrier Antitrust Immunity Revisited: The Continent Abolishes It; Is Uncle Sam Next?

BY STEVEN W. BLOCK

The European Competitiveness Council (ECC) of the European Union (EU) recently lowered the hammer on ocean carrier antitrust immunity, a move portending similar legislation in the U.S. and elsewhere. Effective October 2008, carriers who call on the ports of EU member states may not do so pursuant to contracts or tariffs the pricing of which is orchestrated by collective rate setting. Only routes involving EU ports are affected; carriers can still collaborate in setting rates for other routes (including North American) without running afoul of the ECC's edict. The intended result: lower freight rates prompted by increased competition between carriers as a result of market-driven forces, and enhanced transportation services resulting from carriers vying for shippers in a stronger bargaining position.

It won't be an unfettered free-for-all. The ECC will develop a series of guidelines governing competition before the new law's effective date. It will publish an "issues paper" shortly to get the ball rolling on what guidelines might be most effective, and inviting input from those concerned. The transition won't be easy,

and EU officials are doing what they can to make this more an evolutionary step than shock therapy.

Having studied the question carefully with EU carrier and shipper groups, the EEC concluded that smaller carriers – contrary to their own protestations – would not suffer unfairly. If anything, they should enjoy the advantage of more fluid entry into smaller niche markets where they can operate most profitably. Moreover, large and mid-size carriers still may still offer joint services (i.e., "vessel-sharing, co-ordination of routes and schedules") in coordination with smaller outfits.

The ECC points out that its recent move "is a logical consequence of the fact that different competition regimes are in force world-wide." Pointing to the example that "... today US law allows carriers to fix prices jointly on inland transport, while EU law does not," the EEC makes clear its feeling that Uncle Sam should follow suit.

So where are we stateside on the issue? Abolition of carrier antitrust immunity has been suggested and promoted since shortly after implementation of the Ocean Shipping Reform Act ("OSRA") in May 1999 (see August 2000 Legal Lookout article entitled "The Uncertain Future of Carrier Antitrust Immunity"). Given that the U.S. no longer owns any major steamship lines, allowing carriers Sherman Act immunity essentially protects only foreigners as they enjoy the privilege of shipping to and from earth's largest market. Bills before Congress have stalled in

committee, partly on the basis that worldwide uniformity is desirable.

Our own movement in the direction of bringing carriers into the more orthodox business world has been underway for some time now. Congress established an entire quasi-governmental agency to study a panoply of antitrust issues with the Antitrust Modernization Commission (“AMC”), founded by federal statute in 2002 as part of an effort toward overhauling America’s anti-competition laws. The shipping industry has been a focus of AMC efforts, and hearings have included representatives of government and industry over the past couple years.

The EU’s latest position is sure to be a consideration in upcoming AMC proceedings, which recognizes the U.S. may be behind the eight ball in worldwide shipping law trends. While uniformity for years has been a reason to maintain antitrust immunity, it now appears to be a strong argument toward nixing it. Submissions from private and public sector representatives indicate that, at a minimum, carrier antitrust issues should be revisited regularly.

OSRA actually limits the extent of carrier antitrust immunity, but does so in the context of circumstances that have evolved over the past eight years in a dynamic shipping industry. Carrier, intermediary and shipper groups naturally differ in their feelings about what’s necessary and appropriate, but their submitted comments demonstrate a general consensus that some measure of change is needed, even if just to keep a closer eye on the industry and its governing law.

Shipping relationships are long and well-established in the U.S., and shipping legislation moves notoriously slowly here. Still, it’s difficult to envision perpetual, U.S.-sponsored carrier antitrust immunity under these circumstances. Time may be needed to effectively wean our transportation industry away from carrier collective rate setting, but principles of worldwide uniformity should be the controlling concern.

Ref: “Competition: repeal of block exemption for liner shipping conferences – frequently asked questions,” available at <http://www.nitl.org/Memo06344.pdf>; and the Antitrust Modernization Commission’s website <http://www.amc.gov>.



**Hot Recent Cases
in Motor Carrier Law**
BY STEVEN W. BLOCK

**Questions of fact about shipper’s stated
intentions defeat carrier’s motion for summary
judgment**

Zolo Technologies, Inc. v. Roadway Express, Inc.,
2006 WL 2092072 (D. Colo. 2006)

Shipper Zolo Technologies requested a rate quote from Roadway to haul a cargo of trade show items from Kansas to Colorado. Roadway submitted a series of quotes, one of which included a limited liability provision of \$25 per pound with a \$100,000 cap. Zolo thought it (verbally) agreed to a full liability term, having purchased an additional \$25,000 in “coverage” for a maximum of \$125,000. Zolo sent Roadway a fax confirming this, but Roadway claimed it didn’t receive the fax until after the freight arrived, yes, damaged.

Roadway had sent Zolo a written rate confirmation that didn’t include the increased cap. Zolo sent back an electronic bill of lading whose increased declared value box was unchecked. The bill of lading also incorporated Roadway’s tariff and provided for Carmack governance.

Zolo sued Roadway in Colorado’s federal court, and the carrier promptly moved for partial summary judgment seeking to limit its liability to \$25 per pound. Finding numerous questions of fact as to what was intended, known and done, the court denied the motion. No evidence confirmed Zolo agreed to Roadway’s limited liability in writing, a requirement *Hughes v. United Van Lines*, 829 F.2d 1407 (7th Cir.) imposes. While the carrier’s tariff includes the limitation of liability, Zolo’s request for additional coverage excepted (and therefore nixed) that term. Roadway also claimed Zolo failed to fill out the bill of lading properly, such that the shipper shouldn’t enjoy an advantage. But the form was silent as to the purportedly agreed limitation amount. That same problem also defeats mere incorporation of Carmack. Questions of fact abounding, summary judgment was not warranted.

... and available procedures with an established course of dealing might not be enough to limit liability either

Shielding International, Inc. v. Oak Harbor Freight Lines, 2006 WL 2193481 (D. OR. 2006)

In a somewhat similar case, carrier Oak Harbor lost on cross motions for summary judgment on the limitation of liability issue. This time, the carrier sent pricing agreements to shipper Shielding, none of which mentioned limited liability. The rate quotes did incorporate Oak Harbor's tariff which included a limitation of liability provision, but the shipper never wrote or signed anything. Moreover, the parties apparently never discussed liability. When Shielding extended its opened palm seeking compensation for damaged freight, Oak Harbor offered only two bucks per pound. They went to the mat in Oregon's federal court.

Even if the tariff were properly incorporated, Shielding was never given the *Hughes*-mandated option of two freight rates. True, the carrier had "procedures" in place whereby different levels of liability could be selected. But rejecting Oak Harbor's position, the court found it's not the shipper's burden to inquire about and exercise those procedures. Without full explanation of its logic or the factual circumstances, the court also refused to recognize the parties' prior course of dealing as sufficient to put the shipper on notice (a concept other courts have recognized).

Shippers' association might be able to collect unpaid freight charges from consignee

Direct Shippers Association, Inc. v. Sanyo Automotive Parts, Ltd., et al, 2006 WL 2355089 (N.J. Super. A.D. 2006)

A New Jersey state appellate court has reversed and remanded for further proceedings summary judgment dismissal of a shippers' association's attempts to collect freight charges from one of its member's consignees. Shippers associations are nonprofit coteries of similarly situated shippers who pool their freight volumes to obtain lower freight rates and other business leverage. They typically enter into transportation contracts on behalf of their members based on the latter's minimum freight commitments. The shipment at issue here, booked pursuant to the association's contract, was documented by a shipping order that provided the shipper was responsible for freight charges, and were marked

"pre-paid." The association alleged that neither the shipper nor its consignee paid the charges, leaving the association holding the bag.

The trial court dismissed the association's claim based on the freight prepaid clause and the fact that shippers' groups don't have standing to enforce bill of lading terms (hey, they're neither carriers nor actual shippers). But while it's true a "freight prepaid" clause can equitably estop a carrier from seeking freight charges from a consignee, that's not always the case, and fact questions govern the issue. Similarly, whether or not an entity is a motor carrier or forwarder are questions of fact a shippers association conceivably could prevail on. The order is not the most compelling, but one cannot dismiss the illogic and injustice that would result if the association's claim were dismissed.

More about an entity's status: is it a carrier, a forwarder or a broker?

Tokio Fire & Marine Ins. Co. v. Megatrux, Inc., 2006 WL 2291281 (Cal.App. 2 Dist. 2006)

Shipper TEAC hired licensed transportation broker Megatrux to arrange for a shipment from California to Texas. Because the selected carrier's trucks weren't available for a day or so, TEAC asked Megatrux to store the freight overnight. The broker's employees did so, using another carrier to haul the freight to a warehouse. TEAC's stuff disappeared, and its insurer paid up. The subrogated insurer sued Megatrux under Carmack in California state court, and was tossed out on summary judgment. Brokers aren't on the hook under Carmack, and no evidence on the record demonstrated Megatrux was negligent in its own right.

The insurer appealed, urging that material issues of fact remained as to whether Megatrux was really a broker. Documents and website postings made it look like the company was a forwarder or even a carrier, both of which might be liable under Carmack. Over 1,000 bills of lading prepared by TEAC for Megatrux apparently named the latter as a carrier. Affirming the trial court's dismissal, the Golden State court of appeals simply went through the list of activities forwarders and carriers statutorily undertake. There was no consolidation or transport under Megatrux's auspices here. True, the distinction between the various entities is "blurred," and how one holds itself out to the public is a consideration. But that consideration has become less compelling in the last 20 years since Carmack

and other federal statutes more specifically define carrier, forwarder and broker activities. The fact that TEAC named Megatrux as a carrier in the bill of lading resulted from the shipper not knowing who actually would haul its freight, and was not “acquiescence” on Megatrux’s part.

Are tow-away warning signs a safety measure or cloaked economic tools?

VRC, LLC v. City of Dallas, 2006 WL 2268459 (5th Cir. 2006)

You know those signs that warn you not to park in certain spaces or areas, lest a tow truck haul you away and subject you to calling a handy-dandy telephone number to get your car back? Has it ever occurred to you that cities like Dallas post those signs out of concern for the public safety? Did it strike you as odd that a Texas court found a Dallas municipal ordinance regarding posted warning signage to be exempted from ICCTA preemption because the ordinance was a “safety measure” (see January 2005 Motor article addressing a 2004 Northern District of Texas decision).

Well, the Fifth Circuit has just blessed the district court’s decision by affirming summary judgment dismissal of tow truck operator VRC’s claims against Dallas. Mindful of the general concept that “Congress does not intend to supplant state law,” the Court of Appeals’ opinion goes into even more detail about how fights between angry motorists and tow truck drivers are reduced by warning signs (and how the cops have to spend time responding to such fights) than did the lower court. If signs like this are sufficiently safety related to activate ICCTA’s exception to preemption for local safety concerns, could one argue that any economic issue might tick off someone enough to require police intervention?

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