



# SURF & TURF

*Legal News in Transportation & Logistics*

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## **Limitation of Liability: What's a Package?**

BY STEVEN W. BLOCK

Anyone in this business for any length of time has encountered the issue of carrier limitation of liability. Freight transportation is an unavoidably risky business, and allocation of its risks as a function of freight charges has been a tenet of transportation contracting for centuries. Most countries around the world have embraced this environment, enacting statutes and generating case law which incorporate, although often with parameters, limitation of liability.

Surface and air carrier exposure typically is restricted by way of maximum monetary limits per weight-volume of damaged freight. This approach is the subject of U.S. federal statutory law (i.e., the Carmack Amendment) for surface carriage, and international treaty (the Warsaw Convention and Montreal Protocols) for international air transit. No statute governs domestic aviation transit, but federal common law addressing air carrier limitation of liability tracks the Carmack Amendment and its interpretative case law.

Water carriage, however, tackles the issue a bit differently. True, some water carriers, particularly domestic lines, limit

their liability based on the cents-per-damaged-pound scheme their trucker cousins have had good success with. However, most international water transit is subject to package limitation of carrier liability. The U.S. Carriage of Goods by Sea Act (COGSA), in keeping with international industry, custom and treaties (even ones Uncle Sam refuses to sign), adopts per-package limitation, drawing the line at which carriers may limit their exposure to 500 dollars/package. Ironically, that figure originally was conceived somewhat as a "ceiling" (500 bucks was a lot of jack in 1936 when COGSA was implemented), but evolved to be a "floor" when carrier exposure became a more significant issue).

With solidly entrenched law in place broadly enforcing limitation of liability, it's no surprise that parties to freight claim disputes often fight over the definition of "package." Carriers want that legally undefined concept to be as broad as possible, perhaps encompassing a disgruntled shipper's entire cargo. Conversely, shippers urge that their bills of lading encompass as many "packages" as possible, thereby raising the defendant carrier's maximum liability. The squaring off can reach humorous proportions; a Seattle claim some years ago received considerable cocktail party attention when a shipper argued – seriously – that each shrimp in his cargo should be considered a separate "package."

While cases have gone in different directions on the issue (often based on judges' notions about what's equitable under a given matter's fact pattern), a couple of basic precepts have been defined with relative consistency throughout our various federal jurisdictions. First, under most circumstances, a shipping container is not a package for limitation of liability purposes. Most freight is containerized these days, and the appropriate inference is that this technological convenience is not intended to identify individual articles of cargo. There are exceptions to this concept: (1) if a shipper fails to describe the contents of its container with enough specificity to allow another determination, then a court may rule that the container is the only definer, and apply it against the entire cargo; and (2) if containers are the freight itself, i.e., when empties are being transported, then each container is a package (even if a number of cans are lumped together under a bill of lading).

Second, when a bill of lading doesn't adequately define how cargo is grouped, combined or situated, then courts will look to the commodity's "customary freight unit" to determine how many packages are in a load. The U.S. District Court for the Southern District of New York, in *Marisa v. M/V CMA LA TOUR*, recently reviewed these principles in the context of a cargo of "74 household goods" (without further description) which were bundled together in a single container. In denying the carrier's motion for a ruling that the container should be the single "package" in this situation, the court found: "In determining whether a bill of lading adequately discloses the contents of a shipping container, courts seem to place greater emphasis on the importance of a shipper specifying an alternative number of units on the bill of lading that corresponds to units that were *actually* prepared or packaged in some way for transport."

A famous U.S. Court of Appeals one-liner, cited in *Marisa* apparently as a vent for the court's frustration, quips: "If it was the COGSA drafters' purpose to avoid the pains of litigation, they must be rolling in their graves." Parties to ocean shipping contracts should be mindful of this legal ambiguity, and protect themselves in bill of lading language. Shippers and intermediaries should describe their freight and packaging with adequate specificity; carriers should make sure those descriptions are appropriate. When a freight claim materializes, the difference between one package and 74 at \$500 a pop is, well, you do the math. That difference grows exponentially with commodities that, at least arguably, are contained in numerous packages. The result could effectively

destroy limitation of liability and the carrier's ace in the hole in this risky business.

Ref: COGSA, 46 U.S.C.A. § 1304(5); the Carmack Amendment, 49 USC § 14706; *Marisa v. M/V CMA LA TOUR*, 2006 WL 2521269 (S.D.N.Y., 2006).



### The Evolution of Intermodalism Personified: A Motor Carrier Takes on a Steamship Line at the FMC

BY STEVEN W. BLOCK

Historically, the bodies of law governing specific modes of transportation were similar, but just diverse enough to cause occasional confusion, inconsistency, unpredictability and, yes, inequity. The advent of containerism some 30 years ago set us on a path toward operational intermodalism. It's taken a while, but the law is finally catching up!

To wit, we've seen legally blessed modernization of standardized bills of lading designed to accommodate multimodal moves, and judicial decisions such as the U.S. Supreme Court's ruling in *Norfolk Southern Railway v. Kirby*, which synchronize transportation law (or at least attempt to provide a common legal frame work), so that operators and participants in divergent modes can gauge their liability and risk.

Recently, the two biggest titans of transportation – motor and ocean – have found a new issue ripe for resolution: does an ocean carrier's alleged violation of an enormous and encompassing, but privately administered, intermodal carrier agreement implicate the Shipping Act of 1984?

Motor carrier Transport Express, backed by the Intermodal Carriers Conference and the American Trucking Associations, sure thinks it does. Transport Express and China-based steamship line Sinotrans are members of the Uniform Intermodal Interchange and Facilities Access Agreement ("UIIA"), which "provides a framework for international marine cargo trade and motor carrier interchange," and is administered by the Intermodal Association of North America ("IANA"). UIIA's membership includes over 6,500 motor carriers, 52 water carriers, seven railroads and two leasing companies. This covers over 90% of the intermodal freight market.

As a UIIA member, Transport Express was hauling Sinotrans' equipment dockside. In October 2004, Sinotrans and Transport Express got caught up in a little tiff over an allegedly damaged container, which Sinotrans thought Transport Express should pay for. We're talking really small potatoes here (the repair tab was \$178.72), demonstrating how little stuff can seriously spiral out of control. Transport Express refused to pay the invoice, pointing to a clean equipment interchange receipt (i.e., one that did not indicate container damage). The dispute snowballed (although Sinotrans ultimately withdrew its bill), and the ocean carrier basically cut off Transport Express from further interchange activity with it. Indeed, Sinotrans apparently wouldn't even deal with freight consigned to Transport Express but handled by a different motor carrier (which Transport Express contracted with to protect its customers).

Transport Express first took the matter up with the UIIA's supervisory body, the Intermodal Industry Executive Committee, which disclaimed authority to require a member such as Sinotrans to reinstate a motor carrier's interchange privileges, concluding "[t]hat is a commercial decision of the provider."

When Transport Express tried to take up the matter informally with the Federal Maritime Commission ("FMC"), the federal agency's Office of Consumer Affairs rebuffed the trucking company on the ground, again, that this was just a commercial dispute between two carriers. Not deterred, the trucker filed a formal FMC complaint on October 24, 2006, alleging that Sinotrans' actions violated provisions of the Shipping Act of 1984 which preclude an ocean carrier from unreasonably refusing to deal or negotiate. By cutting it off from Sinotrans' interchange operations, Transport Express feels the water carrier is retaliating against it for refusing to pay the container repair bill, and that Sinotrans is interfering with the trucker's relationships with other companies (i.e., the other motor carrier it contracted with). The money damages Transport Express seeks are minuscule, but it wants an FMC order reinstating its interchange rights with Sinotrans, as well as other declaratory relief.

Is this the kind of regulatory matter the FMC should resolve? After all, UIIA is a private deal, and its own supervisory body has declined jurisdiction over Transport Express' beef on the ground this is, hey, a commercial dispute. Do we really want to make a federal regulatory mess out of every little \$178.72 dispute between two companies, especially in this deregulated era of reduced government intervention?

And even if we do, shouldn't Sinotrans have the right to deal with partners it wants?

On the other hand, what is a federal shipping provision for if it doesn't come to the aid of an entity against which an international steamship line is discriminating and harming (if that's really the case)? Doesn't an operation UIIA's size command special attention, given the controlling role it plays in the international freight interchange industry? Does (or should) the concept of freedom of contract go so far as to allow a steamship line to wield this level of power over another player in the industry? Every cog in the intermodal chain is vital, and the services Transport express performs are essential to the process.

IANA has filed to put in an amicus brief, showing how seriously that association takes the matter. All eyes are watching, as we await this latest installment of transportation law's modernization.

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Ref: *Transport Express, Inc. and The Intermodal Motor Carriers Conference, American Trucking Associations v. Sinotrans Container Lines, Co., Ltd. and Sinotrans Shipping Agency (NA), Inc.*, pending before the U.S. Federal Maritime Commission, Docket No. 06-10.; provisions of the Shipping Act of 1984, 46 USC 41104.10 and 41102(c).



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

**Carmack can be waived, but the  
waiver must be clear**

*Central Transport International, Inc. v. Alcoa, Inc.*, pending in the U.S. District Court for the Eastern District of Michigan under Cause No. 06-CV-11913-DT, decision reported at 2006 WL 2844097 (E.D. Mich. 2006)

Shipper Alcoa booked interstate transit with carrier Central Transport International ("CTI") of a gearbox pursuant to a transportation contract that said the cargo's value was 100 grand. CTI delivered some

saw blades to the consignee instead, and eventually determined that the gearbox had been lost. Alcoa sought compensation, but CTI wanted to limit its liability to the gearbox' actual value (as provided by Carmack), which was \$35,000.

Alcoa and CTI were unable to resolve their dispute, and went to the mat in the Eastern District of Michigan. Confirming that Carmack preemption of state and common law theories of recovery still applies, the court granted CTI's dispositive motion on the extent of liability. Alcoa urged that its transportation contract contained a choice of law provision in favor of Pennsylvania, suggesting the parties had opted out of Carmack by electing a particular state's law. Not enough, ruled the court. While parties to a transportation contract may waive Carmack, that election must be clear and unambiguous. Notably, the court noted that Alcoa's alternative pleading for relief under Carmack did not amount to a concession that Carmack applied.

### **Why transportation contracts should be written. . .**

*Patriot Logistics, Inc. v. Contex Shipping (NW), Inc.*, pending in the U.S. District Court for the Northern District of Ohio under Cause No. 1:06CV552, decision reported at 2006 WL 2869559 (N.D. Ohio 2006)

Contex and Patriot entered into an oral agreement whereby Patriot would arrange interstate transport of a cargo of tunnel boring equipment. Patriot apparently did so (details are sketchy in the opinion), and consignee/beneficial owner Robbins received the freight. Everything was hunky-dory, except that Contex didn't pay Patriot's freight bill. Patriot sued Robbins seeking to collect, and Robbins moved to dismiss Patriot's claim on the ground that 49 USC § 13706 doesn't permit a transportation broker to collect against consignee/beneficial owners of freight.

"Transportation broker," huh? While a consignee in Robbins' shoes might be held liable for unpaid freight charges, the court denied the motion, finding issues of fact as to what hat(s) Patriot might have been wearing throughout this transaction. Patriot claimed it was a motor carrier, and pointed to its FMCSA licensing to prove it. But just because a company holds carrier licensing doesn't mean it was operating as one (especially if it didn't move freight on its own truck). No written contract spelled out the obligations and roles the players agreed to undertake. Consequently, a detailed factual record must be

developed for the court to rule, and the lawsuit continues.

### **Motor carrier not liable for freight damaged while still in air carrier's care, custody and control**

*Sompo Japan Insurance, Inc. v. Nippon Cargo Airlines Co., Ltd.*, 2006 WL 2579706 (N.D. Ill. 2006)

In this factually-intensive analysis of he-said-she-said conflicting testimony, we see how important the circumstances of freight transfer between carriers can be as to who gets to pick up the tab for damaged freight.

Sompo Japan is back in the news, this time as the subrogated cargo insurer of Hitachi Data Systems ("HDS"). HDS engaged (through a Japanese air forwarder) air carrier Nippon Cargo Airlines ("NCA") to transport a series of palletized computer systems from Japan to Chicago. HDS separately booked transit with motor carrier Pace from the Windy City to HDS' distribution center. The computers made it to O'Hare just fine.

The problem arose when NCA and Pace personnel were loading HDS' freight into trailers for the ride to HDS' distribution center. What was done, by whom and at whose direction was the subject of conflicting testimony when Sompo Japan sued NCA to get back the 100 grand it paid HDS. The extent of someone's potential liability would be determined by whether this loss happened during air carriage subject to Warsaw Convention terms, was a good old fashioned Carmack claim, both, or neither. At issue was whether NCA had effectively handed off the freight to Pace before it fell onto the pavement outside NCA's loading dock. The court's struggle in reaching a bench-trial verdict was that it really didn't believe anyone's story (both versions were confusing and "fraught with improbability, confirming the maxim that truth is stranger than fiction").

In the end, a driver whose pre-litigation statements could not have been tainted by threat of liability carried the day. NCA had begun loading a trailer before the Pace driver had returned from doing paper work. The delay caused a mechanical malfunction in loading equipment, preventing a roller from operating properly. Consequently, a pallet became wedged in the space between NCA's loading dock and Pace's truck. At NCA's direction, the driver moved his truck, causing another unsecured pallet to roll back and knock over the lodged one. All of this happened on

NCA's watch, so the damage occurred during carriage by air.

**Notwithstanding an MCS-90, two insurance policies amount to one coverage for purposes of determining when an umbrella opens**

*Triple Crown Services Co. v. Insurance Company of the State of Pennsylvania*, 2006 WL 2917176 (N.D. Ind. 2006)

Here's an interesting motor carrier insurance coverage case in which a carrier took its excess liability insurer to task when the latter refused to pay full value. Carrier Triple Crown had two primary liability policies in place, both written by Travelers Property Casualty and with \$1 million ceilings. One Travelers policy was designated for coverage inside Texas, and the other was for "All Other States." Triple Crown also had an umbrella policy from the Insurance Company of the State of Pennsylvania ("Insurance of Pennsylvania") to a cap of \$4 million but subject to other coverages being first exhausted.

A Triple Crown truck was involved in a catastrophic accident in Michigan that produced a multi-million dollar settlement. Insurance of Pennsylvania claimed that fully \$2 million had to be paid before its umbrella coverage kicked in. It urged that the designation "Texas" in one of Travelers' policies doesn't mean an accident had to occur in the Long Horn State for coverage to apply, as other policy language provided that the policy would kick in for liability anywhere in the country. Thus, per Insurance of Pennsylvania, Travelers had to pony up two big ones before it paid a dime (which would reduce coverage under the umbrella substantially). But this really made no sense, as it would mean Triple Crown bought two identical but separate policies, obtaining no additional benefit over having just one.

Insurance of Pennsylvania pointed to the MCS-90 endorsement Travelers had affixed to its policies, claiming that federal law precluded an insurer from refusing coverage when this statutorily-mandated attestation of coverage was in place. Going through an analysis of minority and majority judicial positions addressing the issue, the Northern District of Indiana adopted the majority approach, and ruled that MCS-90 endorsements and other provisions of mandatory motor carrier insurance were not designed to protect insurers from each other. Insurance of Pennsylvania could not argue that Travelers' policies were activated pursuant to federal insurance requirements, and its umbrella opened after Travelers forked out \$1

million only. Note that some circuits might go the other way.

**An insured subrogor finds itself defending a lawsuit**

*Nipponkoa Insurance Co. v. Ozark Motor Lines*, pending in the U.S. District Court for the Middle District of Tennessee under Cause No. 3:06CV0447, decision reported at 2006 WL 2947467 (M.D. Tenn. 2006)

Insurer Nipponkoa insured Toshiba's cargoes of television sets, which Toshiba tendered to carrier Ozark in Tennessee for transport to Pennsylvania. After Ozark's rep signed for the first load, but before it ever left Toshiba's facility, the freight disappeared. What's worse, an identical theft happened a month later! Ozark's trucks were recovered damaged. Nipponkoa paid Toshiba and went after Ozark for payback.

Ozark wanted to implead as third-party defendants Toshiba and Wackenhut Corporation, which provided security at Toshiba's facility. Ozark realized it might be liable under Carmack (having signed for the freight), but felt the real wrongdoers were Wackenhut and Toshiba employees who allegedly were asleep at the switch when securing the place. Ozark wanted to recover the costs of repairing its damaged trucks.

Nipponkoa and Toshiba opposed Nipponkoa's motion for leave to file third-party actions, claiming Toshiba essentially already was a party to the action though its subrogated insurer. Moreover, Carmack should be dispositive as to all rights and obligations between shipper and carrier.

The court disagreed and allowed the third-party actions. Fed.R.Civ.P. 21 provides that certain claims, counterclaims and cross-claims are compulsory, such that Ozark could be found to have waived them if they were not asserted and litigated as part of the primary action. Claims are compulsory if they arise out of the same transaction or occurrence at the heart of the main action and don't require jurisdiction over persons beyond the court's jurisdiction. Toshiba's participation in its own right is appropriate to defend claims that its negligence resulted in loss to the carrier, something outside Carmack's exclusive dominion.

**Noncompliance with FMCSA safety regs lands two drivers in the slammer**

*United States v. Marquez*, 462 F.3d 826 (8<sup>th</sup> Cir. 2006)

This case shows how log book records, bill of lading information, driver inspection requirements and other regulatory hoops do more than just keep roads safe and the shipping business honest. They also impose barriers to drug running.

Two drivers were caught hauling a load of marijuana hidden in their trailer behind stacks of insulation. The drivers claimed ignorance. Affirming a trial court conviction, the Eighth Circuit didn't buy the drivers' story, and ruled a jury could reasonably conclude that drivers who had irregularities in their logs (false entries) and bill of lading (not matching the drivers' story about routing) probably were lying when they gave that look of dumb-founded surprise about the

dope. Moreover, it would be impossible for a driver to look in the trailer without getting a goof whiff of pot.

All told, experienced drivers in this "heavily regulated industry" generally should be assumed to know what it is they're hauling.

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