JURISDICTION OVER MOTOR CARRIERS, BROKERS AND FORWARDERS: *BOC-3 Consent vs. Presence*

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Miles Kavaller

Several years ago, while attending an industry function, a colleague and I were causally discussing jurisdiction in federal court litigation. My respected colleague informed me that the filing of a BOC-3[1] with the Interstate Commerce Commission, many of whose functions were transferred to the Federal Motor Carrier Safety Administration with the passage of the Interstate Commerce Commission Termination Act in 1995,[2] was sufficient to allow a federal district court in any of the forty-eight contiguous states to exercise personal jurisdiction over a motor carrier, forwarder and broker. Not so, I replied. The BOC-3 merely allowed for service on the designated agent but only in a jurisdiction where the motor carrier, forwarder or broker had sufficient contacts under the traditional *International Shoe* criteria.[3] I had not had the opportunity to assert this position in any case until recently when fellow member Scott McMahon, representing a Boca Raton, Florida broker, sued my client, a Tracy, California-based motor carrier, in Palm Beach, Florida. The case was ultimately settled, and the jurisdiction issue was not plead, argued or decided, but we had an animated conversation. Scott contended that the filing of the BOC-3 covering all states conferred jurisdiction over my motor carrier client, absent the usual criteria for doing business in Florida and the Circuit Court in Palm Beach. He cited *Ocepek v. Corporate Transport Inc.*[4] At the time, mid 2017, *International Shoe* jurisprudence notwithstanding, my research disclosed no appellate authority to the contrary specifically addressing the BOC-3 operating as consent to jurisdiction. At a recent meeting of another professional organization we discussed *Western Logistics v. Oscar Villenueva d/b/a Las Marias Pallets,*[5] decided on October 24, 2017 ("*Western Logistics*"). Following 6th Circuit law, *Western Logistics* concluded that the BOC-3 alone was not sufficient to confer personal jurisdiction. Contrary district court decisions were addressed and rejected. But Tennessee is in the Sixth Circuit, and there is no decision directly on point from that Circuit. And there are no other decisions citing *Western Logistics*. Accordingly, outside the Eighth Circuit, although probably not the Sixth Circuit as well, district courts are free to choose whether to accept jurisdiction by consent or require that the party asserting jurisdiction address the traditional *International Shoe* factors. This article will offer reasons for following either line of cases. Scott will take the position reached in *Ocepek* and I will argue in favor of the *Western Logistics* decision. The *Western Logistics* court followed Sixth Circuit precedent. It considered *Bendix Autolite Corp. v. Midwesco Enterprises*,[6] where the Supreme Court suggested *in dictum*, that pursuant to Ohio statute, "to be present in Ohio, a foreign corporation must appoint an agent for service of process, which operates as consent to the general jurisdiction of the Ohio courts."[7] The Court did not conduct any analysis of the state statute, however, and was not called upon to judge its constitutionality. The Sixth Circuit therefore concluded that *Bendix's* suggestion that the mere designation of an agent for service of process constitutes consent to jurisdiction was dictum. The court also picked up on Bendix's comment that "[r]equiring a foreign corporation to appoint an agent for service in all cases and to defend itself with reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction, is a significant burden."[8] The Sixth Circuit read that portion of *Bendix* to be "saying that the mere designation of an agent in compliance with the service-of-process statute does not automatically eliminate the requirement of minimum contacts to establish personal jurisdiction."[9] The *Western Logistics* court concluded, based in part on that reading, that the *Pittock* court held unequivocally that the mere designation of an agent for

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service of process in a particular state, in compliance with a state statute, standing alone, does not constitute consent to general jurisdiction within that state. Because the plaintiffs did not show that defendant Otis had any contacts with the state of Ohio and instead based personal jurisdiction solely on consent, the court affirmed the dismissal of the case based on lack of personal jurisdiction. The Sixth Circuit's opinion in *Pittock* is binding precedent within the Sixth Circuit on the precise issue presented. U.S. Supreme Court authority in *Daimler AG v. Bauman*,[10] would appear to support the *Western Logistics* logic.[11] "Accordingly, the inquiry under *Goodyear*[12] is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State.'"[13] From a broker, carrier, forwarder perspective, defending in a jurisdiction where it has no ties or where nothing relating to the case occurred is unfair. It is an undue burden to subject a party to the choice of defending a suit in order to avoid a default judgment and the sister-state enforcement of that default judgment in a federal district court or state court which does have jurisdiction based on the traditional *International Shoe* factors.

Scott McMahon

Does a motor carrier consent to personal jurisdiction in every state where it operates by appointing a "designated agent for service of process" under the Motor Carrier Act, 49 U.S.C. Section 13304(a)? Particularly where the carrier does not otherwise meet the "minimum contacts" standards for establishing personal jurisdiction within that state? Yes and No. These opposing answers arise from a patch-work of conflicting Federal case law,[14] with divergence between several Circuit and District Courts. I present the position that registered agent designation alone affords "consent" to personal jurisdiction. For my motor carrier colleagues, please do not mistake this or what follows as a "legal advocation" of that position. Rather, I see this article as a "spirited academic debate" with a fellow transportation attorney. That is my prefatory disclaimer.

Before moving forward, I confess that my initial reaction is to agree with my good friend Miles. Perhaps it is unfair that interstate carriers are deemed to have consented to personal jurisdiction in every state where registered, and simply because they may pass through (i.e. "operate within or traverse") that state for commercial convenience. Particularly carriers filing BOC-3 blanket designations to operate in the forty-eight contiguous states. Interstate carriage nearly always requires cross border transport, however brief, and often without the carrier "doing any business" therein. However, I am not the arbiter of what the Courts (or Congress) deem fair, and thus objectively address the precedent inapposite to that offered by Miles. Depending on your case and jurisdiction, one may choose that which serves your client's best interest, at least until this issue is finally adjudicated by the United States Supreme Court.

The Registration Requirements of the Federal Motor Carrier Act ("MCA") and Accompanying Federal Regulations

Title 49 U.S.C. Section 13304(a), and its precursor iterations, dictate that motor carriers (and brokers) providing transportation under Chapter 135 "…shall designate an agent in each State in which it operates…on whom process issued by a court with subject matter jurisdiction may be served in an action brought against that carrier or broker…". Likewise, Chapter 49 C.F.R Section 366.4 further provides: "Every motor carrier (of property or passengers) shall make a designation for each State in which it is authorized to operate *and for each State traversed during such operations*. Every motor carrier (including private carriers) operating in the United States in the course of transportation between points in a foreign country shall file a designation for each State traversed.[15] There is no mention of "consent to jurisdiction", the absence of which is conspicuous. So the question is, did Congress intend that interstate carriers would (or must) consent to personal jurisdiction in all states where authorized to operate and/or within which they "traverse" during said operations? On this there is a split of opinion.

Case Law Addressing Carrier Consent to Personal Jurisdiction

The Eighth Circuit leads the way in holding that designation of an agent for service of process under then Section 10330(b) of the MCA[16] is, standing alone, sufficient to exercise personal jurisdictional over the carrier.[17] The *Ocepek* decision arose from an Ohio motor vehicle accident where the plaintiff was a Missouri resident and the carrier incorporated and had its principal place of business in New York. The plaintiff brought a diversity action in the Missouri Federal District Court, where the claim was initially dismissed for lack of personal jurisdiction, the lower district court aptly noting the accident and carrier's activities had no nexus with Missouri. On appeal, the Eighth Circuit reversed, finding the carrier's "limited registered agent designation" was sufficient alone to confer personal jurisdiction by consent, thus eliminating the need to even address a "minimum contacts/constitutional analysis."[18] The touchstone for *Ocepek*, and subsequent concurring authorities, was "Congressional plenary power to regulate interstate commerce," combined with an expressed Congressional intent to… "protect the public from safety abuses

causing increased death and property damages…and the protection of shippers in the event of loss of property shipped via interstate commerce." (As codified in Congressional and Senate Commerce Committee Reports.) That said, *Ocepek* held: "Trucks cross many states with increasing frequency… *The obvious purpose of the Federal Statute is to eliminate potential jurisdictional problems and provide injured parties with reasonably easy access to the courts,* keeping in mind the injured party is frequently a resident of some state other than where the accident occurred."[19] The "obvious purpose" found by the *Ocepek* court is perhaps not so obvious, as the Congressional record and Section 10330 were then silent on whether Congress truly intended that registered agent designation equated to jurisdictional acquiescence. Decisions from the Ohio, New York and Illinois District Courts have at least implicitly adopted *Ocepek's* reasoning.[20] As Miles notes, the recent case of *Western Logistics* reaches the opposite conclusion. *Western's Logistic's* logic is predicated on the Sixth Circuit's decision in *Pittock* and a decision from the Federal District Court of New Jersey in *Davis v. Quality Carriers Inc.*[21] *Pittock* in part relied on the Supreme Court's decision in *Bendix, supra.* That reliance may be suspect. The case addressed an Ohio state law forcing foreign corporations to either consent to general jurisdiction (regardless of minimum contacts standards) or lose the protection of the applicable statute of limitations afforded to in-state companies. The Supreme Court concluded this choice represented "an impermissible burden on interstate commerce." Section 13304 of the MCA was not mentioned. Finally, I understand the merits of Miles' position and his supporting case law. Namely, that state designated agent registration should not vitiate the long standing constitutional requirements for establishing minimum contacts required for personal jurisdiction. One can argue that if Congress intended abdication of those principles within Section 10334(a), it should have been less opaque.[22] We are left with diametrically opposed precedents which can only be resolved by Congress and/or our highest court.

Unanswered Questions

A few parting thoughts and takeaways, as the case law leaves unanswered questions: First, the decisions fail to address a defendant's right to transfer venue to a more "convenient forum" under 28 U.S.C. Section 1404 ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.") In other words, even if there is personal jurisdiction, the carrier may still timely move to transfer venue to a more convenient forum. Alternatively, a carrier may rely on the venue requirements in Carmack cases.

Second, negotiated contracts with an enforceable forum selection clause could avoid the jurisdictional analysis. For those of us on the carrier side of the equation, this is yet another reminder of the critical importance of ensuring that a forum selection clause in our shipper/broker/carrier agreements are carefully reviewed and the client advised accordingly.

Third, by extension, if jurisdiction is permissible based upon carrier registered agent designation alone, one can argue property brokers with blanket registrations likewise consent to personal jurisdiction wherever registered, regardless of their minimum contacts with that state. That would seem to be an even further stretch. Fourth, would the jurisdictional analysis change if the case arises from the carrier's actions in tort versus contract, given the expressed Congressional intent under Section 13304(a) to "protect the general public and injured parties." In other words, if public protection and safety are primary concerns, should jurisdiction be analyzed differently in a commercial dispute (i.e. a freight charge or cargo loss claim)? Fifth, the case law touches upon the potential difference between a blanket versus a state specific designation, implying a blanket designation provides a less credible argument for finding personal jurisdiction while encouraging forum shopping. Something to keep in mind.[23] Sixth, because the BOC-3 requirements are in the ICC Termination Act, would the argument follow that jurisdiction by consent should be strictly limited to cases arising under that statute and not cases, regardless of theory, that arise under state law?

Conclusion

We submit that the arguments on both sides of the consent vs. minimum contacts debate are logically sound. We would be interested in your experience in future cases, whatever side is taken.

Endnotes

1 See 49 U.S.C. §13304(a); 49 C.F.R. Part 366.

2 Act, Dec. 29, 1995, P.L. 104-88, §2, 109 Stat. 804.

3 Due process requirements are satisfied when *in personam* jurisdiction is asserted over a nonresident corporate defendant that has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). This seminal decision established the concept of "specific jurisdiction" which arises out of the contacts the defendant has in connection with a specific occurrence. General jurisdiction, on the other hand, requires substantially more, the point made clear in *Daimler AG v. Bauman.*

4 950 F.2d 556 (8th Cir. 1991).
5 2017 WL 4785831 (M.D. Tenn. 2017).
6 486 U.S. 888 (1988).
7 *Id.* at 889.
8 *Bendix,* 486 U.S. at 893 (citing *Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 114, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987)).
9 *Pittock v. Otis Elevator Co.,* 8 F.3d 325 at 329 (6th Cir. 1993).
10 571 U.S. 117 (2014).
11 The complaint alleged that during Argentina's 1976–1983 "Dirty War," Daimler's Argentinian subsidiary, Mercedes-Benz Argentina (MB Argentina) collaborated with state security forces to kidnap, detain, torture, and kill certain MB Argentina workers, among them, plaintiffs or persons closely related to plaintiffs. Damages for the alleged human-rights violations were sought from Daimler under the laws of the United States, California, and Argentina. Jurisdiction over the lawsuit was predicated on the California contacts of Mercedes-Benz USA, LLC (MBUSA), a subsidiary of Daimler incorporated in Delaware with its principal place of business in New Jersey. MBUSA distributes Daimler-manufactured vehicles to independent dealerships throughout the United States, including California.
12 *Goodyear Dunlop Tires Operations, S. A. v. Brown,* 564 U. S. 915 (2011).
13 *Id.* at 139.
14 State law decisions are not addressed, nor will I address state versus federal law jurisdictional standards. Under Rule 4 of the Federal Rules of Civil Procedure, the federal district courts follow state long arm statutes where the federal court is located, and whether its application otherwise comports with due process requirements of the 14th Amendment.
15 Under this same regulation, subsection (b), property brokers "shall make a designation for each State in which its offices are located or in which contracts will be written". For purposes of this article and its limitations, the jurisdictional implications upon broker agent registration are not discussed.
16 *Ocepek* addressed the pre-ICCTA registration provisions is Section 10330(b), which are nearly identical to those contained in the current Section 13304(a).
17 See *Ocepek v. Corporate Missouri Transit,* 950 F.2d 556 (8th Cir 1991); *See also Knowlton,* 900 F.2d 1196 (8th Cir. 1990).
18 The *Ocepek* Court furthermore rejected the carrier's argument that its authorized agent (as registered with the State of Missouri) agreed "only to accept service for those actions that arose in Missouri," concluding this self-imposed limitation impermissibly attempted to obviate Congressional intent.
19 See *Ocepek v. Corporate Missouri Transit,* 950 F.2d 556 (8th Cir 1991).
20 See *RR Donnelley and Sons. Jet Messenger et al,* Case No 03-C 7823, 2004 WL 1375402 (N.D. Ill. 2004) (weight of authority correctly holds that Section 13304(a)'s registered agent provision establishes consent to personal jurisdiction); *Rounds v. Rea,* 947 F. Supp. 78 (W.D. N.Y. 1996); *Grubb v. Day to Day Logistics, Inc.,* No. 2:14-CV-01587, 2015 WL 4068742 (S.D. Ohio 2015).
21 Case No 08-6262 (D. N.J. 2009).
22 See *Paz v. Castellini,* Case No. 07-038 (S.D. Tex. 2007)
23 See *Davis v. Quality Carriers et al.,* No. 2:2008cv04533 (D.N.J. 2009).