April 2018

Hot Motor Carrier Law

By Steve Block

FAAAA preempts decedent's negligent hiring claims against broker.

Volkova v. C.H. Robinson Co., 2018 WL 741441 (N.D. Ill. 2018)

A shipper hired broker C.H. Robinson to arrange interstate transit of cargo (the opinion doesn't give much detail), and Robinson booked the load with motor carrier Antioch Transport. Antioch's truck apparently was making an illegal U-turn when Alexandre Volkov collided with it, tragically killing Mr. Volkov. Volkov's estate sued Antioch and Robinson in the U.S. District Court for the Northern District of Illinois, claiming that the broker negligently hired Antioch without ensuring it would operate safely.

Robinson promptly moved to dismiss based on Federal Aviation Administration Authorization Act (FAAAA) preemption. FAAAA disallows, i.e., preempts, any state law that has "a connection with or reference to carrier rates, routes, or services, whether directly or indirectly" to the extent it concerns a "broker's transportation of property." Robinson's notion was that how it goes about engaging truckers impacts "rates, routes, or services," certainly indirectly, such that state-law based negligence claims are nixed.

The court recognized Seventh Circuit pronouncements against "developing broad rules concerning whether certain types of common-law claims are preempted by the FAAAA," and determined that courts have gone every which way when it comes to broker liability for accidents. It found preemption based on the claimant's allegation that Robinson "failed to adequately and properly perform its primary service" of vetting truckers, concluding that such claim "directly implicates how Robinson performs its central function of hiring motor carriers." True, some courts have carved out a personal injury exclusion for FAAAA preemption, but thos one concluded that those courts don't "faithfully apply the preemption analysis established by the Supreme Court" in its review of the subject. The court also rejected the claimant's contention that state negligent hiring laws were related to motor carrier safety (which wouldn't be subject to FAAAA exemption).

Emails and inferences are enough to substantiate that a broker paid detention charges.

***Transport Unlimited, Inc. v. Ardmore Power Logistics, LLC*, 2018 Pa. Super. Unpub. LEXIS 573 (Penn. 2018)**

Freight brokers Transport Unlimited (TUI) and Ardmore Power Logistics had a co-brokerage agreement by which TUI booked cargo shipped by Ardmore's customers. Representatives of the two brokers informally had discussions and exchanged emails about Ardmore's responsibility to pay detention charges TUI paid truckers. When Ardmore failed to pay some 195 grand in detention, TUI sued Ardmore in Pennsylvania state court. A jury split the baby, awarding TUI about 97 grand, which the trial court bumped to 112 grand.

Foster Pepper PLLC © 2018

Ardmore moved for a judgment notwithstanding the verdict ("JNOV," from the Latin judgment *non obstante verdicto*), essentially asking the trial court to disregard and strike the jury's verdict on the ground it was unsupported by law and/or fact. Its theory was that the parties' emails were imprecise in that they didn't state exactly the circumstances in which detention would be due; and only hearsay evidence suggested TUI ever paid truckers detention in the first place.

The trial court refused to change the verdict, and the Pennsylvania Court of Appeals wouldn't do so either. While Ardmore's arguments make sense from a strictly evidentiary perspective, the boundaries are wider when it comes to what a jury may "infer" from evidence and the circumstances. Truckers didn't testify as to the detention they charged, but TUI could, and did, testify to the sums it paid; Ardmore did pay a portion of the detention; and the jury's award of 50% of TUI's claim apparently had a compromise built in.

Damages need not be proven to a mathematical certainty, and "evidence of damages may consist of probabilities and inferences." Here, the courts concluded this standard had been met.

Court can't decide whether arbitration clause applies.

***LPF II, LLC v. Cornerstone Systems, Inc.*, 2018 WL 994708 (D. Kan. 2018)**

Applicability of arbitration clauses usually is a pretty straightforward matter, but not when a claimant isn't a party to the contract that contains it. Just ask shipper Cornerstone Systems, which had a contract with two transportation services providers. Those service providers had given Great Western Bank a security interest in their accounts receivable. For unstated reasons, the bank exercised its rights under the security interests, and assigned them to LPF II, LLC as part of an undescribed settlement agreement.

When LPF extended its open palm to Cornerstone asking for 157 grand in transportation service charges, Cornerstone balked, claiming defenses to the claimed ARs. LPF sued Cornerstone in the U.S. District Court for the District of Kansas, and Cornerstone raised those same defenses. It also pointed to an arbitration clause in its contract with the service providers, and asked the court to dismiss either on substantive grounds or in favor of arbitration.

In its opinion, the court goes through five pages to basically say "this is a tricky one." LPF isn't a party to any arbitration agreement with Cornerstone, and usually your adversary has to be for you to force it into alternative dispute resolution. But then LPF's rights and claim were entirely derivative from entities which were parties to arbitration agreements.

While the Federal Arbitration Act implies a presumption of arbitrability, precious little case law addresses what happens in this odd circumstance. Cornerstone made a compelling argument that LPF had "stepped into the shoes" of the parties to the contract, but no authority it cited says that's enough.

The court basically punted, and ordered a "summary trial" on the issue of arbitrability. What evidence might be adduced at such trial isn't clear (it doesn't look like much is disputed), but the court apparently needs to think about this one. Cornerstone's substantive motion was denied without prejudice pending the results of that trial.

Contractual time-to-cure period is an enforceable precondition of breach of contract action.

***ONF Systems, LLC v. Cargomatics, Inc.*, 2018 WL 1087500 (D. NJ 2018)**

This one deserves quick mention because it addresses a common contract term many players disregard as meaningless, which often it is, but nonetheless is enforceable. Brokers ONF Systems and Cargomatics entered into a co-brokerage agreement that contained broad applicability clauses and a term requiring any aggrieved party to give a 15-day time to cure, initiated by a "detailed written notice," before pursuing a contract claim against the other.

Apparently, a beef arose between the brokers as to ONF's liability to Cargomatics for *per diem*, detention and demurrage charges, and ONF hauled off and filed suit in the U.S. District Court for the District of New Jersey seeking a declaratory judgment. The court didn't like it, and granted Cargomatics's motion to dismiss. Not really surprising, given courts' predilection toward clearing their dockets, and assuming the parties don't resolve their dispute, not likely a significant problem.

Does 49 USC §14704 create a private right of action for cargo damage which Carmack doesn't preempt?

***Starr Indemnity & Liability Co. v. YRC, Inc.*, 2018 WL 905523 (N.D. Ill. 2018)**

Procedural irregularities cloud the analysis in this one, and the court doesn't state a conclusion pending the parties filing supplemental pleadings, but the U.S. District Court for the Northern District of Illinois recently considered a shipper's argument that 49 USC §14704 may be the basis for a cargo claim outside of Carmack. 49 USC §14704(a)(2) provides that "[a] carrier or broker providing transportation or service subject to jurisdiction under chapter 135 is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part."

Subrogated insurer Starr Indemnity & Liability Co. sued motor carrier YRC seeking recovery of some $2 million in insurance proceeds it paid shipper Cessna for alleged damage to a cargo of two aircraft engines incurred in interstate transit. Starr sued YRC alleging Carmack liability, but also liability under §14704 based on alleged violations of FMCSR safety regs, which it believed implicate §14704. Notably, §14704(e) provides for an award of attorneys' fees to successful claimants.

YRC moved to dismiss the §14704 claims based on Carmack preemption. It pointed to the clause "in violation of this part" at the end of §14704(a)(2), and the remaining subparagraphs of §14704 address tariff and rate issues. Legislative history demonstrates that Congress intended this statute only to transfer to the courts jurisdiction the Interstate Commerce Commission once held over these issues, and that's how it's been applied. If it could be interpreted per Starr's understanding, §14704(a)(2) "would render Carmack meaningless."

Foster Pepper PLLC © 2018

The court could find no precedent of §14704 being applied based on FMCSR violations, but also none for the notion that one federal statute can preempt another. Because Starr hadn't had a full opportunity to brief the issue, the court deferred ruling.

While adequate opportunity to be heard is important, it should be clear from the existing record that Starr has no cargo claim based on §14704 derived from safety regs.

For more information about Foster Pepper or to register for other firm communications, visit www.foster.com.
This publication is for informational purposes only and does not contain or convey legal advice.

Foster Pepper PLLC © 2018