FOSTER PEPPER PLLC

THE INTERMODAL LEAD

Legal Developments in Freight Carriage, Logistics and Transportation Infrastructure

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Paying to play: Considerations transportation intermediaries should consider before contractually accepting cargo liability.

By Steve Block

Virtually all ocean freight forwarders and surface freight brokers have to decide whether to accept liability for their shipper customers' cargo claims. The issue arises in two contexts: (1) when a shipper, typically a high-volume, likely very profitable customer, proposes to its prospective ocean forwarder or surface broker a master contract providing that the intermediary will be primarily liable for cargo loss; and (2) a shipper makes a cargo claim to the forwarder/broker, saying something along the lines of "pay or we'll take our business elsewhere."

Generally speaking, ocean freight forwarders and surface freight brokers are not liable for loss, theft, destruction, damage or delayed delivery of cargo unless their own wrongdoing causes the loss. This most typically arises when an intermediary books a customer's shipment with an incompetent carrier, such as one that's not properly licensed, adequately insured, or doesn't have adequate equipment and means to undertake the shipment; or when it provides the carrier improper shipper instructions or other directives needed for the transport. If an intermediary tells a motor, rail or ocean carrier that a shipper's cargo requires refrigeration at 5° Fahrenheit when the shipper told the intermediary it should be set at 5° Celsius, well, you get the picture.

Note that this concept doesn't apply to non-vessel operating common carriers and surface freight forwarders, those species of transportation intermediary that can indeed be held liable for cargo loss even if they didn't cause the loss. But that's another article.

What if the ocean freight forwarder/surface broker didn't do anything wrong, or in the case of shipper's proposed brokerage contract, hasn't even booked a load yet? The decision is more of a business issue than a legal one. Legally speaking, accepting liability for events you cannot control or for which you are not culpable makes no sense. What transportation lawyer would say otherwise?

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Hurricanes highlight the Jones Act's faults.

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But intermediaries facing this dilemma know that business, start to finish, is all about risk. Many consider acceptance of contractual liability for potential cargo claims a somewhat-manageable uncertainty akin to the ebbs and flows of transportation demand. Sometimes an account is too juicy to refuse, and sometimes a business operating in a competitive industry needs to be flexible. Standard intermediary insurance policies don't cover cargo losses for which the insured isn't legally liable. While insurance products for contractually assumed cargo liability are available, they can be expensive and tricky to procure.

Acceptance of the risk isn't always a yes-no contractual matter. Many of those shipper-proposed brokerage agreements not only hold the intermediary liable for cargo claims, some disavow COGSA and Carmack defenses that ocean carriers, motor carriers and railroads would enjoy if the claim were made directly against them. In other words, the intermediary could be held liable under its brokerage contract, but be limited in its ability to seek indemnity from the carrier that actually caused the loss. Some shipper-designed contracts even go so far as to hold intermediaries liable for full cargo invoice whether or not it's completely destroyed, and even consequential damages on the level of profits a shipper might lose, for example, by way of a delayed construction contract. Thus, if ocean forwarders and surface brokers are inclined to stick their necks out in the name of business opportunity, at a minimum they should be aware of, and try their darnedest to reduce, the contractual consequences they might face for cargo loss.

Nor should intermediaries accept cargo liability, even for a claim a shipper makes with no contractual entitlement, dismissing it as no big deal. It might seem like good business sense to pay a good customer a one-time $500.00 cargo claim to keep it happy and avoid administrative issues with having to process a claim through the wrongdoing carrier. But by paying out that claim, the intermediary sets a precedent whereby its shipper can legitimately claim an understanding that its service provider generally accepts cargo liability. When along comes the big six figure claim from that same shipper, the intermediary is harder pressed to point to law providing that it's not liable.

In this context, best practices include stating in contracts (which can be through their incorporated terms and conditions), that the intermediary is not liable for cargo loss, and that any claim payment is made strictly as an accommodation. You might restate that in a letter accompanying the check, or even on the check itself.

While most business enterprises want to protect their legal interests, business realities in the intermediary world complicate the analysis. But an analysis should still be undertaken, and forwarders/brokers should assume liability only with their eyes open.

Recent Developments in Motor Carrier Law

By Steve Block

Carmack doesn't preempt broker's cargo claim against trucker.

Mid-America Freight Logistics, LLC v. Walters Trucking, Inc., 2017 WL 4778570 (E.D. Mo. 2017)

Freight broker Mid-America Freight Logistics had a contract with motor carrier Walters Trucking whereby Walters agreed to hold Mid-America harmless from shippers' cargo claims. The contract specified that Carmack would define Walters' liability. Mid-America booked with Walters a load of frying oil belonging to shipper Stratas Foods from Missouri to Texas, some of which was stolen en route. The consignee rejected the entire load when it saw the container seal was broken, and Mid-America had to pay Stratas some 36 grand based on its shipper-broker contract.

When Walters refused Mid-America's demand for reimbursement, the broker sued the carrier in the Circuit Court of St. Louis County, a Show-Me State court. Walters removed the action to the U.S. District Court for the Eastern District of Missouri, and Mid-America moved to remand the claim back to state court. The court granted the motion, and awarded Mid-America its attorneys' fees to boot.

The broker's claim here was based on rights under a contractual agreement, and not Carmack. Just because the contract provided that Carmack concepts determine the trucker's liability doesn't mean Carmack preemptively governs it as a statute. Incorporation of Carmack's liability and defense provisions was just another contract term, and not a basis for federal jurisdiction.

Temperature--damaged cargo claim isn't proper for summary judgment.

Capital Logistics, LLC v. Gray Transportation, Inc., 2017 WL 4803925 (S.D. NY 2017)

Proper application of Carmack defenses to cargo claims is frequently fact-driven, rendering them unsuitable for resolution on motions for summary judgment. Just ask broker Capital Logistics and motor carrier Gray Transportation, which recently went to the mat before the U.S. District Court for the Southern District of New York over a load of strawberries spoiled by improper temperature maintenance. The parties cross-moved for summary judgment over liability and Carmack defenses, and the court issued an opinion that explains why claims valued at less than six figures can be outside justified litigation costs.

Shipper Amex Distributing Company booked the load from Texas to Illinois with Gray through broker Capital, which presumably was assigned Amex's rights against Gray. Amex drew up a clean bill of lading, and the cargo arrived "cooked." Because Amex had loaded and tendered the reefer container sealed, the court agreed with law requiring evidence in addition to the bill of lading about the cargo's pre-tender condition to establish a prima facie Carmack claim.

There was lots of such evidence, but it was conflicting. Capital argued that while Amex originally set the reefer temperature, the law imposes a non-delegable duty on carriers to ensure reefer settings are proper under penalty of liability. The court disagreed with that interpretation of precedents, and ultimately concluded there are too many factual issues to decide on summary judgment whether Gray's Act of Shipper defense was valid. Gray's driver claimed he wasn't able to inspect the load at the time of tender, and a shipper expert opined that strawberries naturally give off heat, a point Gray should have known and made temperature accommodations for. All told, the court threw up its hands and told the parties to go develop a factual record.

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FAAAA preempts shipper's claim against broker for negligent selection and supervision of a carrier, but not claim for failure to procure cargo insurance.

Georgia Nut Company v. C.H. Robinson Company, et al., 2017 WL 4864857 (N. D. Ill. 2017)

Shipper Georgia Nut Company engaged broker C.H. Robinson to arrange transit of a cargo of almonds from California to Illinois, specifying that the haul be routed through Georgia. It wasn't, and the consignee rejected the load, worth some 162 grand, because the trailer's band seal number didn't match the bill of lading number (probably a valid rejection). Georgia Nut sued C.H. Robinson (the trucker apparently disappeared) in the U.S. District Court for the Northern District of Illinois, alleging various negligent carrier selection and supervision theories, as well as a claim the broker hadn't procured the cargo insurance Georgia Nut ordered up.

C.H. Robinson moved to dismiss all claims based on Federal Aviation Administration Authorization Act (FAAAA) preemption. While courts have gone in different directions on this, FAAAA generally is held to trump state and common law-based actions against brokers when the law at issue as applied would "relate to carrier rates, routes, or services either by expressly referring to them, or by having a significant economic effect on them." The court agreed that Illinois negligence law, if applied as Georgia Nut wanted, would have that effect and thwart FAAAA's intended effect. The shipper urged that its tort claim was essentially part and parcel of a contract claim based on the parties' oral agreement for brokerage services. The court disagreed, finding there was no "contractual" understanding of how C.H. Robinson would do its job.

However, the court denied C.H. Robinson's motion as to the insurance claim. That service is not related to the movement of property. Brokers routinely offer shippers cargo insurance, but that service isn't a freight brokerage undertaking that FAAAA is concerned with.

Non-solicitation clause in broker-carrier contract is enforceable, but whether carrier violated it is a fact-driven question not properly addressed on summary judgment.

Quality Transportation Services, Inc. v. Mark Thompson Trucking, Inc., 2017 IL App (3d) 160761

Freight brokers like Quality Transportation Services (QTS) have long been in the practice of requiring motor carriers like Mark Thompson Trucking (MTT) with which they book loads to sign non-solicitation clauses precluding the carriers from seeking to establish direct relationships with the broker's shipper customers. That would cut the brokers out of future deals. QTS's broker-carrier contract provides that truckers will not "solicit" business from QTS customers for a year after transporting their cargo under penalty of a 35% liquidated damages obligation to QTS. In this case, QTS booked with MTT cargo belonging to shipper US Silica Company (USS), and then USS reached out directly to MTT to transport future loads. When QTS found out, it sued MTT in an Illinois state court seeking recovery of 35% of the charges USS paid MTT. MTT succeeded in having the case dismissed on a summary judgment motion, it being demonstrated that USS made the first call to MTT.

The Illinois Court of Appeals reversed. While USS did make that first call, there were numerous back-and-forth discussions, some instigated by MTT, about the terms and conditions of the future loads. The broker-carrier contract didn't define "solicit," but the court liked Black Law Dictionary's definition of the term "solicitation," i.e., "the act or an instance of requesting or seeking to obtain something," and "an attempt or effort to gain business." While passive acceptance of a shipper's overture would not constitute solicitation under this definition, involved negotiations, at a minimum, might. An issue of fact proper for trial remains as to whether MTT violated the contract clause.

Also finding that QTS has a legitimate interest in protecting its customer relationships, the court found the non-solicitation clause reasonable from the contract construction perspective. This one goes to trial.

Upcoming Speaking Engagements

Steve Block will be presenting at the following upcoming conferences:

Transportation and Logistics Council Annual Conference

March 19-21, 2018 in Charleston, South Carolina

http://www.tlcouncil.org/conferences

Marine and Energy Symposium of the Americas 2018

April 18-20, 2018 Toronto, Canada

https://www.mesa2018.com/

"Limitation of Liability by Statute – Conventions and in Contracts"

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