



SURF & TURF

Legal News in Transportation & Logistics

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One Arm Out of the Stockade: FMC Appears Poised to Grant NVOCCs Contract Freedom
BY STEVEN W. BLOCK

It's been over a year since one; then three; then ultimately eight non-vessel operating common carrier (NVOCC) companies and trade groups petitioned the U.S. Federal Maritime Commission (FMC) for equal treatment under the Ocean Shipping Reform Act (OSRA). NVOCCs, those cargo-consolidating, ocean transportation intermediaries who sign on as carriers of record to their shipper customers, and as shippers of record to steamship lines from whom they purchase bulk space, missed out in Congress' 1998 adoption of OSRA. They're pretty much watching from the sidelines as everyone else enjoys the benefits of OSRA's revolutionary program, which transmuted international water transit from a tariff-based, one-freight-rate-fits-all common carriage system to one whereby players negotiate customized deals.

Unlike their vessel operating cousins, NVOCCs were forbidden under OSRA from entering into tailor-made service contracts cloaked by confidentiality and unencumbered by "me-too" rights asserted by other shippers (envious of their competitors' freight rates

and service options). Rather, NVOCCs still operate in the dark ages, forced to publish tariffs which (theoretically, at least) offer the same options at the same rates under the same terms to any shipper who wants them. Ocean shipping's prevailing business environment isn't friendly to those who have to publicize their deals and duplicate them to anyone who asks. As predicted early on, the NVOCC industry is suffering business losses and administrative costs and inconveniences.

Beginning in the summer of 2003, NVOCCs began pounding on FMC's door (see September 2003 Legal Lookout article). FMC is statutorily empowered to grant "exemptions" from "requirements" of OSRA shipping legislation in the agency's discretion (based on its shipping industry expertise). An array of substantive and procedural issues suggested intermediaries would face difficulty convincing the feds to allow them to enter into the same confidential service contracts steamship lines can. For example, a proposed amendment to the OSRA bill before its passage would have allowed NVOCCs to enter into service contracts, but Congress specifically rebuffed it. Opponents of the intermediaries' position urge that a government agency can't undo by regulatory rulemaking what Congress explicitly intended.

Opponents also pointed out that NVOCCs aren't really looking for an "exemption" from any part of OSRA as much as they're seeking affirmative authorization to undertake currently prohibited

activities. Thus, they argue, FMC can't do an end-around Congress' intent by "exempting" NVOCCs from their statutory obligation "not to operate strictly by tariff."

Attorneys representing NVOCC interests recently made compelling counterarguments. The circumstances under which Congress rejected the proposed amendment allowing NVOCCs contractual freedom have changed tremendously. The earlier concern was that NVOCCs, by and large, are not as heavily capitalized and fiscally responsible as are carriers, rendering them less reliable service contract partners. But six years of mergers and expanded NVOCC operations by larger logistics companies, as well as by steamship lines themselves, have changed the waterfront significantly. Now, the intermediary industry is financially more stable even than certain sectors of the carrier business.

Regarding FMC's regulatory authority, the petitioners persuasively point to numerous precedents in which snuffed statutory amendment proposals effectively have been implemented by subsequent regulatory rulemaking. Congress can always be specific as to statutory provisions it doesn't want regulatory agencies to tinker with; here it took no such action. Moreover, many of these precedents survived challenges that requested relief was "affirmative" in nature, as well as scrutiny by federal courts which have viewed the alleged distinction as an attempt to put form over substance.

Perhaps the most compelling argument in favor of allowing NVOCCs business parity with carriers is the fact that required NVOCC tariffs don't even play the role Congress and FMC contemplated they would back in 1998. Statistically, hardly anyone even refers to them in deciding whether to purchase shipping through an NVOCC. Intermediaries fiddle around with their tariffs constantly, essentially rendering their uniform reliability an immaterial and academic concept. The National Industrial Transportation League, in its expanded role as a forum for all transportation players, supports the pending petitions. Even a few larger carriers are for it, and the World Shipping Council, representing ocean carriers as an industry, has withdrawn its previous objections. The concept of intermediary-based service contracts still troubles a few larger shipper associations and the carriers who run NVOCC operations, but proponents of regulatory reform urge that those entities are just afraid of added competition.

It appears FMC is leaning toward the petitioners. The agency recently announced that its commissioners have unanimously agreed to grant NVOCCs "conditional authority" to service contract with their shipper customers under the cloak of confidentiality and unhindered by me-too rights. The intermediaries still must file their contracts with FMC. The announcement was made by way of a notice of proposed rulemaking inviting potentially affected players to chime in about the issue's ups and downs before the edict becomes final.

Forwarders and NVOCCs play a critical role in the international water transit process. The five-year old business disadvantage under which NVOCCs have operated should be eradicated. The ultimate losers in the current system are shippers, and therefore the American public. Shippers will enjoy a wider range of less-expensive shipping options when intermediaries are able to operate on the same par as carriers. The savings will be passed along.

Ref: FMC's Notice of Proposed Rule Making, available at www.fmc.gov/Dockets/04-12%20Proposed%20Rule.htm.

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Uncle Sam Reacts to Europe's Unfair Customs Clearance Treatment

BY STEVEN W. BLOCK

The Office of the U.S. Trade Representative (USTR), charged with analyzing, promoting and representing America's international trade interests abroad, recently fired a salvo against the European Union (EU). Invoking dispute resolution procedures at the World Trade Organization (WTO), U.S. Trade Rep Robert Zoellick hopes to solve a problem small and medium size U.S. exporters face getting their wares through customs on the Continent. He seeks to have the uniformity-oriented EU to, hey, get uniform.

The EU, comprised of several significant U.S. trading partners, was created to obtain advantages through its member states working as a more singularized unit in politico-economic affairs. The union strives for clout by way of a larger unit streamlining its economic infrastructure.

The problem is that, in many customs clearance procedures, there really isn't much uniformity among those states. Tariff schedules and classifications can differ greatly from country to country, as can the procedure non-EU exporters must follow to get their freight entered and cleared. Many aspects of customs administration also are handled differently amongst EU members. A commodity's classification in one state isn't binding, or even precedential, in another. Smaller and mid-size U.S. exporters (and those who represent them) often face a complex maze in trying to export to EU countries, one that often is cost prohibitive. What's more, the goal posts seem to move, such that experience with a successful clearance one time doesn't mean you know just what to do in the future.

And woe to the little U.S. shipper who wants to challenge a tariff classification of one or more EU members (which might even be issued pursuant to the same export). There is no comprehensive, user-friendly EU review procedure or program. You pretty much have to figure out and deal with the customs programs and laws of each destination state involved, get their final positions, and then appeal them to a EU Commission. The costs, difficulty, and delays of jumping these hoops are daunting, especially for little guys who don't have deep pockets for this kind of thing.

To be fair, the EU Commission has tried to rectify its customs uniformity issues on an *ad hoc* basis, dealing with grievances of individual U.S. exporters that have arisen in recent years. Apparently, the union doesn't deny there's a problem. However, USTR believes the EU's effort has been insufficient to the extent it has failed to produce "systemic solutions."

The 147-member WTO, of which Uncle Sam and the EU are brother members, offers a tribunal for this kind of beef. WTO members are obliged to run their customs programs even-handedly, such that trade is not unreasonably deterred. If someone feels they're getting a bad deal, the WTO will seek both macro and micro solutions. In response to USTR's petition, WTO will first request consultations, and try to work out the players' disagreement through settlement procedures. If that doesn't work, the matter will get more formalized attention. The whole proceeding could take eighteen months.

USTR proclaims that its complaint will be good for the EU, as it will prompt the Europeans to take another look at their customs-based coterie with a mind toward making it more uniform and equitable for all

concerned. Zoellick has announced USTR "will continue to work with the EU to try to resolve our concerns over their customs administration," but that "[t]oday our exporters face a common market with non-common customs practices." Ultimately, says Zoellick, "[w]e hope there is an opportunity to combine uniformity throughout the EU with Europe's effort to integrate its ten new members" (The EU having recently expanded from fifteen to twenty five members, making the matter increasingly significant).

This issue is part of, if not central to, furtherance of Uncle Sam's interests in the Doha Development Agenda. Doha is an initiative WTO launched in November 2001 toward the general liberalization of world trade, the groundwork for which was laid this past July. Doha seeks to bring many underdeveloped and emerging economies into the 21st Century by tailoring certain trade programs to accommodate their circumstances. USTR believes uniformity in EU customs practices, especially given that the union's new membership includes several developing economies, would further Doha's aims.

U.S. exporters and the transportation/trade professionals who serve them should welcome USTR's effort. If free trade is the battle cry; if liberalized global economic relationships will carry us through this era of uncertainty on the international scene; and if the profitability of smaller and medium U.S. exporters are concerns, then EU uniformity in customs clearance is essential.

Ref: The websites of the Office of the U.S. Trade Representative, www.ustr.gov, and the World Trade Organization, www.wto.org.

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Hot Recent Cases in Motor Carrier Law

BY STEPHEN L. DAY
AND STEVEN W. BLOCK

Are transportation brokers liable for motor carrier accidents? Not likely, but....

Schramm v. Foster, et al v. Foster, et al, 2004 WL 1882629 (D. Md. 2004)

Shipper Jasper hired transportation broker C.H. Robinson to arrange transport of a cargo of soy milk from Missouri to New Jersey. Robinson issued a guarantee to Jasper for the freight's safe delivery (taking financial responsibility if the actual carrier didn't pay up), and placed the transit with motor carrier Groff Brothers. While in Maryland, Groff's driver Foster ran a red light and crashed into a pickup truck, severely injuring Tyler Schramm. Schramm sued Robinson, alleging the Robinson was liable under Maryland state law and some novel applications of the Motor Carrier Act.

Hearing cross motions for summary judgment, the District of Maryland rejected a series of arguments Schramm urged under motor carrier law governing transportation brokers, as well as Robinson's specific actions and representations in this haul. The court found that a broker's role in surface transportation doesn't result in *respondeat superior* liability for the acts of motor carriers' drivers, mainly because drivers aren't brokers' employees. Under Robinson's contract with Groff, the carrier was an independent contractor for Robinson (that argument probably wouldn't work had Groff asserted it regarding Foster), and Groff controlled the means and method of transportation. "Control over the result" isn't enough to make an independent contractor's driver a broker's employee.

The court looked at Schramm's negligent entrustment theory the same way. Robinson didn't give Foster his truck, so it hadn't entrusted him with anything, let alone negligently.

The ICCTA-created right of private action in 49 USC § 14704(a)2) is written rather broadly, and imposes liability on brokers for damages ensuing from their acts and omissions. The court recognized that, "at

first blush," this suggested Robinson might be on the hook. But looking at the statute's context and history, the court concluded it was intended to apply to commercial damages only. Moreover, it doesn't create a private cause of action (as has been ruled in other federal precedents).

But what about Robinson's contractual assumption of liability? Schramm argued that the guarantee's broad language reasonably implied Robinson would accept liability for anything, including personal injuries, as asserted by anyone. The court disagreed. Accepting commercial liability for clearly business purposes doesn't mean you're agreeing to liability for the Lindbergh baby.

But then the court reached Schramm's argument that Maryland state "negligent hiring" law dictated Robinson was liable. Old Line law imposes a duty of care on entities which select carriers. Apparently, FMCSA's website suggested Groff might not have been an ideal selection (based on its operational history). This presented a question of fact, even though "evidence of Robinson's alleged negligence is somewhat thin. . ." Summary judgment was denied on this issue, suggesting a jury might decide whether a broker may be liable in Maryland for truckers' accidents.

Nice try, but the Interstate Commerce Act isn't a basis for federal jurisdiction in former motor carrier employees' non-compete action against motor carrier.

M,G, & B Services, Inc. v. Buras, et al, 2004 WL 1872718 (ED La 2004)

Motor carrier M,G & B sued in Louisiana state court some of its former employees for allegedly breaching a non-compete clause in their employment contracts. The employees removed the action to the U.S. District Court for the Eastern District of Louisiana, asserting that federal law under the Sherman Act and the Interstate Commerce Act (ICA) governed part of the dispute. M,G & B moved to remand the case back to state court asserting there was no federal jurisdiction.

Going through a nice little summary of jurisdictional issues involved in removal, the federal court explained that a federal jurisdictional basis must be supported by the complaint. Defenses to the complaint's allegations, even if the complaint's nature necessarily contemplates them, cannot support removal. While M,G & B was a motor carrier and the

employment terms it imposes on its employees might implicate elements of the ICA (as well as the Sherman Act), those sources of federal law weren't the subject of the complaint. Indeed, the defendants failed to suggest how the ICA possibly could bear on the substance of the complaint.

The case was remanded to Pelican State court. Not totally put off by the defendants' argument, the federal court refused to award plaintiff its attorneys' fees. The removal theory wasn't "frivolous."

**Keeping local authorities in tow:
Philadelphia regs are mostly preempted**

Helmrich Transportation Systems v. City of Philadelphia, 2004 WL 2278534 (E.D. Pa 2004)

Over the past several years, federal courts around the country have been striking down state and local regs which impact towing companies (see August 2002 Highlights Motor Column). This time, the City of Brotherly Love got its hand slapped for trying to enforce certain licensing, lettering and fee requirements on tow truck operators.

The general rule is that 49 USC § 14501(c)(1) precludes state and local authorities from enacting regs which have the "effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." Courts have held that the term "with respect to" should be interpreted broadly. That pretty much nips tow truck licensing and fee requirements in the bud.

Like other local government agencies in the same predicament, Philadelphia pointed to the federal statute's two exceptions. Under the federal statute, states and cities can implement safety regs, and they have freer reign when it comes to nonconsensual towing. Like its predecessors, Philadelphia largely failed in this argument. But not quite. The municipal tow truck licensing fee was only fifty bucks, an amount so low the court couldn't see how it could seriously impact service pricing. One of the licensing requirements was really just a business privilege license which, again, hardly regulated motor carrier aspects of the towing business. These regs were allowed. But Philly failed to show how vehicle identification lettering requirements were a safety concern, or how mandating towage permission forms reduces danger to life and limb. Therefore, most of the city regs are preempted.

**DOT's Inspector General
raid is okay in the Fourth Circuit**

United States v. Sanders, et al, 104 Fed. Appx. 916, 2004 WL 1688340 (4th Cir. 2004)

The Federal Motor Carrier Safety Administration accused motor carrier K&C Trucking of various hours of service violations on a particularly nasty scale, compounded by allegations of conspiracy and making false statements to Department of Transportation investigators to conceal violations. DOT asked K&C nicely for certain documentation, then demanded production, then slapped a subpoena on the carrier. K&C still wouldn't produce the documents. Consequently, DOT's inspector general obtained a search warrant for K&C's premises. Combat-ready federal agents stormed the carrier's kitchen while the media waited outside. Incriminating documents (from K&C management to drivers directing them to violate hazmat rules) were found there.

A federal grand jury in the Western District of Virginia asked to see the documents. The feds already had them, so K&C's agreement wasn't needed. The grand jury indicted K&C and its principals on the basis of the documents, prompting the carrier to move the court to exclude them from consideration. The district court granted K&C's motion, finding that the search had been executed in bad faith, and that the grand jury's subpoena of the ill-gotten documents was improper.

The court didn't apply criminal law's exclusionary rule (whereby evidence obtained in violation of a defendant's constitutional rights is suppressed). Rather, it resorted to the court's general supervisory powers, concluding that DOT-IG's search was, well, too harsh. The court deemed the "totality of circumstances" demonstrated the search was in "bad faith" because it was beyond the scope of an IG's authority.

On the government's appeal, the Fourth Circuit reversed and allowed the evidence. The district court abused its discretion in applying its supervisory power. The feds' conduct simply wasn't so severe under the circumstances as to amount to "brazen lawlessness." The lower court's approach would only be appropriate in cases of "severe official misconduct," which wasn't demonstrated here.

Mayflower hits the dec with preemptory strike against a shipper

Mayflower Transit v. Troutt, 332 F.Supp.2d 971 (W.D. Texas 2004)

Shipper Troutt approached a Mayflower agent requesting freight charge quotes for transport of household goods and office furniture. Troutt refused the office furniture quote, stating it was above his budget, and apparently directed Mayflower to move his household goods only. Mayflower did so. Troutt then demanded that Mayflower move his office furniture, and hit the carrier with damages demands based on its refusal to do so. Hmm.

Mayflower, probably confused and ticked, brought an action for declaratory judgment against Troutt in the Western District of Texas, seeking an order clarifying that Mayflower had no obligation to transport freight it hadn't been hired or paid to transport. Troutt

appeared in the action and requested additional time to answer. Then he disappeared.

Mayflower brought a motion for default judgment. The court went through a detailed analysis of the basis of its subject matter jurisdiction (Troutt would have to seek recovery under the Carmack Amendment), federalism, default judgment standards, and how miffed it was at Troutt. A dec action is appropriate here, a default judgment is even more appropriate, and Mayflower is not required to haul freight it wasn't hired to haul.

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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:

Steve Block to Present at Washington State Bar Association CLE

Steve Block will co-present at the upcoming Washington State Bar Association CLE, "Insurance Today: The Markets, The Claims, and Critical Litigation Issues." The CLE will be at the Washington State Convention and Trade Center, on Tuesday, December 14, 2004. For additional information or to register for the event, please see <http://www.wsba.org/cle/seminars/insurance+today.htm>.

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