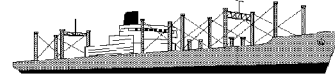




Rollin' On



An Electronic and Facsimile Newsletter for the Transportation Industry

Volume XVI, Issue 1

Copyright © 2011

January 2011

STB AS REGULATOR, WARRANTIES, AND OREGON TAXPAYER INSANITY

As most transportation folks know, in the mid-1990's Congress abolished the Interstate Commerce Commission, which had been in existence since the memory of man runneth naught to the contrary, and replaced it with a brand spanking new entity, the Surface Transportation Board. The abolishment was preceded by the elimination of state economic regulation of motor carrier transportation and of the requirement of for motor common to maintain a filed tariff with the feds.

The STB is in charge of surface transportation, which includes rail and motor carriers. As part of its gig, it can get involved in disputes between rail carriers and their shippers over disputes, such as issues pertaining to demurrage charges for rail shippers.

The nuances of STB adjudication of disputes are significant. To begin with, there will be no hearing. That means that the STB will push paper around until it makes a decision.

Another factor is that the STB regulates railroads. It is a dicey proposition to be involved in a dispute where the regulated is a party to the dispute to be decided by the regulator. Nothing overt or something you can put your hands on, but there are numerous examples of where the regulator's grasp of what was happening with its regulated was not as clear as one would like. We only need to look at the recent financial crisis, still ongoing and which has put many businesses out of business, which was caused in large part by the regulators being asleep at the switch.

If you are a railroad, and there aren't many of you, you want your

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

regulator deciding disputes with your customers. You are a repeat customer, you are usually much bigger than your customer, and you certainly do not want to be bothered with having to testify at a hearing when you can have your attorney do a paper dump on the STB desk and call it good.

If you are the customer, you are usually captive to the railroad in that you have no other carrier choices. And you are not a member of the regulator-regulated club.

Express Warranties:

Ham sandwich without the ham.

When we buy something new, we expect it to function properly. Manufacturers assure us that indeed their products will work, and in support of their sales pitch they will frequently provide express warranties, in writing, in which they vow that they will stand behind their product.

Unfortunately, many manufacturers will simultaneously severely limit the extent of their express warranties, to the point that they become practically meaningless. In doing so they will also attempt to limit their exposure for con-

Watch your step.

Farm equipment dealers will say that they will stand behind all of their equipment, except the manure spreader.

sequential damages. For example, they may offer to replace their defective product that may cost \$100, but not be responsible for the \$1,000 in damages caused by the defective product in the first place.

Manufacturers are still held to some minimal obligations as there are implied warranties that pertain to their

products, such as implied warranties of merchantability and fitness for a particular purpose. They cannot limit their remedy to the extent their product fails of its essential purpose.

But the application of that doctrine may be problematical. Again, if the replacement of the product pales in comparison to the damages caused by the product, the replacement remedy may fall short of furnishing a properly functioning product.

Compare the cost to a manufacturer of replacing a defective fifth wheel, with the cost to the trucker for damages and down time caused by the bad wheel.

Oregon Death Penalty Postsript: *Insanity for taxpayers.*

With the Woodburn creeps now esconced in a heated facility and eating better meals than thousands of Oregonians, the insanity portion of the legal exercise begins, sponsored by Oregon taxpayers.

Only two exexecutions have occurred in Oregon since 1963, and in both instances the convicts waived their appeal rights. We will pay literally millions of dollars for legal fees for guys who know there is a good chance they will never be executed. Many family members of their victims will die before they die. It is widespread knowledge that it would be far cheaper to lock them up, feed them and throw the key away then to go through the appeal charade.

Ironically, Oregon's law is patterned off of Texas law, where 265 executions have occurred since January 2000. It is time to exercise both social and fiscal responsibility and judgment which is owed to both the dead and the not-yet dead.

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

The Obligatory Disclaimer

This newsletter is for informational purposes, does not provide legal advice and does not create an attorney-client relationship

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