

SURF & TURF

LEGAL NEWS IN TRANSPORTATION & LOGISTICS

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MEXICAN TRUCKING STATESIDE: UNSAFE AND BAD FOR BUSINESS, OR NO PROBLEMO?

By Steve Block

Since 1982, regs implemented by the U.S. Department of Transportation (DOT) have prohibited Mexican trucks from operating beyond twenty-five miles or so north of the border. Concerns, driven mainly by a perceived poor track record of Mexican trucking safety (resulting from alleged inadequate resources, a lackadaisical culture, corruption, and slack governmental enforcement in Mexico), have prompted American trade groups, unions, environmentalists and safety advocates to vocally oppose any amendment to those regs. Post-9/11 concerns about homeland security, and recent attention to illegal immigration, combined to heighten that sentiment.

But what about American importers and consumers of goods imported from Mexico? Forcing them to have Mexican-originated freight transloaded onto American trucks at the border - a process that sometimes requires three trucking transloads to complete - takes time and costs money. Shouldn't we be able to work with our neighbor to ensure Mexican trucks bound for the U.S. meet the same safety and homeland security criteria that our locals do?

Mexico is one of America's largest trading partners, and has been growing in that capacity. Is the chance that a Mexican trucking outfit would risk its good standing to undertake lucrative American hauls by smuggling illegal immigrants so bothersome that compelling economic advantages lose out? After all, this is the era of NAFTA, and the U.S. has made some commitments we were supposed to fulfill 12 years ago!

And while any point made about roadway safety, security and immigration should be appreciated and taken seriously, isn't it also true that many (though

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not all) groups urging the Bush Administration to leave well enough alone have their own economic interests to protect? For every Mexican truck running up I-5, there's one less American driver on a haul. Moreover, it would be very difficult to prevent Mexican truckers from hauling cargo between two points within the states (something NAFTA doesn't require us to allow).

DOT officials dispute the notion that Mexican trucks and drivers are significantly more dangerous than their American counterparts. Licensing in Mexico is now federalized with systems to enforce safety concerns that have been greatly improved over the last few years. U.S. customs inspection at crossings has been beefed up thanks to \$500 million in federal budgeting for that purpose.

These arguments and attitudes have been coming to a head over the past couple years amidst lobbying, court action and regulatory hearings. DOT has implemented an inspection program at border crossings designed to address stated concerns. Uncle Sam launched a one-year "pilot program" on September 8th, when the first Mexican truck underwent a two-hour border inspection, and nervously proceeded up highways large and small to deliver freight in North Carolina.

Mexican Trucking... (Continued)

Ultimately, over 100 Mexican trucking companies representing an estimated 500-600 trucks are slated to get DOT's blessing to operate in the U.S. DOT has implemented a safety inspection and audit program for all Mexican trucks intended to cross the border, and they will be equipped with a satellite tracking system to make sure they don't do business beyond what they're cleared for.

In passing the Safe American Roads Act of 2007 last May, Congress authorized funding for a three-year pilot program. However, that authorization was contingent on a number of safety issues being attended to, and provided that it be nixed if safety is ever compromised. Congress apparently thought twice about the program when it passed DOT's 2008 budget, prohibiting the agency from using its funding to implement the program. Confusing, huh?

Not so confusing is the introduction of a bill entitled the NAFTA Trucking Safety Act of 2007, which is designed "To prohibit Mexico-domiciled motor carriers from operating beyond United States municipalities and commercial zones on the United States-Mexico border until certain conditions are met to ensure the safety of such operations" that is now in committee.

The current system is unworkable, not to mention probably violative of the NAFTA treaty that America benefits from. Safety and security are a paramount concern, but it should be well within our capacities to work with Mexican authorities to ensure that risk is minimized. Congress and DOT, with industry support, should undertake an effort to create a safe and reliable program for Mexican trucks to deliver freight from Mexico in the states.

Ref: H.R. 1773, the Safe American Roads Act of 2007, available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-1773>, and H.R. 1756, NAFTA Trucking Safety Act of 2007, available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-1756>

A TRANSPORTATION INTERMEDIARY COULD BE LIABLE FOR A CARRIER'S ACCIDENT

By Steve Block

The federal judiciary's trend toward holding intermediaries at least potentially liable continues. Yes, the concept that forwarders and brokers are just booking agents who facilitate the increasingly complex array of elements modern transportation encompasses is taking a backseat to the notion that intermediaries are integral players in each transport's operational aspects. Broker CH Robinson, hauled into court for the second time on this spotlight-grabbing issue (remember *Schramm v. Foster* in 2003?), couldn't get an accident plaintiff's claims dismissed on summary judgment, the court finding even more legally substantiated theories of liability than last time around.

A shipper hired CH Robinson to arrange transit of commercial freight from North Carolina to Virginia. The broker engaged motor carrier AKJ Enterprises for the task. Riding up the Old Dominion State, AKJ's truck collided with another commercial vehicle. The driver of the latter vehicle (Winford Jones) sued AKJ, the estate of AKJ's driver (she tragically was killed in the accident) and a number of CH Robinson entities in the U.S. District Court for the Western District of Virginia. He alleged various state and common law claims, as well as violation of the Motor Carrier Act and certain FMCSA regs. CH Robinson moved to dismiss.

Historically, surface transportation brokers have been viewed as "travel agents for freight," liable only for their own negligence and breaches of contract. Analogous to ocean freight forwarders that perform similar tasks on a saltier basis, transportation brokers don't actually move freight, and usually are non-asset companies that sell expertise, convenience, contacts within the transportation industry, and other fundamentals to their shipper customers. If a broker passes along incorrect shipper instructions to a carrier, or selects an incompetent carrier, sure, it can be held liable

A TRANSPORTATION INTERMEDIARY (Continued)

for the consequences. But why should a broker be liable when a qualified carrier it hires crashes into an innocent bystander?

Mr. Jones alleged negligence in his claims against CH Robinson, but not the type intermediaries typically encounter. This negligence claim was based on CH Robinson's alleged vicarious liability for AKJ's negligent driving. CH Robinson responded by pointing to its contract with AKJ, which specifies that AKJ and its employees are "independent contractors" for which there is no vicarious liability. Recognizing that the parties' agreement as to employee or independent contractor status is not controlling, and noting plaintiff's challenge to the contract's authenticity, the court denied CH Robinson's motion to dismiss this theory. Enough evidence suggesting an employment relationship was on the record to take this to trial. Apparently, the court thought Mr. Jones might demonstrate a direct employment relationship. Hmm.

But how could a broker be liable for negligent hiring and supervision of a qualified motor carrier? Mr. Jones and, ultimately, the court that it indeed could be. The issue wasn't actually AKJ's driver, but the carrier itself that CH Robinson purportedly hired and supervised negligently. True, AKJ had an FMCSA "conditional rating," but it was fully licensed and had appropriate equipment for the haul. Nothing suggests it was underinsured. Nonetheless, even if the carrier was an independent contractor, the court found that CH Robinson's hiring of AKJ could have been negligent. Enough factual substantiation was there to survive summary judgment.

Okay, how could a broker be liable for negligent entrustment, when it unequivocally neither owned nor had anything to do with giving, providing or otherwise entrusting a truck to AKJ's driver? Plaintiff and the court found a way: it's not the truck CH Robinson negligently entrusted, but the haul itself. Virginia law, which the court applied, provided this theory could be asserted with respect to a task

assignment, as opposed to physically tendering a material instrument. That issue goes to trial, too.

The one set of theories Jones failed to keep in court were under the Motor Carrier Act and certain FMCSA regs addressing use of safe and adequate equipment. Those provisions do not create a private right of action in favor of personal injury claimants.

CH Robinson has not been found liable on any theory, and its arguments appear very strong. It may very well prevail at trial or settle out favorably. However, *Schramm*, this decision and a few others around the country show a clear trend toward allowing accident claimants an opportunity to put on a case against brokers who have nothing to do with truck operations. Given the prevalence of small, mom-and-pop carriers that might not have extensive assets or more than the minimum required insurance coverage, deep-pocket intermediaries can be attractive targets for accident claimants looking to score a substantial judgment. Brokers and their insurers should be mindful of this development in their business arrangements and risk management.

Ref: Jones v. D'Souza, et al, 2007 WL 2688332 (W.D. Va 2007); *Schramm v. Foster*, 341 F.Supp.2d 536 (D.Md. 2003).

HOT RECENT CASES IN MOTOR CARRIER LAW

By Steve Block

Carrier documentation mistakes nix limited liability.

Mosso v. Dependable Auto Shippers, Inc., 2007 WL 2746723 (E.D. Cal. 2007)

Shipper Mosso retained carrier Dependable Auto Shippers (DAS) to haul his antique Camaro from Michigan to California. The car apparently arrived with all kinds of problems, including a stolen DVD player, an oil stain, a scratch, a bottomed out corner panel and some 175 miles in unauthorized travel. Mosso sued DAS in the U.S. District Court for the Eastern District of

California, seeking to recover twenty thousand dollars in damages, plus attorneys' fees. DAS moved to dismiss.

DAS knew some cool transportation law buzz words, but didn't impress the court with its failure to do the right paperwork. DAS's bill of lading contained a \$250.00 limitation of liability clause, applicable unless the shipper filled in the "actual cash value" blank *and* paid for valuation coverage. Mosso did indeed pay for coverage, even though he didn't fill in a value. It's your contract language, ruled the court, and dismissed the carrier's limitation of liability defense.

DAS tried to defeat the attorney fee claim first by stating that there was no contractual fee agreement. DAS pointed to the bill of lading's first page. Mosso brought in the second page, which did indeed have an attorney fee clause (nice try, DAS). DAS then pointed to case law that disallows fee awards as preempted when a shipper tries to rely on a state statute that makes them available. But that's an entirely different scenario than we have here. Case law makes clear that transportation parties may contractually agree to a winner-takes-all attorney fee clause. This one continues.

Another botched vehicle delivery, but the deliverer isn't responsible.

Brennan v. A-A Auto Transport, Inc., 2007 WL 2886355 (N.D. Ohio 2007)

Shipper Brennan contracted with two carriers to move an Oldsmobile and two "straight trucks" from California to Ohio. One straight truck contained expensive professional tools of some sort. The Olds and empty straight truck arrived at consignee Sam Winer Motors without incident, but a few weeks later, the tool-laden truck was delivered missing a lock and eighty grand worth of tools and other supplies. A Sam Winer rep advised Brennan of the circumstances, but didn't have anything else to do with the loss.

Brennan sued the two carriers and Sam Winer in the U.S. District Court for the Northern District of Ohio with a poorly crafted complaint that failed to assert Carmack liability against the

carriers and "presumably" alleged breach of contract and negligence against the consignee. On all defendants' dispositive motions, Brennan's claims against the carriers were dismissed based on Carmack preemption.

In analyzing the consignee's potential liability, the court concluded that no viable theory had been asserted. True, there was communication between the shipper and Sam Winer, but nothing in the complaint alleged any sort of contractual or other bailment relationship. There was no assertion, let alone one supported by evidence, that Brennan intended his consignee to take possession of the missing tools, that Sam Winer did so of its own accord, or that Sam Winer converted the property. Consequently, Brennan's claims against the deliverer were dismissed as well. In other words, there is no presumptive liability on a consignee's part.

Carmack preemption in the counterclaim context: it applies when freight claims are defensive measures as well.

United Van Lines, LLC v. Edwards, 2007 WL 2900220 (E.D. Cal. 2007)

Here's one carriers and their counsel might keep in mind for instances when deadbeat shippers counterclaim with damaged freight claims in response to freight charge collection actions. Shipper Edwards hired carrier United Van Lines to ship her household goods from California to Montana. United later sued Edwards in the U.S. District Court for the Eastern District of California, alleging the shipper hadn't paid some eight grand in freight charges. Edwards countersued, alleging the carrier damaged her stuff to the tune of ten grand.

Edwards' counterclaim (called a "cross complaint" in the opinion) alleged state and common law causes of action such as negligence and failure to use due care. The court tossed out the counterclaim on United's dispositive motion, agreeing that Carmack preempted the shipper's claims. Of course, the shipper can always file an amended complaint asserting Carmack, but the counterclaim will then be heard subject to appropriate law. The court refused to dismiss Edwards' claim based on timeliness, finding that

Hot Recent Cases (continued)

it was a properly asserted compulsory counterclaim interposed in response to a first amended complaint.

Billing blues: a complex invoicing system costs a carrier big bucks.

Con-Way Transportation Services v. Auto Sports Unlimited, Inc., 2007 WL 2875207 (W.D. Mich 2007)

Yet another auto-related shipper matter, this one involving a dispute over due-and-owing freight charges. Carrier Con-Way had an ongoing relationship with shipper Auto Sports which involved significant discounts off the carrier's standard rates as part of a series of pricing agreements. Payments were not made on each shipment; rather, a single check often would cover a number of freight invoices.

Con-Way's standard bill of lading provided that it must invoice any charges beyond those originally contemplated within 180 days of a shipment, and that discounts granted a shipper would be retracted if the carrier wrote the shipper advising that it was placing an invoice with a collection agency.

Somewhere along the way, Auto Sports stopped paying invoices, and Con-Way turned the matter over to collection service Bethune. Bethune wrote Auto Sports demanding that it pay up. Nothing doing. Con-Way then sued its shipper in the U.S. District Court for the Western District of Michigan seeking to collect some \$102 thousand in freight charges (i.e., the undiscounted amount).

Auto Sports' first issue was that the invoices Con-Way submitted were only computer-generated copies of the statements Con-Way actually issued. Thus, urged the shipper, they weren't "best evidence" of the amounts due and owing, and should be excluded in favor of the actual statements. The court disagreed, finding that a motor carrier's computerized statements were reliable as identical in substance to the pieces of paper Auto Sports received.

Momentarily distracted by trucking's complex regulatory history, the court went through a nice little history of regulation, the filed rate doctrine, deregulation, and modern trucking industry trends. The court concluded this is not a federal rate case; rather, it's properly a state court contract action under Michigan law.

But that's about where the court lost sympathy for Con-Way's accounting and billing system. By the terms of its own bill of lading contract, Conway had to issue bills for charges over those originally billed within 180 days of the shipment. Conway never billed Auto Sports the undiscounted amount, which would be a charge over the original amount. Moreover, Con-Way didn't send Auto Sport a letter notifying the shipper of its *intent* to place the invoices for collection, and Bethune's demand letter didn't count because the matter was already in collection before Bethune sent it. Auto Sport has to pay only \$18,156.40, and even that amount is the best a court can do given the complexity of Con-Way's accounting system.

Federal Motor Carrier Act doesn't preempt state law claims, but can provide remedies in addition to otherwise exclusive state workers comp laws.

Craft v. Graebel-Oklahoma Movers, Inc., et al, 2007 WL 3012715 (Okla. 2007)

Craft, an employee of carrier Graebel-Oklahoma Movers, was critically injured on the job when another vehicle struck a van she was riding in. Graebel's van had been inspected by Central City Mobile Services. Craft credibly asserted that Central City had blessed the van as compliant with federal safety regs despite numerous blatant and unsafe conditions, such as missing seats and seatbelts. Moreover, Craft contended that Graebel vans regularly broke down, and that Central City had issued false safety reports about its inspection results.

Craft sued Graebel and Central City in Oklahoma state court citing violations of the Federal Motor Carrier Act, 49 USC § § 30103, and 31101, *et seq* (FMCA). The defendants moved to dismiss based on Oklahoma's worker compensation laws, which are an employee's statutorily exclusive remedy

Hot Recent Cases (continued)

for workplace injuries in the Sooner State. Craft retorted by pointing to FMCA's preemptive effect. The plaintiff was urging that state preemption of common law was preempted by federal law, such that common law should apply.

The court was intrigued, observing that Craft's position "presents a twist on traditional preemption theory, since a finding in this situation that the state's law is preempted would not necessarily mean that a federal law would replace the state's law. Instead, it could mean that the state's common law claim of ordinary negligence would be reinstated ..."

Unfortunately for Craft, however, the court didn't find federal preemption in this circumstance. Section 30103 applies only to commercial vehicle manufacturers, and not to inspectors or carriers. Sections 31101-31162, when read in its context and with other precedents' interpretation, are not crafted to suggest Congress intended "to occupy the entire field of motor carrier safety, much less workers' compensation." It would be impossible for carrier employers to comply both with the minimum safety standards these sections impose and Oklahoma's labor laws at the same time.

Craft also asserted she has a federal claim under 49 USC 14704(a)(1), but other cases citing this statute in favor of personal injury claimants didn't involve worker compensation claims. No go there, either.

The court did find that Craft has a claim against Central City based on the inspector's independent obligations under FMCA. False inspection reports and habitually allowing unsafe vans to operate are not preempted by workers comp laws, leaving Craft free to pursue such claims.

Owner operators have little left to sue about.
Owner-Operator Independent Drivers Association v. Swift Transportation Co., Inc., et al, 2007 WL 2808997 (D. Ariz. 2007)

OOIDA rides again, this time without much success against a few carriers, namely Swift. At issue were alleged carrier violations of the federal Truth in Leasing regs, including Swift's purported failure to adequately substantiate driver charge backs for such things as fuel and insurance.

Apparently, OOIDA had earlier taken issue with Swift on this, prompting the carrier to change its standard lease. Thus, the U.S. District Court for the District of Arizona had to address a series of claims in terms of the old and new leases.

The court sided predominantly with Swift, although some relief was granted OOIDA drivers on cross motions for summary judgment. The list is too long to address thoroughly here, but the court felt that Swift's substantial compliance approach to documenting charge backs generally was adequate, and that literal compliance - as urged by OOIDA - wasn't necessary. The court ruled Swift could add an administrative mark up for fuel charge backs, and need not explain how that bump was calculated. Swift could retain certain documentation and methodology as "confidential information." Moreover, the drivers had no evidence they had lost anything, so their damages claim was thrown out.

OOIDA was looking for injunctive relief, but the court ruled an injunction is unavailable when the circumstance complained of no longer existed. Swift's new lease corrected most of what OOIDA was angered about. Declaratory relief was granted to OOIDA with respect to certain performance bond issues.

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