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CARRIER LIABILITY: LIMITATION THEREOF, Part 2

As we were saying in Part 1 (October 2008 issue), carriers' levels of liability can vary. That is where the battle is frequently fought: The carrier concedes liability and fights the limitation fight.

While some courts, as noted in the last issue, look at whether there is a specific agreement between the shipper and carrier regarding limitation of liability, and other courts look at the so-called sophistication the shipper, other courts instead look at the paperwork. They are, after all, lawyers, and lawyers love paperwork.

The law requires the carrier to provide the shipper with a copy of its rules, etc., which we'll refer to as the tariff. The law does not require the carrier to be proactive, so the carrier doesn't have to be bothered with providing the tariff if the shipper hasn't bothered to ask for it.

Well guess what. The tariff will frequently provide that the carrier's liability is limited, based upon a small valuation, frequently per pound, unless the shipper declares a higher value. To be sure, there is usually a reference on the carrier's bill of lading, stating that the carrier's liability may be limited, and directing, albeit in small print, the shipper to review the carrier's tariff, which is usually available on the carrier's website, which means that the carrier usually doesn't know if the shipper has gone there and done that.

So these courts say, gee whiz, the shipper had every opportunity to become educated, the carrier's freight rate is not compensatory if the carrier is required to pay full value, and therefore the carrier's liability is limited, as provided by the tariff.

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So with Carmack cases, you have those various possible outcomes: (1) full liability unless there is an actual agreement, (2) full liability if the shipper is not sophisticated, and (3) limited liability if there is a reference on the bill of lading and the carrier has rules that provide a choice of rates.

This same standard may apply for federal common law cases, such as where the cargo is moved by motor carrier before it is put on a plane. Carmack is, after all, a codification, or mimicking, of what the common law provided before Congress got around to regulating interstate commerce.

For COGSA case, where the cargo comes off of the ship after an overseas shipment, the carrier's liability is usually limited to $500, and as discussed in prior issues (e.g. November 2004), that limitation may apply for the inland portion of the shipment. That's a subject for some other time.

Which brings us to purely intrastate shipments, and a peculiarity I recently encountered. In a decision a few years ago, the 9th Circuit Court of Appeals, the federal appellate court that covers the western states, ruled that for intrastate shipments, the court will consider the transaction history between the parties. In that case, there were 40 some shipments between the parties. There had been no discussion between the parties about limitation of liability. The carrier had dutifully stated on its bill of lading that a limitation of liability may apply, and had also done its homework by providing a choice of rates in its tariff. The court held that the shipper had had ample opportunity to review those documents, and thus found that the carrier's liability was limited accordingly.

The court noted that had the shipment been an interstate shipment and thus governed by Carmack, the court would not have considered the course of dealing between the parties, and would have found in favor of the shipper. So the difference was solely based upon whether it was an interstate or intrastate shipment, which doesn't make a whole bunch of sense, regardless of which side of the argument you find yourself.

The truly weird thing was that it was an **interstate, not intrastate**, shipment, since the shipment was from where a ship had docked to an inland destination. That is interstate commerce, and thus governed by Carmack, but the lawyers on the case did not argue that to the court. Courts place some reliance on the lawyers to help them get it right.

I recently argued a case, on behalf of a carrier, to the 9th Circuit, involving multiple shipments, and I pointed out to the court that it had already considered the transaction history in a Carmack case, where it did not know that it was a Carmack case. You may think that there would be a little delicacy in making that argument, given that courts may not like being told that they didn't know what they were doing in a prior case. But the three judges on my case weren't involved in the prior case so that was fine.

No word yet from the court. Courts don't like to break new ground.

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