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Carmack Amendment:
DOT Slumber & a Tug of War

I sat down awhile ago to review a recent 1998 opinion from a federal court of appeals case regarding Carmack. With TIRRA, FAAAA and the ICC Termination Act having been passed into law over the last few years, I try to keep up on what the courts are doing. There is much disagreement as to the interpretation of the revised version of Carmack, now that filed tariffs are ancient history. One issue is how constructive notice impacts release rates. DOT is still dinking around with its cargo liability study, but that's OK since it is only 15 months late so far.

So I pour a fresh cup of coffee and prepare myself for what I hope will be a clear, well-thought out decision about the new law. After all, it's from the feds so it must be right.

The opinion started in a peculiar manner, as the "facts" portion of the case was all of 10 lines long. Next, there were no dates mentioned. True, dates are sometimes not important, but they are usually included so that if everything else is incomprehensible, at least the reader knows when the incident, etc. occurred. You gotta give the reader something.

In the analysis portion, the court started off by citing old statutes, but finally included a footnote stating that references were to the law as it existed prior to January 1, 1996. So now we finally know that the controversy pertains to a time when the ICC was still around. That's a nice clue, and maybe you stop there if you are not historically inclined at that moment. But I decided to read on.

In this case the shipper, a business, had left the released rate box blank, and the lower court had ruled against the shipper, stating that it could not claim ignorance. However, the appellate court stated that the carrier had the option reversed, and that the carrier had the obligation to bring the levels of liability to the shipper's attention. Since the shipper had not agreed in writing to a lower value and since the carrier had not provided the shipper with a choice of liability levels, the court ruled the shipper was not bound by the lower valuation.

The court further ruled that the shipper must make an "absolute, deliberate and well-informed choice", and the shipper must "agree in the same sense that one agrees or assents to enter into a contractual obligation". The court stated that the shipper's "failure to fill in the blanks cannot be held to be an affirmative act of agreement".

The court also stated in the same footnote referred to earlier that the new legislation "did not substantively affect" the prior version of the statute. This short, simple statement by no means is universally accepted. Carriers have historically been permitted to limit their liability through constructive notice of their filed tariffs. The new law requires carriers to furnish copies of their tariffs only on request of the shipper. This issue will be a problem until the DOT completes its study and Congress takes further action. Until that occurs, there will be conflicting opinions from the courts.

On a related note, in Oregon the appellate court held, courtesy of yours truly, that a shipper was bound by the released rates when he had used the carrier on 26 prior occassions. It was a deregulated, federal common law case (transport by ground prior to air transport), not a Carmack case, but the same idea.

Hitch 'em up, pardner

The NBA playoffs are right around the corner and we have to wonder whether the Blazers will once again say "we can cause some damage" and "no one wants to play us", then go out in the first round for the 6th consecutive year. Meanwhile, management wants to remove some seats since it cannot consistently sell out the joint (putting aside the issue of some player profiles and how that sits with the average fan). Management could donate those nosebleed seats to children who would be tickled pink to see a game since they, and many of their parents, cannot afford the tickets. They could even squeeze a few $$ for some overpriced popcorn, drinks, etc.

However, Portland is still a one horse town. So if you are parentless and live in a glass palace in a distant city, you can be immune from the day-to-day struggles of the ordinary working stiffs and their offspring.

That's all for now. To shippers, carriers, agents and other third parties, keep the cargo rollin'!!

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