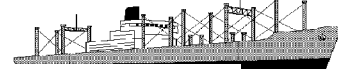




# Rollin' On



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## THE DOW AND THE UP:

A missing letter or missing shipment?

**L**ittle did I know last month, when I discussed the question of federal court jurisdiction for collection of freight charges in TAP's newsletter, that the subject would come up in the near future. I could try to claim that I am clairvoyant, but since that would not be true and since I am an attorney, I would of course never even dream of making such a claim. Anyway, someone must have known that I wanted to follow up on the topic, so they obliged with a lawsuit involving the issue. That was awful considerate of them. Of course, I'd rather be involved in the lawsuit instead of talking about it.

Many of you know that Dow Chemical filed a lawsuit against the UP for damages arising out of the delays and other problems that Dow Chemical has suffered now that the bloom is off the UP/SP marriage. Dow made the decision to file in state court in Texas. As a shipper in a damage claim against a humongous company, you want to be in state court.

The UP, sensing a potential problem (that's the UP, always on its feet), decided to get the case in federal court, or to "remove" it to federal court, using legal jargon. The procedure is simple. All you do is file the "removal" documents in federal court, paying the necessary filing fee, and then file a notice with the state court that the case has been "removed", and that, essentially, the state court's services are no longer necessary, thank you. In other words, no court order or judge's permission is neces-

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sary; the attorney just does it and it's complete. Of course, the removal attorney will want to be sure that the case is removable, meaning that there is federal court jurisdiction. The UP must have made such a determination, as it removed the case to federal court.

Now if you're the shipper and you filed the lawsuit, you don't take kindly to having someone else tell you where the lawsuit is going to be processed. So Dow, and presumably (at least hopefully) its attorneys, get a little distressed about this uninvited development, and the decision is made to try to have the case "remanded" back to state court. Except this time, Dow cannot simply willy nilly move the case back to state court. Instead, Dow is required to file a motion in federal court, the court that was not initially invited to the party, laying out exactly why it is that the case should be in state, not federal, court. I guess that we believe that the federal court must be right, since the judges get paid a lot more than state judges and they have lifetime tenure.

I should mention that Dow's claims were for breach of contract, fraud, negligent misrepresentation and negligence. The UP's removal documents stated that the case belonged in federal court because, first, the shipments were in interstate commerce and, second, the lawsuit was against an interstate common carrier.

The UP filed a response to Dow's motion to remand, and then Dow responded to that response. By court

rule, no further responses are allowed. (Otherwise, the nation would suffer a paper shortage.)

The ball was thus placed in the hands of the federal court, which ruled that the intent of the contract between the parties was not to bring the entire contract within the parameters of the Carmack Amendment, but instead only to refer to the claims processes in Carmack. The court also rejected UP's argument that Carmack controls since, as the UP claimed, there is no

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difference, in this case, between a contract carrier and a common carrier. The court held that the purpose of the federal statute was to allow contracting parties to avoid the entire federal regulatory scheme.

The court then granted Dow's motion to remand the case back to state court, with each party to bear its own costs and attorneys fees. This was fortuitous for UP since the court had the discretion to order UP to pay Dow's attorneys fees, which were probably sizable. The court then took the matter a step further, ordering the parties not to file any motions to reconsider "or the like", so if UP really wants to pay Dow's attorneys fees, all it has to do is to file such a motion.

Now we can watch and see how the shipper and UP do in the first major case involving UP's problems.

That's all for now. To shippers, carriers, agents and other third parties, 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 20 years and emphasizing transportation law, business law and related litigation.