Spring Cleaning at the Ports: A Summary of Recent Legislative and Regulatory Attention Directed at the Wharves.

By Steve Block

This spring saw quite a bit of activity in the administration of U.S. seaports, regionally and nationally, in response to challenges up and down the seaboards.

Problems actually began some years ago with tension about contemplated congestion, particularly in ports on the west coast. Carriers’ usage of megaships through larger alliances that are said to clog up loading and offloading at ports; getting out of the chassis business, resulting in equipment shortages; and signing contracts with fewer terminals, all set the stage for concern about congestion issues. Carrier groups responded by pointing to inefficient port, trucker and shipper practices that are beyond vessel operators’ control.

Then, spikes in demand spurred by an improving economy and seasonal demand; U.S. Customs slowdowns resulting from adjustments in government spending budgets; and truck driver shortages exacerbated the situation.

And then, west coast longshore workers commenced an unprecedented work slowdown last fall. The International Longshore & Warehouse Union ("ILWU") originally was upset just with minor arbitration terms in its union agreement with the Pacific Maritime Association ("PMA," which represents ports in Washington, Oregon and California). But this snowballed into a giant labor dispute ILWU and PMA representatives couldn’t finally hash out through a new labor agreement until this past May.

Estimates as to the damage the congestion-wreaking slowdown did to the economy are as high as $2 billion/day for months. Shippers were the biggest losers, with contract and seasonal deadlines passing as cargo sat in harbor-anchored ships. Disputes over “congestion surcharges” carriers suggested were due to them from shippers almost came to a head, but were largely averted.

While port labor issues have at least temporarily eased up, concern about future such predicaments prompted Senators Cory Gardner (R-CO) and Lamar Alexander (R-TN) to introduce on June 5th the Protecting Orderly and Responsible Transit of Shipments Act of 2015 ("PORTS Act"). The PORTS Act would expand the Taft-Hartley Labor Act’s provisions to cover port labor slowdowns, strikes and lockouts. It also would empower state governors to get federal court injunctions;
and set up boards of inquiry if the president doesn't act within ten days. In other words, it puts more power in the hands of state executive branches to deal with port issues affecting their communities.

While the PORTS Act is supported by dozens of business groups and trade associations, getting new legislation on a topic as politically sensitive as labor, especially quickly, is one tough nut to crack. Some observers see the bill as more of a nod to the introducers' business constituencies than one actually expected to make it into law, especially if both houses of Congress and, potentially, the next president, are all Republican.

Some west coast ports have formed working groups to study means to optimize port operations in advance of the upcoming holiday season, but the environment remains uncertain regarding congestion management now that the labor issue is at bay. Last year, the U.S. Federal Maritime Commission (“FMC”) conducted a series of port forums at the country’s major ports, and summarized its findings in a report issued this month entitled “U.S. Container Port Congestion & Related International Supply Chain Issues: Causes, Consequences & Challenges.” The report boils down the forums' results into six major themes: “Investment and planning; chassis availability and related issues; vessel and terminal operations; port drayage and truck turn-time; extended gate hours, PierPASS and congestion pricing; and collaboration and communication.” Needless to say, addressing congestion will involve analysis of vast and systemic issues beyong labor unrest.

Another port development of note is the marriage the Ports of Seattle and Tacoma, known as the Northwest Seaports Alliance, which FMC blessed this month. Washington’s two primary seaports realized they had been spending a level of energy and resources competing with each other. This was detrimental to both, especially in light of Canada’s bolstered competition in the Ports of Vancouver and Prince Rupert. In addition to joint planning, management and marketing of the two ports’ services, the arrangement includes establishment of a Port Development Authority to develop cargo operations and other aspects of port business. FMC agreed the alliance wouldn’t harm competition or service, and noted that the combined facilities create the nation’s third-largest trade gateway (behind LA/Long Beach and New York/ New Jersey).

Let's hope the discussion about port administration and promotion becoming part of a national strategic initiative, as opposed to pork doled out to keep local constituencies happy, gels into reality.


Recent Developments in Motor Carrier Law
By Steve Block

ICCTA preemption of negligence claims against brokers doesn’t extend to personal injury lawsuits.


Ms. Montes de Oca sued freight broker El Paso Los Angeles Limousine Express to recover for personal injuries (how and why, we don’t know) in a California state court. The broker removed to the U.S. District Court for the Central District of California, claiming that ICCTA, per 49 USC §14501(c)(1), provides federal question jurisdiction and preempts the plaintiff’s tort claims. In other words, El Paso-Los Angeles Limousine Express asserted that freight brokers can’t be liable for personal injury claims based on state tort law theories.

Sound frivolous? Well, that’s close to what a recent line of cases addressing cargo liability claims against brokers has held, a point the broker made in response to Ms. De Oca’s motion to remand her case back to state court. Interpreting ICCTA’s 49 USC §14501(c)(1) as preempting tort claims against brokers, cargo claimants have been forced to proceed based on contract theories.

While not finding the broker’s position frivolous, the court cited precedents for the notion that federal courts are loath to find federal preemption when a plaintiff “invokes traditional elements of tort law.” Personal injury matters are within that tradition. Also, ICCTA tracks the Airline Deregulation Act (ADA) in its preemption terms, and the Ninth Circuit has cautioned that “broad interpretation” of the statute outside
More than one motor carrier may be liable under Carmack for the same loss.

Walters Metal Corporation v. Universal Am-Can, Ltd., et al., 2015 WL 1880186 (S.D. Ill. 2015)

Six service providers were involved in the transport from Illinois to Texas of an oversized load of pipe spools belonging to shipper Walters Metal Corporation. While en route, the cargo was damaged in a bridge collision. We don't know which of the several truckers involved was running the truck at the time, but it doesn't much matter for purposes of the case.

One of the involved providers was Mason and Dixon Lines (MADL), which had issued a bill of lading to Walters. MADL filed a declaratory judgment action against Walters in the U.S. District Court for the Southern District of Illinois (the nature of the requested judgment isn't clear). Walters counterclaimed, in that action, alleging that MADL was a motor carrier, and was liable under Carmack and common law negligence principles. Walters subsequently settled out with MADL.

Why MADL was named in a second action involving several other defendant truckers we also don't know. In any event, the others moved to dismiss Walters' claims, asserting it had been established by Walters' own counterclaim in the earlier action that, hey, MADL was a motor carrier, and was liable under Carmack and common law negligence principles. Walters subsequently settled out with MADL.

The problem with that argument is that it assumes only one entity may be a carrier of record subject to Carmack at a time. That's not the case, ruled the court. Per Carmack, anyone issuing a bill of lading is a potentially liable record, and Walters had alleged that four of the defendants had done so for this haul (huh?). The motion to dismiss was denied.

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Demurrer affirmed based on Carmack's public authority defense.


Robert Gibson, under disputed circumstances, was said to be the shipper of a UPS parcel containing some 658 grand in cash. Police dogs barked their conclusion that the package smelled like dope. UPS had discovered the parcel's dubious contents through an audit in Sacramento before shipping it to destination in North Carolina. UPS turned it over to the California State Bureau of Narcotic Enforcement, which handed it off to the U.S. Attorney's Office.

Gibson sued UPS in a California state court, alleging a number of state and common law causes of action. In response, UPS filed a demurrer (in law-speak, a defendant's way basically of saying “so what” to a complaint, asserting that, at least as currently crafted, it must be dismissed because the allegations couldn't possibly lead to liability or an award of damages). The court agreed, and dismissed the complaint with leave to amend. Gibson took another stab at it with an amended complaint that alleged there was a mix-up of some sort within the Gibson household, leading to a family member shipping the wrong cargo. Uh-huh.

UPS demurred again, and this time the court agreed by dismissing the complaint without leave to amend. The California Court of Appeals agreed as well. If Carmack governs this matter, Gibson's common law claims are preempted, and because the government had seized the cargo, he no longer held any possessory interest in the cargo for which he could assert a claim against UPS in the first place. And even if he did, Carmack's public authority defense would so clearly shield UPS from liability that the claim clearly would surely fail. There was some suggestion this shipment was intended to be by air freight, but even if that were the case, the preemptory effect of the Airline Deregulation Act, 49 USC §41713, would have similar effect.

Analysis of complex interaction between two entities leads to conclusion that insurer must pony up full MCS-90 value.


Get out your pencil – you'll need it to diagram this one out. A rig, operated by driver Solano and owned by Sav-On Waste Services, was involved in a multivehicle collision in Pennsylvania that injured the Lugos and Youngs. Eco America Trucking Corp. was in the process of buying the rig from Sav-On at the time of the accident, and its registration had already been transferred to Eco. Eco also paid for the truck's fuel, maintenance and repairs.

The relationship between Sav-On and Eco was ambiguous. Sav-On hired owner operators and operated as a freight broker, and isn't registered with FMCSA as a motor carrier. Eco is an FMCSA-licensed motor carrier, and employed Solano. But Sav-On gave Solano credit cards to pay for fuel and repairs, and it collected payment of freight charges from shippers. Record keeping by all concerned was shoddy, as were memories about who actually paid the driver his wages.

Park Insurance Company insured Sav-On in a policy that covered the rig involved in the accident. Park's policy had a coverage ceiling of $500,000, but included an MCS-90 Endorsement certifying coverage up to $750,000 that would be applicable to motor carrier liability resulting from bodily injury or property damage (FMCSA regs require motor carrier coverage to that extent).

When the Lugos and Youngs made claims for their extensive damages, Park brought an interpleader action in the U.S. District Court for the Southern District of New York, seeking to deposit with the court, and have its liability limited to, about 455 grand ($500,000 less expended costs). Interpleader is a legal mechanism whereby a party that concedes it's liable for a certain amount, but doesn't know to whom, can deposit the amount of its conceded liability with a court, naming those potentially entitled to the proceeds as defendants. If the court agrees the amount deposited is all the “plaintiff” depositor should owe, then the “defendant” claimants are left to fight out who gets how much of the deposit, and the depositor is done with it with no further exposure.

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At issue here was whether or not Sav-On was a motor carrier. If it was, then the MCS-90 Endorsement kicks in, and Park can’t get off the hook for less than $750,000. Park thought Eco should be the motor carrier, arguing Sav-On was just the lessor of a truck to Eco. The court didn’t see it that way, and granted interpleader subject to a $750,000 deposit. Sav-On’s activities in controlling the truck’s activities and collecting freight charges, along with the ambiguities as to which entity paid Solano, suggested motor carrier activities. And if Sav-On didn’t think it was motor carrier, why did it procure the MCS-90 Endorsement?

But even if Northrich had standing, it never got off home base for a Carmack claim. There was no evidence of good order and condition at time of tender. The shipper pointed to bill of lading language confirming the cargo was “properly classified, described, packaged, marked and labeled,” but that’s a far cry from an indication of its condition. In any event, a bill of lading “is not necessarily prima facie evidence of that condition.” Northrich goes home empty handed.

An unsustainable cargo claim poster child.


Here’s a shipper that just didn’t get things right, in a claim that shouldn’t have been brought. Northrich was a representative of manufacturers of HVAC products. It engaged broker Group Transportation Services (GTS) to arrange interstate transit of a load of three heat exchangers, which it claimed carrier FedEx delivered damaged. The shipper sued GTS and FedEx in the U.S. District Court for the Northern District of Ohio, and after discovery closed, was met with a barrage of the defendants’ motions for summary judgment.

GTS made the brokers-aren’t-liable-for-cargo-they-didn’t-touch argument, and Northrich responded with a claim that GTS was FedEx’s agent, and therefore was within Carmack’s purview of potentially liable entities. That sounds like a reasonable position if you have evidence to back it up. Northrich didn’t. Coming into court with empty hands and claiming you think somewhere there’s a contract between the two defendants just doesn’t cut it. GTS was dismissed out.

In its motion, FedEx first argued lack of standing based on the absence in any bill of lading of Northrich as a shipper of record. In fact, the shipper itself said it never saw a bill of lading, “which, in itself, militates against Plaintiff’s right to recover under the Carmack Amendment.” The bill of lading attached to the shipper’s briefing didn’t identify Northrich anywhere. The court put it best: “After consideration of the relevant authority, the Court is unable to find any decision which explains how a party that is not the shipper; that is not listed on, or a party to, the bill of lading; that did not possess the bill of lading; that did not negotiate with the carrier; and that was not the receiving party of the shipment, has standing to sue for damage to the cargo under the Carmack Amendment.”
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