CARGO CLAIMS

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I. Legal liability of motor carriers.

Liability of a carrier is dependent upon whether it can be classified as a common carrier or a private carrier. All carriers are either common carriers or private carriers. The liability varies greatly depending upon which classification the carrier fits into. The liability of a common carrier is often spoken of as that of an insurer. This is not quite the case--the common carrier's liability is not absolute but is more in the nature of a strict liability. A common carrier is strictly liable for loss or damage to the goods from any cause whatsoever except

1. act of God;
2. act of the public enemy;
3. act of public authority;
4. act of the shipper;
5. the inherent nature or inherent vice of the goods. In order for a common carrier to be excused from liability for loss due to one of these five exceptions, the excepted cause must be the proximate cause of the damage to the goods and, more importantly, the carrier must prove itself free from negligence.

Thus, all that the plaintiff need prove is delivery of the goods to the common carrier in good condition and the failure of the carrier to deliver the goods at destination, or the delivery of the goods in damaged condition. This is sufficient to establish a prima facie case.

The Carmack Amendment, 49 U.S.C. §11707, codifies the common law rule which imposes liability upon a common carrier without proof of negligence. A prima facie case is established against a common carrier by proof of delivery of the subject shipment in good

condition to the carrier and the failure of the carrier to deliver the goods, or their delivery in damaged condition, at destination. Missouri Pac. R.R. v. Elmore & Stahl, 377 U.S. 134, 84 S.Ct. 1142, 12 L.Ed.2d 194 (1964). Proof of this prima facie case creates a conclusive presumption of negligence against the carrier. Hall & Long v. Nashville & C.R.Cos., 80 U.S. (13 Wall.) 367, 372 (1872). The burden then shifts to the carrier to prove that it was not negligent and that the sole cause of the injury was one of the five common law exceptions to carrier liability; namely, Act of God, inherent vice, public enemy, act of public authority, or act or omission of the shipper. Joseph Schlitz Brewing Co. v. Transcon Lines, 757 F.2d 171 (7th Cir. 1985).

A. How does one distinguish between a common carrier and a private carrier?

The concept of a common carrier requires that the carrier holds itself out to the public to provide transportation services to anyone wishing to pay it, rather than to a particular part or parties. The essential characteristics distinguishing common carriers from private or contract carriers is the presence or absence of an offer to serve the public generally.

A private carrier only operates for itself or for a particular shipper or group of shippers. Contract carriers do not offer their services to the public.

It is especially important to remember that the failure of a common carrier to issue a bill of lading does not make it a private carrier and does not change its liability from that of a common carrier.

B. When does the liability of a common carrier begin?

The liability of a common carrier begins when the goods are delivered to it for transportation, i.e., as soon as the delivery is complete and possession has been transferred from the shipper to the carrier. The traditional rule is that there must be an acceptance of the goods by the carrier for transportation and physical transfer of possession of the goods.

The liability of the carrier does not merely begin with the giving of shipping instructions and the signing of a bill of lading if the goods have not been delivered to the carrier for transportation.

Keep in mind that delivery does not necessarily require that the goods be physically placed in the hands of the carrier if the parties have agreed on "constructive delivery". In other words, if the dealings of the parties over a period of time treat the placing of the goods on the carrier's premises as a delivery to the carrier for immediate shipment, this can create common carrier liability.

Another customary situation in which common carrier liability could commence is where the carrier spots its vehicle at the shipper's platform and accepts the shipper's load and count. You can have carrier liability once the vehicle is loaded by the shipper and the carrier is notified that the goods are ready to be transported. The delay in moving the vehicle could be held to be for the convenience of the carrier.

When one who is engaged in business both as a warehouseman and a common carrier accepts instructions from the owner of the goods to ship the goods being stored in the warehouse, this relationship changes. In Rohr v. Logan, 206 Pa. Super. 232 (1965), the court held that where the warehouseman accepted oral instructions to ship the goods at the earliest practical opportunity in the usual course of his business, his status with relation to the goods became that of a common carrier. This case was interesting in that the shipping instructions were given by the customer on August 6 or 7, 1962. On August 8, 1962, a fire occurred in the warehouse and destroyed the goods. Thus, even though the goods had never left the warehouse, the court held that defendant was acting as a common carrier. As a common carrier, defendant attempted to avoid liability by showing that the fire was caused by lightning, (i.e., act of God).

However, even though there was evidence that a lightning strike started the fire, because the warehouse was not properly maintained in terms of fire protection, lightning rods, etc., it was held that the defendant did not meet his burden of showing freedom from negligence as a common carrier in the construction and maintenance of the warehouse.

C. Can the relationship of the claimant and the carrier change from that of shipper-common carrier to that of bailor-bailee?

Yes. The general rule is that the liability of a common carrier for possession of a shipper's goods (1) prior to receipt for purposes of immediate transportation or (2) after completion of transportation and tender of delivery and until delivery to the consignee, is that of a warehouseman or bailee who is liable only if negligent. For instance, if a carrier receives goods from a shipper which are not intended for immediate transportation, such as not in final condition for shipment or awaiting further instructions from the shipper, common carrier liability is not created.

On the other hand, merely because the goods arrive at their destination, the carrier's liability is not changed to that of a warehouseman if anything remains to be done to effectuate delivery. For instance, if a carrier attempts to make a delivery at a time when the consignee's business is closed, this in itself does not constitute a sufficient tender of delivery to make the carrier into a warehouseman.

D. Can a common carrier limit its liability?

The Carmack Amendment specifically provides that a common carrier may not limit or be exempt from liability as imposed by the statute except as permitted by the Carmack Amendment. 49 U.S.C. §11707(c)(1). 49 U.S.C. §10730 authorizes common carriers to limit

their liability for loss or injury to property under released rate provisions prior to January 1, 1996. 49 U.S.C. §10730(c) provided that:

> "A rail carrier. . .may establish rates for transportation of property under which the liability of the carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier, and may provide in such written declaration or agreement for specified amounts to be deducted from any claim against the carrier for loss or damage to the property. . ."

The ICC Termination Act of 1995 terminated the existence of the Interstate Commerce Commission effective January 1, 1996. The Termination Act contains the following provision concerning the limitation of liability of rail carriers at 49 U.S.C. §11706(c) (1995):

> "(3) A rail carrier providing transportation or service subject to the jurisdiction of the [Surface Transportation] Board under this part may establish rates for transportation of property under which - (A) The liability of the rail carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier; or (B) specified amounts are deducted, pursuant to a written agreement between the shipper and the carrier, from any claim against the carrier with respect to the transportation of such property."

Whether or not the carrier is negligent does not increase its liability beyond a legally valid limitation. The courts have held that the Carmack Amendment, 49 U.S.C. §§11707 and 10730, preempts state common law remedies for negligent damage to goods shipped by common carrier. Underwriters at Lloyds v. North American Van Lines, 890 F.2d 1112 (10th Cir. 1989). In that case, citing numerous precedents, the court specifically held that negligence of the common carrier does not avoid the limitation of liability contained in the carrier's tariff and bill of lading under Carmack. Many other courts have held that Carmack preempts state and common law remedies, such as negligence claims. See cases cited in Hughes v. United Van Lines, 829 F.2d 1407, 1412-1415 (7th Cir. 1987).

As indicated, negligence of the carrier does not avoid the limitation of liability pursuant to a tariff, bill of lading or written agreement with the shipper. The only cases which avoid the limitation of liability are those when the carrier actually converts the goods to its own use and gain. Even if the theft of the goods is by the carrier's own employees, the carrier may properly limit its liability. Glickfeld v. Howard Van Lines, 213 F.2d 723 (9th Cir. 1954); Quasar Co. v. Atchison, Topeka & Santa Fe Ry. Co., 632 F. Supp. 1106, 1108 (M.D. Ill. 1986). Even gross negligence or proof that an employee of the carrier actually stole the goods does not render the tariff limitation inapplicable. Tishman & Lipp, Inc. v. Delta Airlines, 274 F. Supp. 471, 480 (S.D.N.Y. 1967), aff'd 413 F.2d 1401 (2d Cir. 1969).

II. What is the liability of a bailee or warehouseman?

The liability of a warehouseman under Pennsylvania law is governed by Section 7204(1) of the Uniform Commercial Code which states:

> "A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonable careful man would exercise under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care."

In other words, if the defendant is acting as a bailee or warehouseman, he is generally only liable for negligence. The fact that a bailee impliedly agrees to return the goods in the same condition in which they were received does not create a bailee's liability as an insurer. If a bailee establishes that he exercised reasonable care and that the damage to the property occurred anyway, he is not liable.

The claimant's prima facie case against a bailee is somewhat similar to that against a carrier. All he first has to show is a bailment, i.e., delivery of the goods to the bailee and the failure of the bailee to return the goods in the same condition. Then the bailee must go forward

with proof explaining how the damage occurred. After the claimant establishes delivery of the goods and the failure to return them in the same condition in which they were delivered, the warehouseman then has to explain how the goods were lost or damaged. It is sufficient merely to show that the goods were destroyed by fire, or were stolen, for example. Then it is up to the claimant to establish negligence of the bailee or warehouseman in order to recover. Again, a bailee, as opposed to a carrier, only has to exercise ordinary care.

III. Exception to common carrier liability of act or omission of shipper (improper packing or loading).

The general rule is that in order to absolve the carrier from liability for loss or damage arising from the act or default of the shipper, that act or default must not be readily apparent. Practically all of the reported cases on this issue concern incidents or concealed damage. The exception is based on the policy that even though improper packing or loading may result from the act of the shipper, the carrier is to be the ultimate judge of whether the packing or loading is properly done. If the improper packing or loading is readily apparent upon delivery to the carrier, the carrier should not accept the goods for transportation until the defect is corrected. In other words, as with the other exceptions to common carrier liability, the common carrier must not only prove that the excepted cause was responsible for the damage, but must also prove that the common carrier was itself free from negligence. When the shipper assumes the responsibility of loading, he becomes liable only for the defects which are latent and concealed and cannot be discerned by ordinary observation by the carrier. If the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper.

With respect to concealed loss and damage claims, the practices of the members of the American Trucking Association require that a claim for hidden loss or damage be made immediately upon discovery of it by the consignee and must be made within 15 days after

delivery. If not made within 15 days, the carrier will not pay the claim unless it can be proven conclusively that the carrier was at fault. The obvious problems with concealed loss and damage claims are that the loss could have occurred either prior to delivery of the goods to the carrier or subsequent to receipt by the consignee of the goods.

Often carriers take the position that a "clean" delivery receipt constitutes definitive proof that the carrier is not liable. However, a carrier's signed delivery receipt which states that the property was received in apparent good order is only prima facie evidence of that fact. This means that the consignee is entitled to present evidence to the contrary.

IV. Claims Settlement Practices

A. Notice Requirements

Claims against carriers subject to the I.C.C. Termination Act of 1995 must be filed in writing with the receiving or delivering carrier or the carrier upon whose line the damage occurred: within 9 months after delivery of the goods or, in case of non-delivery, within 9 months after delivery should have been made. Contrary to popular belief, no specific form of claim notice is required, as long as it is in writing. A minimum requirement would only include three items:

1. Enough information to identify the shipment;
2. A statement that the carrier is alleged to be liable for the damage; and
3. A claim for payment of either a specific or determinable amount of money.

B. What documents do you want to process a claim?

1. The original bill of lading--this is necessary to establish that the goods were delivered to the carrier as a common carrier, the nature and description of the goods and,

often most significantly, whether the cargo was subject to any released valuation which would limit the amount of carrier liability.

2. The original paid freight bill.

3. The delivery receipt of the carrier--this will indicate whether notation was made of the loss or damage at the time the goods were delivered.

4. Any acknowledgement from the carrier of the loss or damage, if it exists.

5. The original invoice or a certified copy of the invoice to support the amount of the claim. This will often contain a discount which the carrier may be able to take advantage of.

C. Measure of Damages.

Generally, after a loss has occurred, the law is concerned strictly with the restoration of the claimant to the same position he would have occupied had there been no loss or damage. This means that the claimant is entitled only to his actual loss, not special damages occasioned by factors which may be unknown to the carrier at the time of shipment.

While shippers are often entitled to the market value at destination when that figure represents the claimant's full actual loss, each case must be determined on its own merits. In some instances, after considering all of the circumstances surrounding the purchase, sale and transportation of the goods, a claimant may be entitled to less than the destination value. In many cases, as for example a shipment from a manufacturer to his own warehouse for storage pending distribution and sale, no sale has actually been made to establish a loss of earned profit. If the profit is not actually earned by the claimant, no recovery for it is allowed.

On the other hand, the law contemplates restoring the claimant to the same position he would have been in had there been no loss or damage. If this involves allowing the

claimant to recover profit which he has earned, the claimant is entitled to this recovery since the Carmack Amendment provides he is entitled to his actual loss.

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