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Seventh Circuit vacates FMCSA EOBR rule

By William D. Brejcha; Scopelitis, Garvin, Light, Hanson & Feary, P.C., Chicago

The Federal Motor Carrier Safety Administration ("FMCSA" or "the Agency") of the U.S. Department of Transportation ("DOT") regulates safety in the nation's trucking industry. A key component of this regulation is the hours of service regulations now published at 49 C.F.R. Part 395. These regulations limit the hours in which a commercial vehicle operator can drive and work in order to assure that drivers operating tractor/trailers on our highways are alert and not fatigued.

Traditionally, driver hours of service have been recorded by drivers on paper hours of service logs wherein the driver would identify the times of each day during which the driver was on duty driving, on duty not driving, in a tractor sleeper berth, or off duty. Of late, however, with the advances in technology, electronic on board recorders ("EOBRs") have become available as an alternate and more accurate device than paper logs for recording whether a driver was driving in excess of the permitted on duty driving time permitted by the FMCSA in 49 C.F.R. Part 395.

Due to the more accurate record of driving times available through EOBRs, FMCSA has considered whether drivers should be required to

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Court awards summary judgment for cargo damage and attorney fees in cargo litigation

By William D. Brejcha; Scopelitis, Garvin, Light, Hanson & Feary, P.C.

In *Contessa Premium Foods, Inc. v. CST Lines, Inc.*, 2011 U.S. Dist. LEXIS 92346 (C.D. Cal. 8/18/11), the District Court granted plaintiff's summary judgment motion and denied the defendant's summary judgment motion, awarding attorneys' fees to the plaintiff pursuant to the parties' transportation contract. The case arose from a May 28, 2008 contract between plaintiff Contessa Premium Foods, Inc. ("Contessa"), a producer and distributor of frozen food products, and CST Lines, Inc. ("CST"), a motor carrier and broker. Under the contract, CST agreed to transport 48 pallets of frozen foods from Contessa's Commerce, CA facility to an Indianapolis, IN warehouse. CST had agreed to provide Contessa with temperature controlled transport with a constant minus ten degrees Fahrenheit. CST had also agreed to assume full liability for all loss or damage to the shipments or portions of the shipments.

After accepting the load, CST contracted with motor carrier Far East Carrier to pick up, transport, and deliver the shipment pursuant to a CST/Far East Broker/Carrier Agreement. CST directed Far East to identify itself as CST when it signed in to pick up the load. Far East's driver picked up the load on September 14, 2009. But the driver identified the carrier as Far East, not CST, on the bill of lading. Regardless, after the Far East pickup, Contessa faxed a "shipment manifest" to CST noting that CST would be paid $4,200 for its transport of the load in issue and CST invoiced Contessa for the $4,200 with no disclosure of Far East's status as the subcontracting carrier. On delivery of the goods, they were damaged because of a temper-

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use EOBRs instead of paper logs in a notice of proposed rule making to change the hours of service regulations. FMCSA required that the EOBRs to be used must record a significant amount of information in order to be accepted by the Agency. Ultimately, however, FMCSA decided not to require carrier use of EOBRs as part of its overhaul of the hours of service rules for a number of reasons. *See*, 68 Fed. Reg. at 22,488-9.

In 2004, FMCSA investigated the EOBR issue when the Agency issued an optional advanced notice of proposed rule making in Electronic On-Board Recorders for Hours of Service Compliance. 69 Fed.Reg. 53386 (Sept. 1, 2004). That notice led to a formal notice of proposed rule making in 2007 which considered three issues: (1) new performance standards for EOBR technology; (2) the use of EOBRs to "remediate regulatory non-compliance"; and (3) incentives to promote voluntary use of EOBR technology. Electronic On-Board Recorders for Hours of Service Compliance, 72 Fed.Reg. 2340, 2343 (Jan. 18, 2007). The non-compliance issue was the most significant as the Agency proposed requiring EOBRs for carriers who had HOS violations of over 10 percent for any two compliance reviews in a two-year period. The Agency found this "2x10 remedial directive" would apply to "a relatively small population of companies and drivers with a recurrent HOS problem." 74 Fed.Reg. at 17,211. The list of statutes authorizing these new rules included the Truck and Bus Safety and Regulatory Reform Act of 1988, 72 Fed.Reg. at 2341. That statute "requires the Agency to ensure that any such device is not used to 'harass vehicle operators.'" *Id.* (Quoting from 49 U.S.C. §31137(a)).

After receipt of numerous comments, the Agency promulgated a new EOBR rule in 2010. The Agency decided on a rule under which motor carriers "that have demonstrated serious noncompliance will be subject to mandatory installation of EOBRs." 75 Fed. Reg. at 17,208. The new rule abandoned the proposed "2x10 directive" in favor of a new "1x10 directive" by which FMCSA would issue a remedial order requiring a motor carrier with greater than a 10 percent record on HOS noncompliance in a single compliance review to install EOBRs in all trucks in its fleet and use EOBRs for a two-year period in lieu of all paper logs. The 2010 rule was entered on April 5, 2010 and was to be effective June 4 2010 with a compliance date of June 4, 2012.

The Owner Operator Independent Drivers Association ('OOIDA") and three independent Drivers filed a Petition challenging the rule on June 5, 2010. On August 26, 2011, the U.S. Court of Appeals for the Seventh Circuit vacated this new rule requiring EOBRs for certain carriers in *Owner Operator Independent Driver Assn., Inc. V. Federal Motor Carrier Safety Administration*, No. 10-2340. After discussing and rejecting the Agency's claims that the plaintiffs lacked standing and the matter was not ripe for decision, the Court addressed the first of OOIDA's three claims challenging the new rule, that being that the rule was arbitrary and capricious because the rule does not "ensure that the devices are not used to harass vehicle operators."

The court noted that when an agency fails to consider a factor mandated by its organic statute, that omission alone is "sufficient to establish an arbitrary and capricious decision requiring vacation of the rule." *Public Citizen v. FMCSA*, 374 F.3d 1209, 1216 (D.C. Cir. 2004). The court found Congress had directed in 49 U.S.C. §31137(a) that if the DOT was to prescribe a regulation requiring EOBRs in tractors to increase operator compliance, "the regulation shall ensure that the devices are not used to monitor productivity of the operators" and held that statutory directive to be mandatory. The Seventh Circuit then found that the new rule failed to comply with the mandatory provision of the governing statute and therefore vacated the new mandatory EBOR rule.

The Seventh Circuit ruled that FMCSA needs to consider what harassment already exists, how frequently and to what extent the harassment occurs, and how an electronic device capable of contemporaneous transmission of information to a motor carrier will guard against or will fail to guard against driver harassment. Even if FMCSA resolves the driver harassment issue, the court left open for subsequent determination other challenges to the rule. One of these other potential issues is an analysis of the cost-benefit contrast of requiring EOBRs.

With this court ruling, it is anticipated FMCSA may need to restart the entire mandatory EOBR rulemaking process and rewrite the rule or issue some supplemental ruling that addressed the harassment issue and other issues that have been raised in evaluating the new rule. ■

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ature higher than Contessa required. Based on the above facts, Contessa and its insurer Zurich American sued CST for cargo damage losses. Both Contessa/Zurich and CST moved for summary judgment.

The court first addressed the issue of CST's status under the Carmack Amendment, 49 U.S.C. §14706, as the court found Carmack applied to motor carriers and not to brokers. Plaintiffs contended CST was a carrier subject to Carmack's strict liability rules while CST claimed that it had no Carmack Amendment responsibility because it acted as a broker in the transaction in tendering the load to Far East per those parties' Broker/Carrier Agreement.

The court held that CST was a carrier for several reasons. First, CST executed a Motor Carrier Agreement with Contessa as the motor carrier and that agreement imposed carrier cargo liability on CST. The court also noted that CST accepted carrier responsibility to move the load under the contract. Second, the court found CST held itself out as a carrier, not a broker, as Congress defined a broker in 49 U.S.C. §13102(2) as "a person, other than a motor carrier" while defining a carrier "a person providing … transportation for compensation" in 49 U.S.C. §13102(12). The court found it undisputed that the Motor Carrier Agreement identified CST as a carrier and CST invoiced Contessa for carrier services. Additionally, the court further found that CST's failure to disclose to Contessa that CST had subcontracted the load constituted further proof that CST was not a broker.

Last, the court held that CST also performed services beyond mere brokerage such that CST exerted carrier control over the load after tendering the load to Far East. CST gave instructions to Far East to make daily check calls to CST, to make daily temperature checks, and to identify itself as CST to the shipper. The court found these facts showed that CST did more than act as broker on the load.

The court next examined the evidence and found that Far East had moved the load at an unauthorized higher temperature with the cargo damaged as a result. This evidence also created an inference the goods were tendered to Far East in good condition. Last, plaintiff showed its actual injury with cargo damage that totalled over $97,000. CST only contested the $4,300 in claimed freight charges, arguing those charges were not damages to Contessa as the charges were never paid to CST. The court, however, awarded the entire claimed freight charge amount to Contessa as CST never withdrew its freight charge invoice.

Last, the court sustained plaintiff's attorney fee claim. The court acknowledged that attorneys' fees are not recoverable under Carmack, but noted that plaintiff sought recovery of the fees under its contract with CST, not Carmack. As such, the court awarded the plaintiff its fees of $37,387.22 as there was no evidence that fee amount was unreasonable. ■

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