# Rollin' On . . .®

**An Electronic and Facsimile Newsletter for the Transportation Industry**

**Volume XIV, Issue 6** **Copyright © 2008** **June 2008**


## CARMACK, COMMON AND CONTRACT CARRIERS; *and live performances, or lack thereof.*

In my next life, I would consider being either a weather man or a federal court judge. As a weather man, I can completely disregard what I said the day before, as if I had not said anything at all. As a federal judge, I would have a lifetime appointment, a permanent job from which I could not be fired, absent some nefarious crime, which would not include erroneous rulings. We can only dream.

I just returned from a settlement conference in Dallas. It's a good thing that Texas is a large state, since it is home to persons with very large egos, like Jerry Jones who you will recall maintains that he, not his coaches, was responsible for bringing the NFL championships to Dallas in the 90s.

My visit to Dallas was prompted by the federal judge who had control of a case in which my client, a motor carrier, found itself a reluctant participant. The judge ordered the parties to hold a face-to-face settlement conference. (Can you imagine that, actually talking to each other before duking it out in court?) It is not advisable to disregard the directives of a federal court judge.

The case involved interesting legal questions. There were four contracted loads, two out of Canada and two state side that were interstate in nature. All four had U.S. destinations. In Canada, the first trailer was loaded, moved a few hundred yards and then sat awaiting further action that did not materialize. Eventually the cargo was off loaded, and the second trailer was never loaded.




**LARRY R. DAVIDSON**
**Attorney at Law**
**1850 Benj. Franklin Plaza**
**One SW Columbia St.**
**Portland, Oregon 97258**
**(503) 229-0199**
**Fax (503) 229-1856**
**E-Mail: larry@rollin-on.com**
**www.rollin-on.com**


The first question was whether federal transportation law applied. The Canadian load did not make it to the U.S., so all on-the-ground contacts were Canadian. Yet the parties had sined a boilerplate contract which stated that federal common law would apply, and not the law that would normally govern contractual movements (like ordering a ham and cheese sandwich, hold the cheese please).

Some of you will recall the distinction between contract and common carriage. Although this distinction was intended by Congress to be eliminated when tariff filing was removed in 1994, the federal government employees either did not get the message or do not care, since the application for motor carrier authority still requires the carrier to choose contract carrier authority or common carrier authority, or both, at $300 for each. So maybe it's a way to pick up some extra cash. They may figure they need the money, and of course, absolutely, they will spend it wisely.

Anyway, the intent of the contract was to hold the carrier to the higher standard of care required by the Carmack Amendment. Yet in many respects, Carmack is carrier-friendly in that it cuts off claims for consequential damages, which the customer was seeking.

If Carmack could apply, whether by agreement of the parties or by operation of law, another question was whether this is really was a Carmack case. After all, there was no physical cargo loss or damage. Instead, the claim, had one been filed (but was not, which raises yet another question), as stated in the lawsuit, was in the nature of a delay claim. Recovery of delay damages can be a problem, since the carrier usually needs to be put on prior notice of the consequences of a delay.

Yet there is still the requirement that the carrier transport the cargo with reasonable dispatch, which raises yet another question of what is reasonable dispatch, a question for another day.

The state side shipments also had interesting twists. After the carrier was contracted to perform the shipments, it turned around and subcontracted with its customer to assist in repositioning its equipment, and doing other action, that were necessary before the cargo could be loaded. So the carrier was acting through its customer. Naturally, problems arose, and unlike the Canadian shipments, not even the first trailer was loaded.

Thus the first issue pertained to the carrier's performance, or lack thereof. That issue required an analysis of the actions preceding the shipment. Those actions were performed, or not performed, by the customer. If you are the customer, you need to prove that you acted appropriately. If you are the carrier, you show that you acted appropriately – because your customer just said that it acted appropriately, and it was acting your behalf. Of course, it wasn't that simple, and necks were twisting 360 degrees while considering the performance issue.

In the end, we settled the case. One factor may have been that, for some reason, the parties may not have wanted to pay their attorneys to disect these legal issues on their nickel. I can't imagine why not.

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

**Short Bio**
Admitted to the state bars of Oregon, Alaska, Florida and Massachusetts. Practicing law for over 30 years and emphasizing transportation law, business law and related litigation.