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LIMITATION OF LIABILITY; and, the Port and Checks

Limitation of liability:
Still struggling after all these years.

The issue of released rates, where a carrier limits its liability, won't go away. Battles are frequently fought on this issue instead of the issue of liability, since in many cases the limited liability is such that there's no percentage to the carrier to fight the liability fight.

Part of the problem is the manner in which Congress has left the issue on the books. After the first deregulation act in 1980, a carrier could limit its liability by offering a reasonable choice of rates. Then along came the Trucking Industry Regulatory Reform Act of 1994, which eliminated the filing of tariffs. The problem for the carriers is that the doctrine of constructive notice that was imputed to the shippers, by virtue of the filed tariff in faraway Washington, D.C., was also eliminated, and thus the carriers could not limit their liability, or so the theory.

This was not what the carriers had in mind, so they went to work when The ICC Termination Act of 1995 (ICCTA) was on the drawing board. One provision of that new statute provides that the shipper and carrier can enter into a written agreement regarding limits of liability. So far so good, no argument there.

Then, immediately following that easy-to-understand provision, is another provision that states that a carrier must provide a shipper with its rates, classifications, tariffs, rules and practices when requested by the shipper. There is no language tying it back to the preceding provision.

With that opening, many carriers argue that they can limit their liability simply by including a limitation in their tariffs to that effect. The shippers, on the other hand, say not so fast, you're not reading the first provision. The courts, mainly federal, are split on the issue.

One factor is due to what is called a Conference Report, which often times arise out of "conferences" of members of both the Senate and the House of Representatives. The conferences are held to meld together separate bills from each chamber, since frequently there are inconsistencies or differences in language. In this instance the Conference Report lays out the pre-TIRRA law and then concludes by stating that this new legislation (ICCTA) is intended to return to the situation where shippers were responsible for determining the conditions of transportation imposed by the carriers. This last sentence is arguably incorrect, since there was a statute that required the rates to be reasonable.

Meanwhile, carriers use inadvertence clauses, which provide that where the shipper fails to state a released value on the bill of lading, or the shipper fails to select a liabilty limitation from the options provided by the carrier, then the liability of the carrier is limited to the lowest released value in the carrier's tariff.

Shippers don't like these provisions which they view as a trap for the unwary. On the other hand, carriers claim that these clauses enable them to classify shipments where the shipper has not provided this information on the bill of lading. These problems can be avoided where the parties enter into contracts, or where the shipper provides the information, although in the latter case, some carriers require advance notice from the shipper when the shipper is tendering the cargo at a higher value.

In a pre-ICCTA case in 1994 where I represented the carrier, the Oregon Court of Appeals held that a carrier can limit its liability by providing a reasonable choice of rates. That decision was based upon a 100 year old decision by the U.S. Supreme Court., which in many instances still applies today.

The Port is down, so what; the check machine still works.

The Port of Portland just can't seem to get much traction in its efforts to obtain more container business, which it desperately needs after losing two of the three major ocean carriers last year. The LA and Long Beach ports, which handle approximately 40 % of the Asian trade, are already busting at the seams. The Port of Vancouver (B.C.) is at a standstill due to a strike. A federal judge recently refused to require the dismantling of upriver dams. The river and bar pilots have seen their number grow smaller, which will help the economics of getting to Portland. And deepening the channel, while a rocky experience, is still alive.

Yet the trickle down benefit is not trickling very much to Portland's advantage. But pay raises are still occurring. In the world of private enterprise, if you lose a huge portion of your business, you have a tendency to put a limit on those sort of increases, even if you lay off some people.

That's it for now. Until next time, keep the cargo *rollin'!*

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