InterConnect
A TRANSPORTATION AND LOGISTICS NEWSLETTER
Vol. 2, Winter 2005

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# A Hot Time in the Old Town for Truckers

Those of us who follow trucking regulation in Washington have been very busy over the past few months. The new Transportation Security Administration ("TSA") is plowing forward with its proposal to improve the security of hazardous materials transportation through background checks on HAZMAT drivers. Although the hours of service regulations themselves remain on hold, other related Federal Motor Carrier Safety Administration ("FMCSA") rulemakings are moving forward. Summaries of these developments follow.

### Threat Assessments of HAZMAT Drivers

TSA is continuing to work to establish procedures for security threat assessments for drivers who want to apply for or renew their commercial driver's license with a hazardous materials endorsement. Completion of these procedures, which are required under the USA Patriot Act, has been on TSA's front burner since TSA assumed jurisdiction over the issue in March of 2003.

Over the objections of trucking industry leadership, TSA adopted a Final Rule effective January 31. The Final Rule (CFR Part 1572) reorganizes, clarifies and adds operating details to prior rule-making proposals governing the security threat assessments.

Adoption of a Final Rule has been delayed several times because the states were not ready to administer the fingerprinting process. Rather than continue with the delays, TSA has hired a contractor who is prepared to provide the fingerprinting services. Therefore, if a state is not prepared, they can ask TSA and its contractor to do it for them.

TSA has also established a procedure to pass the cost of processing the hazardous materials endorsement application back to the driver applicant. Whether the state does it or TSA does it, the driver will be required to pay between $83 and $105 for each application. The fee includes (1) an Information Collection and Transmission fee (applicable directly only if TSA handles the application process), (2) a Threat Assessment Fee to cover start up costs and recurring costs, and (3) an FBI fee to cover the cost of the fingerprinting process.

In addition to its comments criticizing the proposal, the American Trucking Associations ("ATA") has now filed an appeal of the Interim Final Rule. According to ATA, TSA has acted arbi-

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trarily and capriciously by proceeding with a decentralized fingerprint-based background check system that is expensive, is full of loopholes, and has an adverse impact on small business. ATA acknowledges that it may have a difficult time with its appeal because TSA has not adopted Rules of Practice under which an appeal may be heard. TSA acknowledges only that it is reading the appeal along with the other comments that have been filed.

### Verification of Hours of Service Records

FMCSA has proposed new rules to clarify the duty of the motor carrier to verify the accuracy of the drivers' hours of service ("HOS") and record of duty status ("RODS") reporting. The proposal is intended to provide clearer and more detailed rules for the drivers and carriers. Carriers will be required to adopt and implement a self-monitoring system to verify the accuracy of the information reported. The proposal is intended to close loopholes that permit some drivers to obscure their violations of HOS rules.

Under the proposed rule, the carrier is required to have a systematic inspection, verification, and maintenance system to verify the information regarding HOS provided by the driver. The carrier must compare the driver's paper records with information contained in the supporting documents.

FMCSA's proposal acknowledges its current study on the use of electric on board recorders ("EOBRs") in commercial motor vehicles. It is possible that the study will lead to additional proposals that will require carriers to verify HOS and RODS compliance through the use of the EOBRs. Based on comments filed so far on the EOBR study, however, any such proposal would generate strong opposition from the motor carrier community. According to the carriers, EOBRs are unnecessary and far too expensive to be justified.

*For additional information on this topic, please contact Robert M. Spira at 216.363.4413 or rspira@bfca.com.*

## What To Do if the Government Seeks to Take Part of Your Company's Property

Our society continues to grow. Continued growth means more traffic, and that means highways must continue to expand. Ohio has the 4th largest volume of freight traffic of any state. In 2005 alone, the Ohio Department of Transportation plans to spend $1.2 billion in highway improvements. As such, it is very possible that someday the government may knock on your door and inform you that they need your company's property to widen a particular highway or public street. You will want to know your legal rights and be prepared to respond.

The taking of property for a public use is governed by the Ohio Constitution and the Uniform Eminent Domain Act of Ohio. In order to take property for the purpose of creating, widening, or repairing a public highway, the government must pay the owner the fair market value of the land. If the landowner and the government cannot agree on the value of the land, the landowner has the right to have a jury of 8 people hear evidence at a trial and assess the value of any land, as well as to determine what damages, if any, the landowner may suffer to the remaining land, known as the residue.

The Director of the Ohio Department of Transportation is granted authority to take land by eminent domain for any purpose related to a highway, road, or bridge. Local governments also have this power. Landowners will want to hire their own professional real estate appraiser to write a report estimating what that professional believes is the fair market value of the land. In order to determine when the landowner is entitled to be paid, it is important to determine the "date of take." The date of take is either the date of actual physical appropriation of the property or the first date of trial, whichever is earlier.

A landowner is entitled to the fair market value of the property taken. The term "fair market value" is defined as the price between a willing seller and a willing buyer in a voluntary sale on the open market. The value of the land is determined by identifying the "highest and best" current use of the property as of the date of take. Where a landowner planned to hold the property in anticipation of future development, such value is speculative and will be excluded by the trial court. If, however, there is evidence that a willing purchaser would be presently willing to pay more than an amount justified under an existing zoning category, such evidence is admissible because it reflects the current fair market value of the property.

Usually, ODOT will present at least one professional real estate appraiser to deliver to the jury his "expert opinion" as to the value of the land. The landowner will want to present his own professional real estate appraiser. The highest credential for real estate appraisers are M.A.I., which designates the person is a Member of the Appraisal Institute. In addition, either party may request the jury view the premises during the trial before reaching a verdict. The final assessment of compensation shall be made by the jury.

When the government announces it is taking private property for public use - such as for a highway construction project, landowners are often surprised and sometimes feel pressure to make decisions quickly. Landowners should think about the current and future use of their property and consult experienced legal counsel before signing any documents or agreeing to even any temporary proposals.

*For additional information on this topic, please contact Frank J. Reed, Jr. at 614.223.9304 or freed@bfca.com.*

## Where the Runway Ends…

Today's multimodal environment requires that parties involved in international transportation have a basic understanding of each of the major liability regimes governing transportation. For instance, the Warsaw Convention and the Montreal Convention of 1999 (collectively, the "Convention") govern virtually all shipments arriving in the United States by international air. In particular, the Convention's benefits apply to claims for goods damaged during "transportation by air." The Convention defines the phrase "transportation by air" as the period of time during which the goods are in the charge of the air carrier. In other words, "transportation by air" does not generally extend to transportation by land, by sea, or by river if it is performed outside of an airport.

However, many businesses do not realize that the Convention's limitations of liability, its statute of limitations, and other provisions can at times also benefit those performing other modes of transportation. Article 18(3) of the Warsaw Convention and Article 18(4) of the Montreal Convention recognize this important exception to the general rule:

> If, however, [carriage by land, by sea, or by river] takes place **in the performance of a contract for [transportation] by air,** for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the [transportation] by air.

*Id.* (emphasis added). The essential gist of this provision is that non-air transportation that is purely incidental to transportation by air is presumptively covered by the Convention. Therefore, to the extent that a carrier of another mode can demonstrate that its role was "in the performance of a contract for transportation by air", such a carrier can take advantage of the protections afforded by the Convention.

Whether or not a "contract for transportation by air" exists is a case-by-case inquiry that turns on the particular facts and circumstances of any given case. However, courts typically consider a number of factors, including the following four, non-exclusive items:

1. *The language of the air waybill.* The air waybill is often the best evidence of whether the case involves damage during the performance of a "contract for transportation by air." An air waybill that simply provides for transportation from origin, to an airport, and then on to a final destination will likely be construed as a "contract for transportation by air." Indeed, to the extent that the air waybill identifies a consignee who is not located at the airport, the waybill necessarily contemplates some form of surface delivery to the consignee. The waybill itself need not specifically reference the other mode of transportation.

2. *The treatment of freight charges.* The manner in which freight charges are billed is often indicative of the scope of the "contract for transportation by air." On the one hand, the ground portion of a shipment may constitute "transportation by air" if the cost of the ground transportation appears as a line item on the air waybill. On the other hand, if a surface carrier issues invoices separately to the shipper, the transportation in question is less likely to constitute performance of a "contract for transportation by air."

3. *The actual arrangements.* Who actually makes the arrangements for the inland surface transportation is likewise a relevant factor. A shipper who, individually or through a customs broker, contacts

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the surface carrier directly to provide details about a shipment arriving by air likely helps contribute to the characterization of the overall governing contract as something other than a "contract for transportation by air." If the air carrier makes these arrangements, the surface carrier is more likely to be deemed to be performing under a "contract for transportation by air."

4. The nature of the transportation contract. The Convention itself plainly states that providing for "combined transportation" by air and by some other mode is only governed by the Convention with respect to the air leg. *See* Warsaw Convention Article 31(1).

In summary, carriers, intermediaries, and shippers should take into consideration the factors that determine whether the liability regime of the Convention applies to the transportation service. Appropriate adjustments should be included in air waybills, other transportation contracts, and even invoices. Your transportation lawyers can help you structure these documents and make the right business decision.

*For additional information on this topic, please contact Marc Blubaugh at 614.223.9382 or mblubaugh@bfca.com.*

## On The Horizon

Marc Blubaugh published *It's Not A One-Way Street: How and Why Shippers Must Cooperate in Investigating Freight Claims* in the December 2004 edition of *The Transportation Lawyer.*

Marc Blubaugh is publishing *Forcing Yourself to Understand Force Majeure* in the winter edition of the American Trucking Associations' *The Informer.*

Eric Zalud is publishing *Turning Lemons into Lemonade: Effective Tactical Handling of Driver Logs from the Chrysalis of Pre-suit to the Crucible of Trial* in the February issue of the Defense Research Institute's *For the Defense.*

The January 2005 edition of *Logistics Today* featured quotes by Bob Spira from his presentation "Recommended Practices in Trucking Contracting" at Benesch's Transportation and Logistics Seminar in December.

Bob Spira is invited to speak at the Cleveland Roundtable of the Council of Supply Chain Management Professionals (formerly Council of Logistics Management) in April.

Marc Blubaugh was appointed to the Membership Committee of the Ohio Trucking Association.

**February 24, 2005** Independence, OH Fundamentals of Export Controls. Bob Spira will be attending.

**February 27-March 2, 2005** Phoenix, Arizona Plastics News Executive Forum. Allan Goldner will moderate a China panel discussion and audience Q&A. The Benesch Polymer Law Group will again co-sponsor and co-present the Supplemental Session for Managers. Jim Hill, Megan Mehalko, Steve Auvil, and John Banks will present the half-day session, "Creating Advantages: Managing Complexity, Capital and Competition."

**March 2, 2005 Columbus, Ohio**
Marc Blubaugh will be presenting at the first meeting of the new Ohio Chapter of Delta Nu Alpha (Transportation Professionals Fraternity).

**March 10, 2005 Columbus, Ohio**
Transportation & Logistics Conference. The Benesch Transportation & Logistics Group will present "Maximizing Opportunities and Minimizing Risks in Transportation and Logistics: How the Law Can Help." Contact Megan Thomas to RSVP.

**March 20-23, 2005 San Diego, California**
Transportation Consumer Protection Council/Transportation Loss Prevention and Security Association Annual Conference on March 22. Eric Zalud will be speaking on transportation security issues.

**March 30-31, 2005 Phoenix, Arizona**
National Tank Truck Carriers Tank Truck Safety Council. Mariann Butch will be speaking on nitrogen loading/unloading issues and shipper liability on March 30.

**March 31-April 2, 2005 Miami, Florida**
Transportation Intermediaries Association Annual Conference. Bob Spira will be attending.

**April 18-19, 2005 Arlington, Virginia**
Association for Transportation Law, Logistics and Policy/National Industrial Transportation League Spring Policy Forum. Bob Spira will be attending.

**April 29, 2005 Columbus, Ohio**
Council of Supply Chain Management Professionals Spring Seminar. Marc Blubaugh will be presenting.

**May 9-11, 2005 Chicago, Illinois**
National Tank Truck Carriers Annual Conference. Eric Zalud will be speaking on nitrogen loading/unloading issues and shipper liability on May 9.

**May 10-14, 2005 Indian Wells, California**
Transportation Lawyers Association Annual Conference. Eric Zalud, Marc Blubaugh, and Bob Spira will be attending. Eric will present on the panel, "Homeland Security: Are We Safer Now?" on May 12.


**FOR MORE INFORMATION, PLEASE CONTACT OUR TRANSPORTATION AND LOGISTICS PRACTICE GROUP:**

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