

TRANSPORTATION

COMMITTEE REPORT

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Report of Committee Counsel

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WMC Transportation Committee

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Model Shipper-Broker Contract Now Available

National Industrial Transportation League and Transportation Intermediaries Association have announced availability of their jointly agreed "Joint Model Broker Contract" (*i.e.*, shipper-broker contract). The model is a useful checklist and provides terms which are well balanced. Our caution, as always, is that any transportation contract form needs to be tailored to the specific circumstances and objectives of the parties. With shipper-broker contracts, in particular, because brokers can wear many different hats and multiple hats at the same time (e.g., traditional broker, freight forwarder, carrier or carrier affiliated, payments agent, shippers agent, logistics provider and so on), it is critical that the model be tailored to the specific circumstances and objectives of the parties.

The new model shipper-broker contract and the previously announced NITL-ATA Joint Model Truckload Contract are available at www.nitl.org (links at the bottom of the home page).

So Sorry, Carmack Means What It Says

In *S&H Hardware v. Yellow*, 2005 WL 3454743 (December 19, 2005, 3rd Cir.), the shipper S&H Hardware suffered over a million dollars in losses when one of its employees, Steven Schwartz, in collaboration with one or more Yellow drivers, diverted shipments of Lionel model trains to addresses not listed on the bills of lading or shipping contract, and never before used by S&H as points of delivery. The culprits were apprehended in a sting conducted by the FBI with active involvement of employees of both S&H and Yellow. This actual knowledge by Yellow was determined not sufficient to satisfy the specific notice requirement under Carmack.

Under Carmack, in addition to being filed within the proper amount of time, a proper written notice to the carrier is required. A proper notice must:

- Be communicated in writing or, where agreed to by the parties, electronically;
- Contain facts sufficient to identify the damaged or lost shipment;
- Assert liability for alleged loss, damage, injury, or delay; and
- Demand payment of a specified or determinable amount of money.

Even though the 3rd Circuit noted that courts have construed the written claim requirement liberally, that was not enough to save this shipper's claim. The standard for determining sufficiency is one of substantial performance. The 3rd Circuit rejected estoppel-based arguments advanced to carve out specific exceptions to the express requirements of Carmack. The Carmack regulations for motor carriers now appear at 49 CFR Part 370.

Motor Carrier Costs Up, Nobody Repealed the Law of Supply and Demand

The story beginning 2006 is the same as ending 2005: tight capacity, high operating costs, volatile fuel prices, and a shortage of drivers. The repeated line on capacity is that no meaningful capacity has been added due to the driver shortage. Most analysts do not expect an increase in freight hauling capacity in 2006. Fuel price volatility is an unknown. The 2007 emissions compliance will add \$7,000 to \$10,000 to the cost of new Class 8 tractors. Orders are up for 2006 tractors, influencing delay in purchasing trailers.

Analysts expect the U.S. economy to grow 3% to 4% in 2006 as in 2005 and predict truckload rates will increase 4% to 7%. As of November, one analyst reported truckload prices were up 6.7% over year earlier and having increased 0.5% over the previous month.

Heartland Express pushed employed driver pay to 50 cents per mile, up 4 cents, and contractor rates to 95 cents plus fuel stabilization. Many regard driver pay as a necessary incentive, but only a stopgap absent making professional driving a more attractive career and lifestyle choice.

ATA reported the truckload driver turnover rate at 135% for 3rd quarter 2005, approaching the record of 136% in 4th quarter 2004. The rate has been at least 110% in 14 of the last 15 quarters. In contrast the rate for LTL carriers was 12.1% in 3rd quarter 2005, the lowest since 1st quarter 2003. The record high was 15% for 2nd quarter 2005. Smaller carriers are also reported to be feeling the effects of driver turnover, mainly because of increased competition for drivers and inability of smaller carriers to compete with larger carrier pay and health insurance benefits.

Fuel Surcharges Getting Renewed Attention

With the big fuel spike came reports of truckload carriers reworking their fuel surcharge formulas. A typical surcharge format provides a one-cent increase for each five-cent per gallon increase in the selected index. Truckload carriers complain that these formulas are returning only 80% to 85% of fuel increases. Adjustments include: (a) reducing the increment that triggers the surcharge change, *e.g.* from five cents to four cents; and/or (b) "fractionalization," *e.g.*, a one-quarter cent increment in the surcharge for each one-cent per gallon on the index.

Some LTL fleets concede that their fuel surcharges are generating operating income that more than offsets higher fuel costs. Another indicated that fuel surcharges have become such a large percentage of revenue; they are now a separate line item reported to shareholders. Shippers, reportedly, generally accept the LTL carrier's fuel surcharge formulas without further negotiation.

OOIDA, having failed to get a mandatory fuel surcharge in SAFETEA-LU, is seeking sponsors for a mandatory fuel surcharge pass-through. Transportation Intermediaries Assoc. President Bob Voltman characterized the effort as "re-regulation," pushing the industry back "to the equivalent of published rates." That theme is similar to the one raised by opponents of the previous mandatory fuel surcharge proposal, characterizing the legislation as a prescription for another "undercharge" crisis in transportation.

Wiser heads, perhaps, note that fuel surcharges do not actually do anything about the cost of fuel. They stress the importance of more shippers engaging more intensively in SCM efforts to optimize matching equipment, loads and drivers. This means encouraging shippers to deal with more carriers in order to match their freight to the carriers' lane capacity.

Wal-Mart has taken a direct approach setting goals for increasing fuel mileage by 25% in 3 years and 100%, to 13.5 mpg in 10 years. Recently, a Wal-Mart test vehicle consistently reached the 3-year goal at 8 mpg, up from an average of 6.5 mpg. Initial efforts have focused on aerodynamics, gearing, auxiliary power to reduce idling, biofuel and reduced weight and rolling resistance (hybrid power trains and electric drive axles). Future efforts are likely to include electrification of auxiliary power loads,

more on aerodynamics, lighter materials to reduce weight and potential for engine improvements (hybrid or hydrogen). Always nice to see someone not only set a goal, but get serious about it.

Intermodal – Stacking, Shifting Ownership and Sources of Capital Investment

In line with the railroads push for more efficiency of stacking containers, Schneider sees the 20% it now executes in containers growing to 50% to 60% within one year (growing from 3,700 containers to some 7,000 to 10,000 units). Schneider has introduced a new 53-foot container of its own design which, while maintaining outward stacking dimensions for the railroads, provides two more inches inside than do conventional 53-foot containers. That 2-inch difference permits rotating pallets in loading to maximize cubic capacity. This 2-inch difference, from the shipper's perspective, gives the Schneider container the same interior space as high grade 53-foot highway trailers, eliminating differences in loading for stacked intermodal or highway.

On the down side, container and chassis cost approximately 20% more than conventional trailers, plus additional costs associated with managing and maintaining additional units of equipment. UPS, USXpress, and others, including Schneider, will continue TOFC operations. UPS will continue to fill long intermodal trains and make pulling them worthwhile for the railroads. As of now, trailer shipments on expedited trains are said to get to their destinations faster than containers.

Though the Class 1s are now in a push to divest themselves of rail-owned intermodal trailers and containers, the trend has been ongoing for some time. In 2004, more than 1.1 million shipments in non-rail-owned trailers was 61% higher than 2000; and more than 1.65 million shipments in non-rail-owned containers was up 36% from 2000. In 2005, non-rail-owned containers rose to 72,000 or 48% of the total, compared to 55,000 or 40% in 2000. The number of rail-owned trailers in 2005 dropped to 40% of the total owned one year earlier. Three of the four U.S. Class 1s will no longer manage intermodal trailer pools. BNSF expects to be out of the business by the end of 2006. BNSF reports, as of the end of 2005, 90% of its intermodal freight is in non-rail-owned equipment.

Truckers and, particularly, non-asset based intermodal marketers have been stepping up to the challenge. They are not only faced with the need to budget for maintaining and repairing equipment, but also, up front costs of acquiring the equipment and upgrading technology and skills to track and control its use. The net result may be increasingly efficient asset management and a better intermodal service, one in which the transportation provider, as owner of the equipment, is better able to manage the assets and track the shipments.

BNSF CEO Matt Rose weighed in on the long term implications of rising intermodal needs in an address to the Intermodal Transportation Institute, reprised in *Traffic World*, December 12, 2005, at p. 8. He cites a likely increase in U.S. consumption over the next five years of more than \$1 trillion, from the current \$8 up to \$9 trillion by 2010. Imports are a large part of the pressure, but he also cites demand for intermodal service by domestic trucking as a large component of the pressure for growth in rail intermodal. The reasons: first, desire by trucking to deal with escalating operating costs from volatile fuel costs, rising insurance and labor costs, and driver shortages; second, the lack of funding for highway infrastructure.

Well said, Mr. Rose, but here's the kicker:

But private investment and productivity improvements probably will not be enough to handle all of the rail volume growth. More capital spending is needed and railroads can't be the only source for the capital. Public-private partnerships will become even more important in the future of rail transportation and our communities.

Mr. Rose may be in the vanguard for an industry that has largely eschewed public funds, mainly to avoid entanglements that might restrict its freedoms, now mostly characterized by the freedom to engage in pricing without effective competitive restraints. Mr. Rose, however, is not out there alone. We reported the first trial balloon on this subject just short of a year ago:

That such public-private partnerships are necessary, we have from no less an authority than Edward R. Hamburger, CEO of the American Association of Railroads (*Journal of Transportation Law, Logistic and Policy*, 2nd Quarter 2005 at pp. 214-225).

Railroads Ready to Build New Capacity?

Shippers continue to say they are paying more for less. Commentators say increasing rates will continue until demand slows or railroad capital expenditures (track, equipment, and more trained people) catch up. It is fairly obvious that neither is going to happen anytime soon, short of more war or a recession deeper and more far reaching than the last.

BNSF's Rose, though the youngest, is just one of a new generation of new CEO's taking over in the rail industry. Recognition of a sea change in the focus of the industry has generally set in. The last generation, the first 20 or so years since the Staggers Act of 1980, kept the industry afloat by rationalizing networks, other cost cutting and searching for freight with which to scratch out revenues far less than adequate (per ICC-STB, if not Wall Street) to pay their cost of capital. Now the talk is about demand so high that the industry can use price to adjust the amount of business it takes on. Departing STB Chair Roger Nober (*Traffic World* December 10, 2005, p. 8), not so surprisingly, summed it up:

For railroad CEOs in the past, the principle [sic; I think?] question was how to get more business for their systems. Now the question is how to get the most valuable business on the railroad while maintaining the emphasis on service, costs, inventory and supply."

That is a pretty fair statement, notwithstanding the odd absence of reference to the obligations of these franchised monopolies as common carriers subject to the Interstate Commerce Act. The new challenge is said to put a premium on rail executives who have a combination of marketing and financial skill, as they face two choices: ration capacity by price; or invest in more capacity. One can only hope that the choice is not seen as "either...or."

DM&E, STB Decision Upcoming Next Month

After STB gave final approval to the Powder River Basin Expansion Project in 2002, various parties sought judicial review. In *Mid States Coalition for Progress v. STB*, 345 F.3d 520 (8th Cir. 2003), the court upheld the Board with respect to all of the transportation issues and most of the environmental issues that were raised. However, the court directed the Board to give further consideration to four environmental issues: whether mitigation for increased horn noise is warranted; the relationship between vibration and horn noise; potential increased coal usage and related air emissions that could result from this project; and ensuring that the Programmatic Agreement governing the historic review is executed.

On December 30, 2005, STB's Section of Environmental Analysis (SEA), in cooperation with five Federal agencies (the U.S. Department of Agriculture, Forest Service; the U.S. Department of Interior, Bureau of Land Management; the U.S. Army Corps of Engineers; the U.S. Department of Interior, Bureau of Reclamation; and the U.S. Coast Guard), issued a Final Supplemental Environmental Impact Statement requiring only minor adjustments in the project. STB has promised to issue its final decision promptly following a 30-day waiting period following EPA's publication of the final impact statement.

We have identified STB approval, funding and implementation of the DM&E PRB Project, including removal of physical and paper obstacles to competitive routes to Wisconsin destinations as a key component in building needed freight transportation capacity and restoring competitiveness. There are, on the horizon, unprecedented opportunities to negotiate or provide trade-offs to relieve capacity constraints. The trade-offs will involve conditioning public-private investments in new capacity on commitments to open gateways and/or access to permit more effective use of existing capacity. New capacity will be developed on competing routes.

By these means, we will shift the focal point of the regulatory and public policy debate. It will move beyond "rate reasonableness" for captive shippers into the realm of satisfying the requirements of "public convenience and necessity" to assure: (a) adequate capacity to meet market demands for transportation service; and (b) overall safety and security on highway and on rail, for people and freight.

The DM&E line will not only add a competitive alternative but, perhaps, more important, will add route redundancy, geographically distinct from the BNSF-UP PRB routes, which may enhance reliability of the coal supply.

Wisconsin coal and electric energy consumers, also, have every reason to be acting, now, to address other obstacles which will be encountered in getting the alternative DM&E PRB coal across the Mississippi and the last few miles to Wisconsin utility and mill destinations. This implicates both cost and reliability of coal moving to Wisconsin destinations, long term. Even in the near term, active involvement in orchestrating indirect support for the DM&E project may be helpful in current dealings with competitors BNSF and UP and may open early opportunities to removing, in advance, the "final mile" obstacles to effectively getting DM&E routed PRB to Wisconsin destinations.

DM&E Seeks \$2.5 Billion Loan from Federal Railway Administration

FRA has 90 days in which to approve the loan once STB has issued its final decision, expected next month. The burden on DM&E is to convince FRA that it will be able to generate enough income to repay the loan.

As one commentator notes, DM&E will not have access to BNSF's and UP's captive utilities. These account for some 40% of BNSF's and UP's coal revenues. Nor are the connecting lines likely to permit DM&E satisfactory economics of interchange to points on their lines. This accounts for another 40% of BNSF's and UP's PRB coal revenues. Thus, the analysis concludes that only 20% of PRB coal traffic is competitive. DM&E, for its part, will contend that increasing demand for PRB coal will permit it to achieve the revenues needed to repay the \$2.5 billion construction loan it seeks from FRA.

Supporting the DM&E project, alone, does not take care of the last-mile issues. That requires removing physical and paper barriers (closed gateways and terminal access) to getting competitive coal delivered to the facilities of the consumers. This is where active involvement by shipper groups may play a key role in making DM&E's project a success but, more importantly, in changing the way the railroad industry approaches competing for all-rail and rail intermodal freight.

The railroad industry takes the view that more rail-to-rail competition (*e.g.*, greater access by shippers to more rail lines) will merely force down rates making it more difficult for the industry to garner capital to increase capacity. The contrary view, expressed by NITL in written testimony in STB's Ex Parte 658, *The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead*, is that increased rail-to-rail competition in the current capacity-constrained environment, even in the short term, would not decrease overall revenue to the railroad industry, but would allocate revenue more efficiently among the rail carriers. In the long term, the competitive process will spur individual railroads, and the railroad industry as a whole, to greater efficiencies.

Supporting the DM&E project, including addressing the last mile issues, may itself be a powerful means to this end.

WisDOT Annual Rail Issues Conference

Counsel attended the 2005 WisDOT Annual Freight Railroad Issues Conference on Wednesday, November 9, 2005, and presented a "Shipper Perspectives" in a program segment devoted to "Freight Service and Rate Issues." This is a forum attended by hands-on railroad operations people, as well as railroad public affairs representatives and many WisDOT policymakers.

Our presentation simply acknowledged 2005 as a year of constrained capacity in all segments, motor, rail and intermodal, with higher rates and the service issues one would expect. The presentation singled out as shippers' main concern that increasing rates may simply be chasing the same capacity. The start-up efforts of the Lake States Shippers Association, to bring SCM technology and techniques to moving pulpwood from producers to consuming mills, was described as an effort to improve both rail and truck productivity, expanding the capacity of existing infrastructure and transportation facilities.

Regional Freight Strategy Workshop, UMFCFS Phase II

Counsel presented a draft of the 10 point CCFC 2006 Agenda to DOT representatives of Minnesota, Wisconsin, Michigan, Iowa, Illinois and Ohio, at the opening workshop of Phase II of the [Upper](#)

[Midwest Freight Corridor Study](http://www.uppermidwestfreight.org/) ("UMFCS") (www.uppermidwestfreight.org/) , at Milwaukee November 15, 2005. This was the first of a series of Phase II workshops which are to be held with the objective of arriving at an agenda for a Regional Freight Strategy. CCFC's draft was presented as "a private sector perspective" and served as a counterpoint for the day's discussion of a draft agenda and series of nine "[white papers](http://www.uppermidwestfreight.org/white_papers.htm)" (www.uppermidwestfreight.org/white_papers.htm) prepared since August 2005 by the UMFCS team. The Agenda is posted at www.centralcorridors.com/ccfc_agenda_2006.asp.

The second and final workshop of the Phase II series is scheduled for Columbus, OH on Tuesday and Wednesday, April 25-26, 2006.

Hazmat, Finding Relief in Tightening the Definition?

With background checking and fingerprinting necessary for obtaining or renewing CDL hazmat endorsements, the driver pool is shrinking, and rates for hazmats are expected to surge. Carriers propose restricting the hazmat list for which the endorsement is required to shipments that require special hazmat permitting from USDOT. The current hazmat list includes items such as nail polish, soft drink syrup and paint, which do not appear to pose high threats to security. Another proposal is to substitute the more limited United Nations list, as the baseline for requiring the hazmat endorsement. While USDOT and TSA officials say they are open to some change in the base list, everyone seems to be looking to Congress to take the lead.

Mandatory Entry-Level Driver Training, Another Judicial Slap at FMCSA

The D.C. Circuit did not mince words in rejecting the FMCSA's CMV driver training rules:

In short, the record in this case shows that the agency entirely failed to consider important aspects of the CMV training problems before it; it largely ignored the evidence in the Adequacy Report and abandoned the recommendations of the Model Curriculum without reasonable explanation; and it adopted a final rule whose terms have almost nothing to do with an "adequate" CMV training program. FMCSA simply disregarded volumes of evidence that extensive, on-street training enhances CMV safety.

Advocates for Highway and Auto Safety v. FMCSA (D.C. Cir., December 2, 2005, No. 04-1233, Slip. Op. p. 18). The crux of the conclusion is the absence of behind-the-wheel training requirements in the FMCSA rules. The Court, however, left the challenged rules in place, pending FMCSA's coming up with new rules consistent with the standards outlined in the Court's opinion. The "Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators" are codified at 49 CFR Part 380 and were published in the Federal Register of May 21, 2004 at p. 29,384 *et seq.*

A FMCSA spokesperson suggested that the agency will consider how the ruling can be combined with safety improvement programs that FMCSA will be undertaking as a result of SAFETEA-LU.

Hours-of-Service, Uncertainty and Litigation

As FMCSA rules on petitions for reconsideration of the new, new HOS rules that became effective October 1, 2005, the discontented on various sides of the issues will move on to court.

From the operator's side, the sleeper berth change is the main bone of contention. The original new HOS rule permitted splitting sleeper berth time as long as one of the two segments is at least two hours. The new, new rule requires off-duty time in the sleeper berth may be divided into two periods with one period being at least eight hours.

OOIDA's petition for reconsideration, recently denied, sought two changes in the new, new sleeper berth rule: exempt team drivers from the sleeper berth minimums; allow solo drivers to exclude the 2-hour sleeper berth rest period from the 14-hour on-duty limit. OOIDA asserted the changes would help alleviate the pressure on drivers not to stop for breaks during the 14 consecutive hours on-duty period. In denying the petition, FMCSA's cited OOIDA's failure to provide information, data, studies or research addressing the safety implications of the proposed change.

FMCSA has also rejected reconsideration petitions from Honeywell and Isochem of Lockport, NY. Both companies asserted that the new sleeper berth rule disrupts specialized team driver operations which

are used to assure a high level of safety and security for significantly dangerous hazmat operations. Honeywell estimated a 40% reduction in driver productivity on short hauls and cited problems recruiting skilled drivers, in a time of a severe overall driver shortage. FMCSA took the view that the petitions were about costs and that the new rule strikes an "appropriate balance between safety and motor carrier productivity and flexibility."

Several petitions remain pending, including those of so-called safety advocacy groups who were successful in overturning the previous, new HOS rules. Joan Claybrook of Public Citizen described their goal to be a driving time limit to eight hours, on a circadian rhythm 24-hour cycle with no 34-hour restart and mandatory electronic on-board recorders.

The mantra of these groups is: "No load of freight is worth a human life."

While one can certainly agree with that sentiment as to any given load of freight, all of our lives are critically dependent on maintaining effective, multimodal systems for moving freight, none of which is free from risks of accidents, injuries and fatalities.

1/27/06

Future WMC Transportation Committee Meetings for 2006	
March 16	Location to be determined, Milwaukee, WI
May 18	WMC Headquarters, Madison, WI
July 20	Wisconsin Paper Group, Neenah, WI
September 21	Port of Milwaukee, Milwaukee, WI
November 16	WMC Headquarters, Madison, WI