FOSTER PEPPER PLLC

THE INTERMODAL LEAD

Legal Developments in Freight Carriage, Logistics and Transportation Infrastructure

Volume 7, Issue 2 – August 2016

COGSA May Be Extended to On-Deck Cargo, but the Extension Must Be Express

By Steve Block

We've seen a good deal of attention over the past decade about how the U.S. Carriage of Goods by Sea Act (COGSA), which by its terms governs ocean carrier cargo liability "tackle-to-tackle," or between the times cargo crosses a vessel's rail during onloading and offloading, can be extended by agreement. Steamship lines typically want stevedores, connecting surface carriers, warehousemen and others it contracts with to enjoy the same COGSA-blessed $500/package limitation of liability ocean carriers do. They just have to specify in a bill of lading or other document evidencing the contract, typically in a Himalaya Clause or Clause Paramount, that cargo claims against other service providers will be subject to COGSA.

The U.S. District Court for the Southern District of Alabama recently had occasion to look at a similar, but less-frequently encountered, scenario of COGSA extension, here, on-deck cargo stowage. Like the Hague and Hague-Visby Rules, COGSA excludes from its definition of covered goods cargo a carrier stows externally above deck (along with a few other varieties of cargo). This is a largely obsolete concept derived from the days when cargo shipped above decks was exposed to damage from the elements and greater likelihood of loss overboard. The law evolved to prevent carriers from enjoying COGSA's various benefits – including limitation of liability – when they derive the economic advantage of added capacity at shippers' heightened risk. Notably, containerized cargo you see stacked high above modern vessels' top decks counts as cargo stowed below deck, as standard shipping containers are deemed an extension of a vessel's internal hold.

In this case, shipper Atwood Oceanics, through a forwarder and with the assistance of logistics service providers, booked transit of a cargo of riser joints with carrier PACCship UK from Malaysia to Alabama. The shipper agreed to on-deck stowage in a bill of lading, which specified that the exposed transit would be at the shipper's risk and expense, and further provided that PACCship wouldn't be liable for loss or damage to on-deck cargo. Per the bill of lading's Additional Clause, the transport was otherwise subject to COGSA "throughout the entire time the cargo is in the Carrier's custody."

Continued on page 2

In This Issue

COGSA May Be Extended to On-Deck Cargo, but the Extension Must Be Express 1
Recent Developments in Motor Carrier Law 2
Upcoming Speaking Engagements 8

For comments or additional information on the articles in this issue, please contact Steve Block | 206.447.7273 | steve.block@foster.com
If you received this newsletter from someone and would like to subscribe, send an e-mail to news@foster.com

The contents of this communication are provided for informational purposes only and do not constitute legal advice.

COGSA May Be Extended to On-Deck Cargo, but the Extension Must Be Express

Continued from page 1

When Atwood Oceanics' cargo was damaged and partially lost at sea, it sued all concerned, and facing the carrier's defenses based on the bill of lading language, moved the court for partial summary judgment. The carrier believed that, based on the shipper's assumption of all risk, its liability, at most, should be limited to $500/package, as COGSA allows. The court disagreed, partially granted Atwood Oceanics' motion.

COGSA can indeed be extended to cover on-deck cargo, but only if documentation does so expressly. PACCship UK urged that its bill of lading demonstrated the shipper's conscious waiver of COGSA. Conceptually, it makes sense that if a shipper is assuming full responsibility for its cargo being transported exposed, it was agreeing that COGSA doesn't apply. But the Additional Clause didn't go far enough to extend COGSA's definition of the term "goods" to include Atwood Oceanics' cargo. At least not "expressly," which the law requires.

The court's opinion goes only so far as to exclude PACCship UK's COGSA argument as providing a quick, easy and cheap out. When COGSA doesn't apply in a situation like this, another U.S. cargo liability statute, the Harter Act, typically kicks in to provide the parties' rights and obligations. However, the court further ruled that issues of whether Harter applied in a way that could relieve the carrier from full liability, and whether it could take advantage of the bill of lading's other responsibility-shifting terms, were premature for ruling. Perhaps because the parties hadn't briefed the issue fully, or fact issues remain to be developed.

Ref: Atwood Oceans, Inc. v. M/V PAC Altair, et al., 2016 WL 3248440 (S.D. Ala. 2016).

Recent Developments in Motor Carrier Law

By Steve Block

Broker can pursue indemnity from motor carrier for payment broker made to shipper for cargo damage.

Traffic Tech, Inc. v. Arts Transportation, Inc., et al., 2016 WL 1270496 (N.D. Ill. 2016)

This one gets it wrong, and if followed by other courts, might shake up aspects of cargo litigation as we know it.

Shipper Pepsi engaged freight broker Traffic Tech (Traffic) to arrange interstate transit of a load of apple slices. Traffic hired motor carrier Arts Transportation (Arts) to arrange the haul. Facts are disputed, but for some reason, Arts placed tires in the trailer with Pepsi's food products, prompting the consignee to reject the load for contamination reasons. Facts again are disputed, Arts apparently destroyed the load despite its salvage value, prompting Pepsi to claim 136 grand in damages.

Traffic paid Pepsi the 136 grand, but didn't obtain an assignment of the shippers' rights against Arts. Instead, it sued Arts and its owner in the U.S. District Court for the Northern District of Illinois, alleging Carmack and state law indemnity liability. The parties filed cross motions for summary judgment.

The court rejected Arts's Carmack preemption argument, finding that because a broker cannot be sued as a carrier under Carmack, and because it didn't assert rights as Pepsi's assignee, that Carmack never comes into play. This ignores the fact that Carmack operates not just in favor of shippers, but creates uniformity and legal advantages motor carriers are entitled to rely on as well. A broker's rights to recoup a payment it made to its shipper customer – one it has no legal obligation to pay unless contractually undertaken – either in indemnity or an assignee, shouldn't be larger than the rights its shipper had in the first place. By the court's logic, brokers could impose on carriers different, perhaps larger, obligations than Carmack contemplates, simply by suing for common law indemnity based on a contract the putative indemnitee knew nothing about. Bad idea.

Continued on page 3

Continued from page 2

The court did dismiss Traffic's Carmack claim based on the same logic. That's a proper ruling given that Traffic had no assignment. It also threw out Traffic's allegations against Arts's owner, ruling there were insufficient grounds to pierce the corporate veil.

Carmack's nonapplicability to brokers doesn't altogether negate their potential liability in complaints pleaded with alternate liability theories.

Sompo Japan Ins. Co. of America v. B&H Freight, Inc., et al., 2016 WL 1392339 (N.D. Ill. 2016)

Concurrently analyzing a related issue, the Northern District of Illinois (through different judges) didn't let a putative freight broker off the cargo liability hook based on a subrogated insurer's complaint allegations pleading alternate liability based on the service provider's unknown status. Shipper Canon USA engaged one of two unknown sister entities, B&H Freight or B&H Systems (it wasn't clear which), to arrange transit of a load of cameras which disappeared en route. Canon's subrogated insurer, Sompo Japan, pleaded alternative theories of liability, one based on Carmack if B&H was a carrier or freight forwarder (Count I), the other based on common law if it were a broker (Count II). B&H moved to dismiss moved to dismiss the state law claims, asserting that Carmack preempts them. B&H theorized that Counts I and II allege the same injury, such that Carmack had been alleged to govern any claims Sompo Japan might have against B&H.

That doesn't follow, ruled the court. Brokers aren't liable under Carmack, but if an entity isn't a broker, Carmack wouldn't preclude a claim against it. While a claim against B&H as a carrier would be premised on different governing law than one against it as a broker, allegation of the alternate theory applicable to carrier liability doesn't displace potential broker liability under state law.

The Motor Carrier Act doesn't provide a private cause of action for personal injury claims.

Drake v. Old Dominion Freight Line, Inc., 2016 WL 1328941 (D. Kan 2016)

An Old Dominion Freight Line driver was operating in a "fatigued state" and struck Ashlee Drake in Kansas. Drake sued Old Dominion in the U.S. District Court for the District of Kansas, alleging violations of the Federal Motor Carrier Act (MCA), specifically 49 USC §14704(a)(2), which 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."

While that sounds pretty cut and dry as a basis for the carrier's liability to Drake, MCA legislative history, as reviewed and applied by several federal courts (including the Eighth Circuit) demonstrates Congress didn't intend this legislation to apply to personal injury claims. It had only commercial claims in mind. Moreover, Drake's complaint didn't allege any factual act or omission that could bring her claims within the MCA as a violation. The court threw out her MCA theories, just as it did her attorney fee claims based on a Kansas statute that requires a specific factual allegation of wrongdoing in violation of state trucking law.

Whether master contract trumps conflicting bill of lading is a question of fact not properly decided on summary judgment.

Indemnity Ins. Co. of North America v. UPS Ground Freight, Inc., 2016 WL 1261266 (D. NJ 2016)

Shipper-carrier volume cargo arrangements typically are documented by master contracts stating general terms of the agreement, and then separate bills of lading for each load transported under the agreement. To accommodate potentially conflicting terms, the master contract often will specify which document controls over the other. When shippers draft the contract, they tend to provide it controls over bills of lading, and vice versa when carriers draft it.

Continued on page 4

The U.S. District Court for the District of New Jersey recently threw up its hands trying to figure out whether a GE Healthcare (GE) master contract prevailed over a UPS Ground Freight bill of lading when it came to a limitation of liability dispute. GE and motor carrier UPS Ground Freight had entered into a Less-than-Truckload Transportation Contract which provided for the carrier's full cargo liability up to a max of $250,000. The contract also provided it would control over any conflicting terms contained in bills of lading.

GE's warehouseman was authorized to ship cargo under a released value of $2.30/pound of cargo, which was a far cry from the seven figure value two cargoes of drugs GE shipped interstate from Memphis, or even the contract's $250,000 cap. Something unexplained in the court's opinion happened to the cargo, apparently causing a total loss.

Parties are free to issue multiple contract documents, specifying which governs in the event of conflict. Many courts have made quick work rejecting arguments that such terms are unenforceable. Here, however, the court focused on the fact the documents weren't interlocking or simultaneously executed. By GE's version of events, any number of bill of lading terms, including limitation, would be superfluous if the master contract negated them. The law seeks to avoid meaningless terms. Summary judgment was denied.

This is an interesting commentary, but it disregards the nature of transportation service arrangements. In that context, it defeats, or at least diminishes, parties' freedom to contract. Not a good direction to go in.

FAAAA preempts Massachusetts law classifying drivers as employees.

Massachusetts Delivery Association v. Healey, 2016 WL 2732054 (1st Cir. 2016)

Massachusetts, in line with numerous other states, has taken steps toward classifying as "employees" drivers with whom motor carriers contract as owner operators. While states have met with large degrees of success in this effort, the Bay State didn't fare so well when a trade association, the Massachusetts Delivery Association (MDA), challenged the state's applicable statute as preempted by the Federal Aviation Administration Authorization Act (FAAAA).

MDA members operate programs whereby drivers "bid" for delivery jobs by "offering" their price for running them. The companies, treating these drivers as independent contractors for taxation, workers compensation, state employment law, and other purposes, don't provide any other comp or benefits to the drivers, or otherwise control their activities.

"Prong 2" of the Massachusetts Independent Contractor Statute requires that a worker's "service is performed outside the usual course of the business of the employer," a provision the delivery companies don't satisfy in the analysis of whether their drivers qualify as independent contractors. Affirming lower courts, the First Circuit Court of Appeals found the statute preempted by FAAAA, and that MDA members could treat their drivers as independent contractors.

FAAAA contains provisions prohibiting states and their municipalities from enforcing law that relates to the prices, routes, or services of motor carriers. In Schwann v. FedEx Ground Packaging System, the First Circuit held that statute was preempted for the same reasons, i.e., regulation of how a carrier engages and pays it drivers could impact the carrier's prices, routes, or services. The state attempted to distinguish Schwann on the ground FedEx had an operating agreement with its drivers which gave them exclusive rights to certain accounts, but like FedEx's drivers, those engaged by MDA's members enjoy complete liberty to accept or decline assignments, and have to pay their own operational expenses. As those points are most significant, Schwann isn't distinguishable.

Insurance policy excludes owner operator's comp claim, and matter is properly heard in federal court.

Altom Transport, Inc. v. Westchester Fire Ins. Co., et al., 2016 WL 2956834 (7th Cir. 2016)

Owner operator Stampley thought motor carrier Altom Transport had underpaid his comp based on his lease and governing Truth in Leasing regs, and sued Altom. Altom asked its insurer, Westchester Fire Insurance Company,

Continued on page 5

 Continued from page 4

to provide a defense and coverage. Westchester refused both, prompting Altom to sue the insurer, and potentially affected third party Stampley, in an Illinois state court to establish coverage.

Pennsylvania-based Westchester removed the matter to the U.S. District Court for the Northern District of Illinois based on diversity jurisdiction. That court dismissed the Altom's dec action based on clear policy exclusions, and Altom took its claim up the hill to the Seventh Circuit Court of Appeals.

First addressing subject matter jurisdiction, the court considered that both Altom and Stampley are Illinois residents. Because diversity jurisdiction isn't available when any two parties on opposite sides of the "v" in a lawsuit are from the same state, subject matter jurisdiction was at issue. An interesting twist applicable to federal diversity jurisdiction allows federal courts to dismiss "dispensable, nondiverse parties to preserve subject-matter jurisdiction." Altom's naming Stampley as a defendant wasn't improper, but it wasn't necessary either. Thus diversity jurisdiction obtains.

Going through Westchester's policy, the court agreed policy exclusions for contractual employment obligations nixed coverage. Altom argued that Stampley's claims could stand alone based on the Truth in Leasing regs, but that's not how he crafted his complaint. His allegations were based on contract in the context of his lease. Westchester's policy doesn't provide coverage.

Carrier's contract with shipper's affiliated company serves to limit carrier's liability for cargo loss.

Kelly Aerospace Thermal Systems, LLC v. ABF Freight System, Inc., 2016 WL 3197561 (E.D. Mich. 2016)

In 2013, Kelly Aerospace Power Systems (KAPS) entered into a pricing agreement with motor carrier ABF Freight Systems. A transport was effected pursuant to that agreement. In 2014, KAPS's sister company, Kelly Aerospace Thermal Systems (KATS), booked with ABF transit of a cargo of aircraft parts from Ohio to California. The cargo arrived damaged; KATS sued ABF in the U.S. District Court for the Eastern District of Michigan; and the parties brought cross motions for summary judgment as to whether the KAPS/ABF governed the shipment.

This was important because the agreement incorporated specific portions of ABF's tariff that would limit the carrier's liability to $25.00/pound, which was a fraction of the cargo's actual value. KATS argued it is a separate legal entity from KAPS, and per its representative's declaration, KAPS thought the 2013 pricing agreement governed only the one shipment KAPS ordered under it, and had nothing to do with future shipments ordered up by other Kelly Aerospace entities.

The court disagreed. A self-serving declaration by an affiliated company's employee, unsupported by any independent evidence, doesn't establish the parties' intentions, and the document itself, which refers only to "Kelly Aerospace" as the shipper, didn't say it was for one shipment only. Moreover, KATS referred to itself as "Kelly Aerospace" in its 2014 shipment request, and received pricing discounts set forth in the 2013 contract. It also used the same billing and website addresses as did KAPS. The 2013 contact adequately incorporated ABF's tariff; and KATS filled out a bill of lading on ABF's website which generated a rate quote which also incorporated ABF's tariff terms limiting the carrier's liability. All told, KATS clearly was on notice of ABF's liability terms for transporting the shipment.

FAAAA doesn't preempt state's worker's compensation laws regarding status of freight broker's employees.

Delivery Express, Inc. v. Joel Sacls, et al., 2016 WL 3198321 (W. D. Wash. 2016)

We've seen a good deal of litigation over the preemptive effect the Federal Aviation Administration Authorization Act (FAAAA), per 49 USC §14501(c)(1), has over state law which purports to impact motor carrier operations, as well as over states challenging the status of owner operator drivers, claiming they are disguised employees of motor carriers (notwithstanding lease language and operational practices carriers claim demonstrate their drivers are independent contractors.

Continued on page 6

Under 49 USC §14501(b)(1), FAAAA also restricts the states from implementing law that impacts the rates, routes and services of freight brokers and forwarders. That FAAAA provision has seen very little judicial attention. The U.S. District Court for the Western District of Washington recently had occasion to explore whether it prohibits Washington's Department of Labor & Industries ("L&I"), which monopolizes and administers workers compensation in the Evergreen State, from requiring freight broker Delivery Express to pay workers compensation premiums. L&I had audited Delivery Express and found it was misclassifying employees as independent contractors.

Even though little has been adjudicated regarding the scope of FAAAA's preemptive effect as regards brokers, the court concluded that jurisprudence interpreting the statute in the motor carrier context was "instructive." That body of law has established that FAAAA won't preempt state law which has "only a tenuous, remote or peripheral" impact on trucker services. Per the Ninth Circuit, borderline cases should be decided based on whether state law "binds the carrier to a particular price, route or service and thereby interferes with the competitive market forces within the industry."

Delivery Express argued it would have to decrease its work staff if it became subject to L&I premiums, such that it would have to "redesign its operations." The court wasn't persuaded, and ruled FAAAA doesn't preempt Washington's L&I law. Increased cost of doing business won't suffice to show interference with services, as any such consequence is too remote and tenuous from an "impermissible effect" the state law might have. Delivery Express has to pay workers comp premiums.

Oregon Court of Appeals reverses an ALJ's determination that owner operators are a motor carrier's employees (first of two Beaver State decisions).

CEVA Freight, LLC v. Employment Department, 2016 WL 3950829 (Ct. Apps. OR 2016)

Oregon-based motor carrier CEVA Freight treated its owner operator drivers as independent contractors not subject to Oregon's various employment law benefits, entitlements and regulations. The state Employment Department took issue with that, and hauled CEVA before an administrative law judge to go through a statutory checklist of criteria an employer must satisfy to demonstrate its workers are independent contractors instead of employees. The ALJ socked it to CEVA with a determination its drivers were employees, along with an order to pay up, and the carrier appealed the decision to the state court of appeals.

In one of two refreshing departures from state court trends, Oregon's judiciary reversed the Employment Department's ALJ, and found CEVA's drivers aren't employees based on its incisive interpretation of how our industry works. CEVA had to satisfy all three statutory criteria, which address (1) the degree of control; (2) whether workers are established in an independent business; and (3) who obtains licenses to provide services. In reaching conclusions opposite from the ALJ's on each point, the court went through what really goes on in a trucking operation that leases trucks and services from owner operators.

Yes, CEVA obtained the mandatory FMCSA license to operate in interstate surface transportation, and its drivers didn't all have their separate authority. But the drivers, who all ran only intrastate hauls, weren't performing services for the public. They were doing only CEVA's bidding, which doesn't require a license, and is what governs the analysis. CEVA did impose certain requirements on its drivers like drug and alcohol testing, condition of trucks, and background checks; and provided certain tools and equipment to them. But all truck drivers are always subject to such requirements whether or not they work for CEVA; and the equipment CEVA provided was minor as compared to what the owner operators supplied themselves (uh, the trucks). Sure, CEVA played a role in how its drivers did their jobs, but the test doesn't require the absolute absence of any control; and whenever someone is getting paid, they always are subject to some level of direction. Lastly, CEVA's drivers were sufficiently set up in their own business to satisfy the last criteria. CEVA's drivers are independent contractors, and Oregon has the first of two effective precedents for other carriers to guide themselves by.

Continued on page 7

Continued from page 6

Oregon Court of Appeals reverses an ALJ's determination that owner operators are a motor carrier's employees (second of two from the Beaver State).

Delta Logistics, Inc. v. Employment Department Tax Section, 2016 WL 3950830 (Ct. Apps. OR 2016)

In this one, motor carrier Delta Logistics succeeded in getting another Oregon Employment Department ALJ overturned in the court of appeals, this time based largely on the definition of "lease" as the term is used in the trucking industry. Delta issued its owner operators two documents, a "lease" and an "owner operator contract," both of which contain standard stuff. Oregon's relevant statute exempts drivers from employee entitlements when they "lease" their equipment to a motor carrier, but the ALJ, looking at another statute and Black's Law Dictionary, ruled the Delta leases don't qualify because a lease definitionally must divest the owner of equipment possession rights. He also noted that a "lease" under federal regs must provide certain compensation terms.

On appeal, Delta responded that its leases and contracts must be read together, such that compensation is demonstrated (it's in the owner operator contract). As federal law requires transfer of possession and use of equipment, the parties can "bargain for" the specifics and still comply with the Oregon statute. In other words, as Delta and its drivers clearly intended to enter into owner operator lease arrangements sanctioned by federal law and in accordance with vast industry practice, Oregon statutes won't upset the analysis.

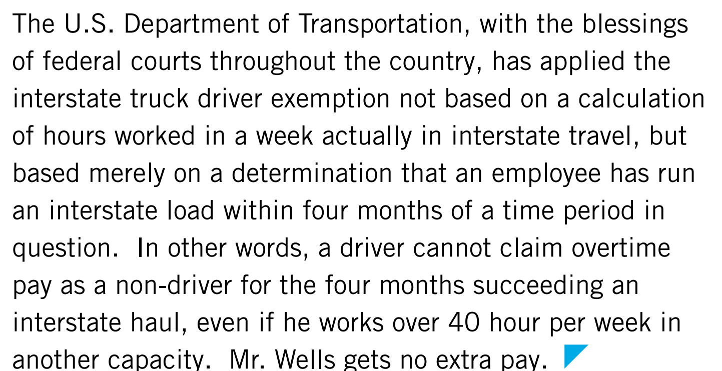
Nor does the fact certain owner operators were themselves separate business enterprises with two or more drivers change the equation. The Oregon statute defining relevant terms with regard to "lease" mandates that the vehicle's owner "personally operate" it. But the companion statute actually providing the exemption is broader, providing that the labor must encompass "services performed in operations of a motor vehicle," which would be incompatible with the ALJ's narrower interpretation. Another good decision from the Beaver State for motor carriers which engage owner operators.

"4-Month Rule" prevents driver from escaping FLSA exemption for overtime compensation.

Cody Wells v. A.D. Transport Express, Inc., 2016 WL 3213396 (E.D. Mich. 2016)

Cody Wells worked for motor carrier A.D. Transport Express in two capacities, one as a "breakdown associate" (troubleshooting problems from a desk), and the other as a driver running both interstate and intrastate hauls. When A.D. wouldn't give him a raise, he quit and sued the company in the U.S. District Court for the Eastern District of Michigan, claiming it owed him overtime pay for hours he worked off the road.

The Fair Labor Standards Act requires employers to pay their employees time and a half their hourly wage rate for all hours worked over 40 per week. However, the Motor Carrier Act exempts interstate truck drivers from entitlement to the extra comp. Mr. Wells argued he only drove interstate for a small fraction of the time he was employed with A.D., such that he should get overtime pay for hours over 40 per week when he was desk-side within the Wolverine State. Apparently, he wasn't familiar with the 4-Month Rule.



The U.S. Department of Transportation, with the blessings of federal courts throughout the country, has applied the interstate truck driver exemption not based on a calculation of hours worked in a week actually in interstate travel, but based merely on a determination that an employee has run an interstate load within four months of a time period in question. In other words, a driver cannot claim overtime pay as a non-driver for the four months succeeding an interstate haul, even if he works over 40 hour per week in another capacity. Mr. Wells gets no extra pay.

Upcoming Speaking Engagements

Washington Trucking Associations Leadership Conference & Vendor Showcase

September 18, 2016

Steve Block will present:
"Motor Carrier Liability Issues"

Canadian Transport Lawyers Association

September 24, 2016

Steve Block will present:
"U.S. Modal Updates"

Transportation Law Institute

November 4, 2016

Steve Block will present:
"There's a Meltdown at the Port...Now What?"

Foster Pepper PLLC Transportation Industries Group

- Steve W. Block, Chair
- Joe A. Brogan
- Beth A. Clark
- P. Steve DiJulio
- Sinjin H.X. Dinh
- Jason R. Donovan
- Christopher G. Emch
- Alicia M. Feichtmeir
- Steven J. Gillespie
- Edward A. Harley
- Katie Carder McCoy
- Thomas J. Parkes
- Lori Terry Gregory
- Adrian Urquhart Winder

FOSTER PEPPER PLLC

1111 Third Avenue Suite 3000, Seattle, WA 98101

206.447.4400 www.foster.com