InterConnect

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In This Issue...

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Fuel Surcharge Fiascos

Congress' recent flirtation with re-regulating motor carrier fuel surcharges reveals a disturbing absence of historical perspective. Carriers, intermediaries, and shippers should be troubled by this legislation for any number of reasons:

- What impact will re-regulation have on economic efficiencies that have been obtained through deregulation?
- Is fuel surcharge legislation the first step on a "slippery slope" towards rate regulation?
- Under what specific circumstances may a fuel surcharge change?
- Can a fuel surcharge be adequately isolated from other shipping costs?

As the foregoing suggests, any such legislation is guaranteed to generate new, expensive litigation for all parties in the supply chain. While some proponents of the legislation dismiss the prospect of litigation as a red herring, all one needs to do is look at the past in order to see that litigation is a very real consequence of legislation in this area.

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One court's description of economic conditions facing owner-operators more than 25 years ago is strikingly similar to a description that one might hear today:

> In late spring 1979, in response to rapidly escalating fuel costs which cut heavily into the income of owner-operators and led to the disruption of the trucking industry by owner-operators, the ICC implemented expedited procedures . . . for the recovery by owner-operators of their increased fuel costs.

Fisher v. Fleming-Babcock, 745 F.2d 513, 513 (8th Cir. 1984). *The Fisher* case involved a lawsuit by independent owner-operators to recover damages for a motor carrier's failure to comply with fuel surcharge orders of the ICC and the Kansas Corporation Commission. The ICC and KCC had authorized carriers to obtain fuel-based increases in their freight charges by employing a percentage-based fuel surcharge. The orders in question also required the carriers to pass fuel surcharges on to those parties actually responsible for the payment of fuel costs (i.e., the owner-operators). While the owner-operators prevailed at trial, the motor carrier

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ultimately prevailed on appeal due to certain exemptions that existed at the time. Nonetheless, all parties spent a great deal of time and money at trial and on appeal litigating over the nature and scope of this particular fuel surcharge.

Fisher is not an anomaly. Lawsuits regarding fuel surcharges in the pre-deregulation era were not at all uncommon. *See, e.g., Carothers v. Western Transport Co.*, 554 F.2d 799, 804-05 (7th Cir. 1977) (actions by owner-operators against motor carriers for their failure to pass on fuel surcharges under ICC special permissions); *Union of Transportation Employees v. Oil Transport Company*, 591 F.Supp. 439 (N.D. Tex. 1984) (finding in favor of union-and awarding attorneys' fees and costs-in an action brought for carrier's failure to use fuel surcharges in computing driver pay); *Arcon Construction Co., Inc. v. South Dakota Department of Transportation*, 365 N.W.2d 866 (S. Dak. 1985) (suit to recover fuel surcharges based on collateral estoppel due to earlier dispute involving recovery of fuel surcharges).

Indeed, shippers and carriers currently continue to litigate issues involving fuel charges wherever the federal government has continued to regulate. For instance, in *Shubert v. Federal Express Corporation*, 306 Ill.App.3d 1056 (Ill. 1999) a shipper brought a class action against Federal Express, alleging that the carrier's imposition of a two percent fuel surcharge constituted a breach of contract. The lower court found that the shippers could not prevail because, among other things, the Airline Deregulation Act preempted the claim by virtue of its continued regulation of the amount, timing, and duration of any fuel surcharges imposed by an air carrier. The Illinois Supreme Court reversed this finding and held that, in this particular case, preemption did not apply and that the plaintiff was permitted to litigate its case. *See also Fenn v. Trans National Travel, Inc.*, 14 Mass.L.Rptr. 714 (Mass. 2002) (granting air carrier's motion to dismiss passengers' class action relating to recovery of fuel surcharge).

Of course, parties involved in transportation will continue to litigate matters involving fuel surcharges even if the proposed legislation is not enacted. *See, e.g., ONYX Arbor Hills Landfill, Inc. v. National Waste Association, Inc.*, 2004 WL 113614 (Conn. Super. 2004) (garbage hauling service unsuccessfully sued garbage broker for recovery of fuel surcharges because "there is nothing in the parties contract authorizing such charge nor any evidence to support it"). However, Congress should tread carefully before opening the door to new litigation.

In summary, all parties involved in the transportation industry should remain circumspect about the federal government's possible foray back into regulating aspects of transportation pricing. At the very least, shippers and carriers should be well aware that one thing is certain to follow from more regulation: more litigation. History proves it.

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

Alert to Freight Intermediaries: Heightened Scrutiny of Carrier Selection

Eight Lessons from Schramm v. Foster

The fluid and instantaneously reactive expansion of freight intermediaries ("3PL's") is causing courts to recognize that they must adopt new legal principles and legal analyses to catch up with the industry. This trend was recently exhaustively and cogently analyzed in the context of a personal injury action against an over-the-road carrier and a multinational transportation broker. A U.S. District Court in Maryland, in *Schramm v. Foster*, 2004 U.S. Dist. Lexis 16875 (D.Md. August 23, 2004), in considering plaintiffs' claims against 3PL C.H. Robinson, concluded that Robinson's 3PL status gave rise to at least a *cognizable* cause of action for negligent selection of a carrier:

> its self-proclaimed status as a 'third party logistics company' providing 'one point of contact' service to its shipper clients is sufficient under Maryland law to require it to use reasonable care in selecting the truckers whom it maintains in its stable of carriers. ...This duty to use reasonable care in the selection of carriers includes, at least, the subsidiary duties (1) to check the safety statistics and evaluations of the carriers with whom it contracts available on the SafeStat database maintained by FMCSA, and (2) to maintain internal records of the persons with whom it contracts to assure that they are not manipulating their business practices in order to avoid unsatisfactory SafeStat ratings...

The court here apparently seized upon a gratuitous assumption of duty theory to create a duty on behalf of Robinson to inquire as to the background of its carriers.

This case provides several lessons for 3PL's and practitioners in this evolving area:

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1. A 3PL *can* get involved to some extent in the day-to-day operations relating to shipments of freight under its contracts. Courts recognize that some of this involvement may be necessary to assure that the shipment is delivered, while still preserving the 3PL's status as an intermediary. However, if it gets too involved, to the extent of frequent operational contact with the driver, providing directions and directives on a daily or more regular basis, its status could be converted into a carrier for liability purposes.

2. Contracting can make a difference. Courts will refer to the monikers ascribed to the contracting parties in the various contracts involved in a 3PL shipping scenario, in an effort to assess liabilities amongst those parties. Consequently, as is often stated, it is important to memorialize the contractual relationships by designating the contracting parties accurately.

3. Insurance coverage matters. Insurance coverage is often analyzed by the courts in these situations, not only for purposes of recompense, but in an effort by the courts to determine the status of the entities involved, and the liabilities as between those entities. Thus, insurance coverage becomes an analysis point in these cases.

4. The acts of the driver and clerical mistakes on the bill of lading will generally not alter the contractual status and liabilities involved in these situations. Courts are looking beyond activities at the loading docks in many of these situations and are not letting clerical mistakes and statements by drivers unaware of the relationships to cloud the legal analysis of categorization of entities in the shipping sequence and their respective liability exposure.

5. For non asset based 3PLs, many states will find it difficult to endorse a cognizable negligent entrustment claim, since in those states, negligent entrustment necessarily involves an actual chattel, and non asset based 3PL's own no chattel.

6. The statutory provision imposing liability on the carrier or the broker for violations of the Interstate Commerce Act [49 U.S.C. § 14704(a)(2)] is muddled and enigmatic and spawns contradicting authority. Courts may find that it does give rise to a private right of action for commercial damages. There is ample authority that it does not give rise to a cause of action for personal injury.

7. Voluntary acceptance of responsibility for freight claims and the existence of insurance that may provide some coverage is generally not enough for a 3PL to be found to be responsible for purposes of personal injury claims.

8. In some states, 3PL's can be defendants in claims for negligent selection of a carrier. These actions are likely to survive and proliferate. However, the present state of the case law indicates that reasonable due diligence into the background of the carrier selected would enable the 3PL's to fulfill that duty and not be liable for personal injury or freight damage.

For additional information on this topic, please contact Eric Zalud at ezalud@bfca.com or 216.363.4178.

NVOCC Service Agreements: A New Option for Shippers

Since the enactment of the Shipping Act of 1984, the use of service contracts in ocean transportation has grown in popularity. The Federal Maritime Commission ("FMC") estimates that, in some markets, 80-90% of the traffic moves under contract. A contract gives the shipper the opportunity to obtain a better price while giving the carrier a guaranteed minimum level of business.

With some prodding from the Washington-based shipper groups and trade associations, the FMC has recently adopted a rule permitting Non Vessel Operating Common Carriers ("NVOCCs") to enter into service contracts with most shippers.

As far as the shipping public is concerned, an NVOCC holds itself out as a common carrier who offers an origin to destination service that includes ocean transportation. A NVOCC may handle full containers or consolidate freight from several shippers into one container to get the benefit of container load rates.

On the other hand, as far as the ocean carriers are concerned, NVOCCs are shippers. The NVOCC operates no equipment, but provides the service by purchasing space on ocean carriers.

The FMC has established a series of procedural requirements for NVOCCs who want to take advantage of the right to enter into NVOCC Service Agreements ("NSAs"). These requirements are based

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on the requirements for ocean carriers who want to enter into contracts under the shipping act. Under the rules, (1) the NVOCC must register with the FMC; (2) the NSA must be filed confidentially with FMC; (3) a statement of the essential terms of the NSA must be published in tariff format; and (4) the NVOCC must otherwise be in compliance with the FMC's regulations. In addition, because of antitrust concerns, a NVOCC may not enter into a NSA with another NVOCC or with a shippers' association that has a NVOCC as a member.

"It is expected that NSA activity will increase dramatically as shippers and NVOCCs become familiar with the contract process."

In addition to establishing minimum tender obligations for the shipper and an agreed rate or rate schedule for the carrier, the NSA may also establish defined service levels, incentives and liquidated damages provisions covering the nonperformance of either party.

The FMC has reported that, as of mid March 2005, approximately 250 NVOCCs (out of 3,000) have registered with FMC to be able to file NSAs. Less than 20 NSAs have been filed. It is expected that activity will increase dramatically as shippers and NVOCCs become familiar with the contract process. The option to ship under contract should be particularly attractive to shippers who can rely on a predictable volume of freight and who can take advantage of the additional services that a NVOCC can provide.

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

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Benesch Business Bulletin - timely legal news and court decisions that may affect your business

China Insights - a publication for those doing business, or considering doing business, in China

Polymer Advisory - a publication dedicated to the polymer, plastics and packaging industries

On The Horizon

July 14-16, 2005 Lima, Peru

TerraLex Latin American Conference. Eric Zalud will be attending.

July 23, 2005 Denver, CO

Executive Committee Meeting of the Transportation Lawyers Association. Eric Zalud will be attending.

July 24-27, 2005 San Diego, CA

ATA Motor Carrier General Counsel Forum. Eric Zalud will be attending.

August 8, 2005 Akron, OH

Benesch is a sponsor of northeast Ohio's premier logistics event: the Northeast Ohio Trade & Economic Consortium (NEOTEC) Logistics Conference and Golf Open at Firestone Country Club. Visit www.neotec.org for more information.

October 5-7, 2005
Las Vegas, NV

Trucking Industry Defense Association's Annual Conference. Eric Zalud will be attending.

November 4, 2005
Washington, D.C.

Transportation Law Institute. Marc Blubaugh and Eric Zalud will be attending.

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