



# SURF & TURF

*Legal News in Transportation & Logistics*

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## **Ocean Hazmat Shippers Beware: IMDG Code Compliance May Not Suffice**

BY STEVEN W. BLOCK

It appears the courts are joining federal regulators in a trend toward holding shippers more responsible for hazardous material mishaps. Witness a horrible fire that broke out on the Brazil-bound *M/V DG Harmony* about seven years ago, resulting in the vessel's total destruction and some \$18 million in damages. The vessel owner, cargo owners, insurers and other players recently went to the mat in a New York federal court, which slapped a hazmat manufacturer/shipper with full liability. The decision was notwithstanding the shipper's compliance with the International Maritime Dangerous Goods (IMDG) Code and honest ignorance of dangers it had created.

Chemical company PPG Industries manufactured, sold and shipped a cargo of calcium hypochlorite (cal-hypo). Carrier Cho Yang slotted the freight with a vessel under charter to the Independent Carriers Alliance. Fire broke out near Brazil, the crew couldn't contain it, the ship was abandoned (thankfully, no one was hurt), and three weeks later, the vessel was scrapped.

It's no news that shippers are responsible for knowing their product, packing it properly, labeling and warning about hazmats adequately, and advising carriers and other service providers about any cargo peculiarities. The IMDG Code provides the specifics for a plethora of hazmats in an internationally accepted format regularly used by such shippers. On the face of it, PPG apparently did all it was supposed to do. So why was its feet held to the fire?

It turns out that cal-hypo is some tiger when it comes to chemical instability and explosive potential. The court's opinion goes through a scientific explanation (based on expert testimony) you almost need a chemistry degree to understand. Put simply, cal-hypo's properties are subject to "thermal runaway," meaning that the right (or wrong) combination of temperature, packaging, ventilation and other factors can cause the stuff to heat up exponentially on its own to the point a vessel and its other freight become toast. The court dismissed PPG's protest that the fire's cause was uncertain, finding the shipper's expert witness not credible (largely because he was inadequately versed in shipping issues).

The IMDG Code contains provisions for safety procedures designed to prevent that chemical snowball effect. The carrier stowed adequately packaged cal-hypo in an acceptably cool hold, and fire resulted nonetheless. But here's where some rather severe legal concepts and attitudes came into play. Federal maritime law, which essentially

embraces general products liability law, holds hazmat manufacturers to the standard of experts. It didn't help PPG's cause that it was both the cargo's manufacturer and shipper. International standards and protocols notwithstanding, manufacturers will be held liable if injured parties aren't informed "of the specific hazard and of the extent of the harm that could follow, so that his choice to brave it was an informed one."

Following certain product liability law, the court held that those who make and/or ship hazmats may be "strictly liable" for injuries. This legal standard is particularly difficult to defend against, as it imposes some daunting legal presumptions and requires defendant manufacturers to demonstrate plaintiffs knew or should have known they were playing with fire when engaged with the defendant's product.

Considering PPG's expertise and background, similar previous mishaps PPG was aware of, and the disaster's sheer enormity, the court concluded that a hazmat manufacturer/shipper of something this dangerous better shoulders risk than would a carrier that processes huge cargo volumes within limited time frames. Apparently, the cal-hypo at issue was still warm from production when it was placed in drums for shipment, increasing the likelihood it would spontaneously combust. Not something a chemical manufacturer should let happen.

The court applied the U.S. Carriage of Goods by Sea Act (COGSA) and similar precedents in support of its conclusion. COGSA holds shippers responsible for "all" unforwarned hazmat losses, including all damages that "directly and indirectly" ensue. Even though the freight was booked with Cho Yang, PPG gets to pay the tab of other parties "indirectly" harmed, such as other shippers and insurers. PPG protested it had no duty to warn a carrier that already had knowledge (per the IMDG Code) of the danger, but the court found the carrier's knowledge incomplete.

This case, especially when considered in the context of onerous demands federal regulatory agencies saddle hazmat shippers with, should give pause to those who ship and book chemical cargo. You can't be too careful in confirming that special-needs freight is in order, regardless of its source or origination. New federal regs broadening the definition of a cargo's "offeror" (see September 2005 Legal Lookout) only complicate the matter. Hazmat shippers should have in place detailed transportation safety programs that might have to exceed the IMDG

Code or similar protocols. Lest they face significant potential liability.

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Ref: *In re M/V DG Harmony*, 2005 WL 2649907 (SDNY 2005).

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### **Railroad Antitrust Immunity: A Needed Quid Pro Quo, or a Solution to No Problem?**

BY STEVEN W. BLOCK

Carrier antitrust immunity hasn't been in the news much lately. The topic was hyped after passage of the Ocean Shipping Reform Act (OSRA), which implemented a market-driven ocean shipping environment beginning in May 1999. In the months following OSRA's enactment, shipping circles, their lawyers, economists and the government began to wonder just what disadvantages carriers suffered that required Sherman Act immunity. Gone were the days of near mandatory tariff-driven common carriage and the economic burdens it imposed on steamship lines.

Moreover, only foreigners stood to gain from Uncle Sam's carrier antitrust immunity laws. The last major American carriers married foreign suitors and hauled down the Stars & Stripes in favor of colors more accommodating of shipping's economic particulars. Congress went so far as to consider ocean carrier antitrust reform legislation in 2000 (see August 2000 Legal Lookout article). But with OSRA's economic successes, guard changings in the federal government's legislative and executive branches, and a new focus in transportation issues imposed by 9/11, the legislation stalled in committee.

Another transportation mode that enjoys antitrust immunity, at least on a limited scale, is railroad. The historical concerns railroad antitrust immunity was designed to redress are similar to those on the wet side, and the two modes got the privilege around the same time (railroads by the Clayton Act in 1914; ocean carriers by the Shipping Act of 1916). But the differences have been highlighted by players voicing their views in a recent initiative to eradicate railroad immunity. Unlike international ocean carriage, the

railroad industry remains highly regulated. The Staggers Act of 1980 loosened regulatory reins a great deal for routes and rate setting (so long as economic conditions justified it), but imposed safeguards that kick in where freight competition is absent or lax. Market-driven forces work just fine, but only where there's a market! Unlike the ocean carriage industry, where numerous lines are operated from every corner of the globe, the U.S. rail industry is rather finite and limited in its growth capacity by geography and the costs of track.

When Congress dismantled the Interstate Commerce Commission in 1995, it transferred railroad regulatory functions to the newly created Surface Transportation Board (STB). Part of STB's mission is to set maximum freight rates or otherwise cut railroads off at the pass when they gain too much market control or squeeze out the competition unfairly. It's a complex mesh of law, government, industry and economics that has been at the heart of railroad regulation for over a century.

So while some antitrust principles (or their equivalent as STB applies them) apply to railroads, train operators do enjoy specific antitrust immunity as regards the commercial interaction and interrelationships inherent in the railroad industry's operations. A primary goal of this immunity is to avoid concurrent regulation of the railroad industry by STB and the courts, which could lead to inconsistency. Thus, "pooling arrangements," whereby railroads join forces in their traffic and services, are kosher if STB approves them. STB is statutorily mandated to bless only those pooling arrangements that would be for the better economic good. Collective rate setting is allowed with similar restrictions. STB also gets the final say on railroad mergers without Sherman Act scrutiny.

This summer, The Railroad Antitrust and Competition Enhancement Act of 2005 was introduced to Congress at the behest of railroad shippers who believe train operators have abused their antitrust immunity to the point they effectively enjoy monopolistic control. The bill's proponents, such as the National Association of Wheat Growers, feel immunity prevents rate-lowering competition for shippers who essentially are railroad "captives." Affected shippers charge that larger railroads operating in the West publicize their freight rates and wink-wink nudge-nudge at each other's numbers, thereby agreeing not to vie for business through pricing. They also complain of railroads taking advantage of "bottlenecks," wherein a railroad owns

or controls a strip of track critical to a given route, and sells access to it at unreasonable rates.

Railroads, largely through the Association of American Railroads (AAR), counter by pointing to the significant degree of government regulation they're still subject to, as well as STB's supreme power to keep trains on an economically appropriate track. Nix railroad antitrust immunity, says AAR, and you'd better lighten up on some of the regs as well. Moreover, railroad freight charges have dropped over the past two decades, which shows the Staggers Act is working just fine.

The Congressionally created Antitrust Modernization Committee (AMC) will take up the issue as part of a sweeping antitrust overhaul. AMC's report is due in April 2007, but quite a bit of activity is expected in the interim. Industry players concerned about the impact antitrust liability might have on the rail industry should read up on AMC's agenda (see website below), and express their views sooner than later.

Ref: The Railroad Antitrust and Competition Enhancement Act of 2005, available at <http://www.theorator.com/bills109/hr3318.html>; and the Antitrust Modernization Committee's website at <http://www.amc.gov/>.

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

**Carriers aren't shielded  
from liability by a forwarder**

*Accu-Spec Electronic Services, Inc. v. Central Transport International, et al*, 2005 WL 2250691 (W.D. Pa. 2005)

Shipper Accu-Spec booked interstate transit of an x-ray machine with freight forwarder Logistics Plus, which placed the transit with carrier Central Transport. The freight was damaged on delivery, and

Accu-Spec sued Central Transport seeking recovery of the x-ray machine's repair or replacement costs.

Central Transport moved to dismiss, stating that the shipper could look only to Logistics Plus for recovery. The carrier pointed to Carmack's provisions regarding forwarder liability, and the notion that Carmack was designed to obviate shippers seeking out and naming multiple carriers in freight claims. Moreover, a congressman's statement recorded in Carmack's legislative history specified that freight forwarders bear sole liability.

The U.S. District Court for the Western District of Pennsylvania saw right through Central Transport's argument, and denied the motion. Going through a neat little historical summary of forwarder law, the court noted that numerous courts have held carriers and forwarders concurrently liable. Just because shippers need not sue the actual carrier (and may name the forwarder only) doesn't mean they're prohibited from doing so. And that congressman? While the court found his unequivocal statement bothersome, it ruled he was confused about the law and, nonetheless, legislative history doesn't trump clear statutory language.

### **The Federal Arbitration Act doesn't exclude dispute over freight forwarder records keeping**

*DVC Trucking, Inc. v. RMX Global Logistics*, 2005 WL 2044848 (D. Colo. 2005)

Freight forwarder RMX Global Logistics booked a series of transits with motor carrier DVC Trucking. DVC later asked RMX for copies of certain shipping records, which 49 CFR § 371.3(c) mandates forwarders preserve and make available. RMX refused. DVC sued RMX in the U.S. District Court for the District of Colorado. RMX moved the court to compel arbitration of the issue as provided by a term in the parties' contract.

DVC opposed RMX's motion, urging that the Federal Arbitration Act, 9 USC § 1, *et seq* ("FAA"), excludes mandatory arbitration of issues concerning transportation workers. DVC argued it was a Ma and Pa operation whose issues concerned the carriers' principals the same as transportation workers might be affected individually. The court didn't buy it. FAA's exclusion is meant for employment related matters, such as wages, entitlements, wrongful dismissal and personal injury. The contract at issue here was an arms-length business transaction between two companies.

DVC also argued that part of the relief it was seeking was revocation of RMX's license and other relief that only the U.S. Secretary of Transportation could implement. Arbitration, urged DVC, wouldn't set in motion wheels needed for that relief (as provided by 49 USC 14707(b)). That argument didn't fly either, as the court found the statute's application "a dubious proposition." Revocation of a forwarder's license requires a registration violation, which DVC couldn't realistically demonstrate. This matter goes to arbitration as the parties originally intended and agreed.

### **OOIDA rides again, just in the wrong state**

*Owner-Operator Independent Drivers Association, Inc. v. North American Van Lines, Inc.*, 382 F.Supp.2d 821 (W.D. Virginia 2005)

The trucking industry sees more than its share of venue disputes. By its unique nature, different locales often are at issue in court battles, with evidence, witnesses and preferred law being in two or more distant jurisdictions. Plaintiffs typically enjoy the benefit of a legal precept granting them deference as to the court they select. This allows many plaintiffs to "forum shop," or seek courts reputed to rule in their favor on certain issues.

Trucking class actions especially encourage venue disagreements and forum shopping. Numerous players typically are involved, several jurisdictions at least arguably are involved, and the stakes are high. Usually, the situs of a compelling event, witnesses, documents and/or parties will suffice to invoke a given court's jurisdiction. But there are certain minimum thresholds class-action plaintiffs must cross before enjoying the deference they're so fond of claiming.

Just ask the Owner-Operator Independent Drivers Association ("OOIDA"), the trade organization that represents drivers in various issues including lease disputes with carriers. OOIDA recently filed a class action suit against North American Van Lines ("NAVL") in the Western District of Virginia, where one plaintiff driver lived. Apparently that one driver was the sole basis OOIDA thought venue in the Old Dominion State was proper. All witnesses and documents were in Indiana (where NAVL's operations are headquartered). The leases at issue were executed in Indiana, and any leasing violations took place in the Hoosier State. Under these circumstances, the court didn't agree that deference to a plaintiff's selected forum or the convenience of a

single driver overrode general venue principles. Virginia may be for lovers, but it's not for this lawsuit.

**More roadblocks to collective lawsuits:  
you can't sue without damages, and ICCTA has  
no retroactive effect**

*Rivas v. Rail Service, Inc., et al*, 423 F.2d 1079 (9<sup>th</sup> Cir. 2005)

The Ninth Circuit recently took a look at four consolidated appeals addressing various driver employment claims against motor carriers. These included – you guessed it – alleged federal Truth-in-Leasing violations (failure to include leasing terms specifying that the motor carrier took responsibility for equipment throughout a haul), sale of insurance coverage (allegedly without state authority to do so) subject to California law, and other lease improprieties violative of ICCTA provisions. The district courts had found defendants liable in each instance.

The parties didn't make a fuss over federal jurisdictional issues, but the Ninth Circuit *sua sponte* took notice of potential defects. The court bounced plaintiffs' claims based on Truth-in-Leasing because, hey, the plaintiff drivers hadn't suffered any harm. Damages are a prerequisite to a claim under the statute, and the plaintiffs apparently conceded there were none. That circumstance also deprived plaintiffs of federal jurisdiction over their insurance claims.

The court of appeals also rejected claims for which the plaintiffs did allege damages, which would only be subject to federal jurisdiction under ICCTA. But the leases at issue pre-date ICCTA, and that statute has been held to have no retroactive effect. Thus, plaintiffs' judgments were reversed.

**Which Carmack hat was a  
rigger wearing? Any at all?**

*Delta Research Corp. v. EMS, Inc.*, 2005 WL 2090890 (E.D. Mich. 2005)

This case is a good example of players plunging into transportation activities not knowing the consequences, and the legal confusion that follows. Delta Research purchased a used boring mill to manufacture goods it would sell to a buyer in accordance with a long-term contract. It contracted with S.K. Rigging Co., a machinery rigger, to arrange

transport of the mill to Delta's Livonia, Michigan facility from Cincinnati. S.K. Rigging, in turn, hired carrier EMS to supply a flatbed and cab, and to haul the mill to Michigan. Of course, the mill was destroyed en route.

Delta sued S.K. Rigging and EMS, alleging Carmack liability against both. On cross-motions for summary judgment, S.K. Rigging urged that Delta's complaint was facially defective, as it did not allege that S.K. Rigging was either a freight forwarder or carrier. The court rejected this argument, finding the complaint contained enough detail about the nature of the loss, as well as controlling statutory principles.

The next issue was whether S.K. Rigging was either species of transportation provider subject to Carmack dominion. It held itself out as a machinery rigger. While it at least arguably performed freight forwarder services by booking a carrier's services, the court found compelling that S.K. Rigging did not do so in the ordinary course of its business. The opinion doesn't mention whether or not it issued a bill of lading. The court may have missed the mark in its analysis, but ruled as a matter of law that S.K. Rigging was not a forwarder.

But was S.K. Rigging a motor carrier? A broker (not subject to Carmack)? The court found issues of fact on these questions rendering summary judgment inappropriate. The issues of fact it found are questionable (e.g., was S.K. Rigging an "agent" of Delta), but the conclusion probably has some merit given the unusual circumstances.

The court's most impressive foray into transportation law is its dismissal of Delta's negligence claims. If the matter is subject to Carmack, such common law claims are preempted. If not (i.e., S.K. Rigging is a broker), then there would have to be evidence suggesting its selection of EMS was negligent. In the absence of such evidence, the negligence claims were properly dismissed.

**Carmack preemption extends to  
state-law claims beyond damaged freight**

*AIG Aviation, Inc. v. On Time Express, Inc.*, 2005 WL 2416382 (D. Ariz. 2005)

This case is a nice little review of Carmack's preemption of common law remedies out of a much-needed Ninth Circuit jurisdiction. Air carrier Mesa Airlines/Freedom Airlines engaged motor carrier On Time Express to haul freight interstate from an

airport. The cargo arrived damaged. The airline's insurer, AIG, sued On Time in Arizona state court, and the action was removed to the Grand Canyon State's federal court. AIG sought recovery under Carmack, but concurrently alleged theories sounding in state law (for such things as consequential damages). On Time moved to dismiss the latter theories.

The court granted On Time's motion. True, some courts have held that Carmack doesn't preempt claims arising apart from the shipment of goods itself (for such things as infliction of emotional distress). Rights and remedies not inconsistent with Carmack's intent are allowed. But sidestepping Carmack by alleging state-law theories which would provide

higher levels of damages "would undermine the certainty that the legislature intended to provide" for damaged freight claims. Because the parties agreed in pleadings that On Time was indeed a carrier, the motion was granted.

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