

Primer on Freight Loss and Damage Claims

The starting point for cargo claims in the United States is the Carmack Amendment to the Interstate Commerce Act, which is found at Title 49 of the United States Code, Section 14706. This section is entitled *Liability of Carriers Under Receipts and Bills of Lading*. The liability imposed by that any carrier involved in the movement of goods is for the “actual loss or injury to the property”.

What you will not see in section 14706 is the judicial interpretation of the Carmack Amendment as it has developed during the last century.

The Prima Facie Case Against a Carrier

The general rule is that a receiving or delivering carrier is liable for the actual loss or damage to a shipment upon proof by a claimant of (1) delivery to the carrier in good condition, (2) arrival at destination in damaged condition and (3) the amount of the damages. The carrier's defenses to the claimant's cause of action are very narrow. Basically, the carrier must first prove freedom from negligence, and then, that the loss or damage was caused by one of five specific exceptions:

1. An act of God;
2. An inherent nature or vice of the goods;
3. An act of the shipper;
4. An act of the public enemy; or
5. The authority of law.

Unless the carrier is able to establish first, freedom from negligence, and second, one of these five exceptions to liability, the claimant will win.

Notice that the claimant is **not** required to prove that the carrier is negligent. As long as the claimant is able to prove delivery in good condition, arrival in damaged condition and the amount of damages, the prima facie case has been established and the burden then shifts to the carrier to prove itself free from negligence and to bring itself within one of the five common law exceptions to liability.

The Requirement of a Timely Written Claim

As a condition precedent to the bringing of a lawsuit against a carrier, the claimant is required to file a written claim with the carrier within nine months of the date of the delivery of the property, or if no delivery was made, then within nine months after a reasonable time for delivery has elapsed. The requirement sounds simple enough, but it has given rise to much litigation. First, what is a claim? Second, is the claim filed timely? Third, if no delivery is made, what is a reasonable time for delivery? Failure to timely file a claim is an absolute bar to recovery.³

In order to standardize the requirements for a written claim, or in the words of one court, "so a carrier may know a claim when it sees one," the former Interstate Commerce Commission issued a regulation, now appearing at Title 49, section 370.3(b) of the Code of Federal Regulations. Briefly, this regulation defines a claim as a written communication filed with the proper carrier

within the time limits specified in the bill of lading, containing facts sufficient to identify the shipment of property, an assertion of liability for loss or damage, and making a claim for the payment of a specified or determinable amount of money.

Each of those separate requirements has been the subject of much litigation. Does the claim contain enough information to permit the carrier to identify the shipment? Does the claim assert liability against the carrier for the loss or damage to the property? Does the claim demand payment for a specified or determinable amount of money?

Once a claim is received, assuming it is a proper claim, the carrier has numerous obligations, which must be met according to the timetable set out by the Interstate Commerce Commission in the Code of Federal Regulation. A carrier must acknowledge the claim within thirty days of receipt, unless the carrier pays it or declines it within that first thirty days. The carrier is also required to create a separate file, assign a successive claim file number to that claim, and affix that number on all documents filed in support of that claim. The carrier is required to pay, decline or make a compromise settlement offer within 120 days after the claim is received. If the carrier cannot do so within 120 days, then at that point, and each 60 days thereafter, the claimant must be advised in writing of the claim status and the reason for delay in making final disposition.

The regulations also describe what documents do not constitute a proper claim. Appraisal reports of damage, notations of shortage or damage on freight bills, delivery receipts or other documents, inspection reports issued by carriers or inspection agencies, even if they indicate loss or damage in dollars or otherwise, are not sufficient to comply within the minimum claim filing requirements of the regulations.

Federal Preemption

There are many other aspects to the defense of a freight claim, which you will not find in the statute. Perhaps the most important is the doctrine of federal preemption. By this we mean relying solely on federal law, to the exclusion of state law, to determine a carrier's liability for a freight claim. While this may sound simple, it has serious implications for the carrier. In many instances, claimant's counsel will seek to hold a carrier liable for a whole range of conduct and activities not permitted under federal law.

As an example, Plaintiffs' attorneys often assert claims against carriers for negligent or intentional infliction of emotional distress, negligent or intentional misrepresentation, fraud, bad faith in claims handling, claims based on the bad faith statutes found in insurance codes, violations of deceptive trade and business practices acts, and most importantly, punitive damages.

By using the doctrine of federal preemption, carriers have been successful in limiting their potential exposure to only the types of money damages permitted by Carmack Amendment, namely actual loss or damage to goods. Many cases have held that the federal law governing common carriers preempts the state law claims popular among Plaintiffs' attorneys. Within the last few years, carriers have been successful in having federal courts declare that the Carmack Amendment preempts even state unfair business and deceptive trade practices acts.

In the area of punitive damages, carriers have been fortunate because federal courts have found that the federal regulatory scheme covering cargo claim liability among carriers is so pervasive, that state common law claims for punitive damages are preempted. In a recent decision handed down by the Second Circuit Court of Appeals, the court held that the Carmack Amendment preempts even federal common law claims for punitive damages.

What this line of cases has done for carriers cannot be minimized. It has permitted carriers to operate, for purposes of determining potential liability, in a narrowly defined, well-circumscribed

area where they are not subject to the creative imaginations of Plaintiffs' attorneys. When a complaint is filed seeking damages against a carrier for cargo loss, and the matter in controversy exceeds \$10,000.00 per bill of lading, as required by the federal jurisdictional statute, the case should be removed to federal court in order to take full advantage of the favorable case law involving carriers.

Limitations of Liability

A carrier is permitted to limit its liability in exchange for a lower transportation rate, as long as a rate for full liability is still offered. Generally speaking, before a carrier may limit its liability, it must maintain a tariff, obtain the shipper's agreement as to choice of liability, give the shipper a reasonable opportunity to choose between two or more levels of liability, and issue a bill of lading prior to movement of the shipment.

Bills of Lading

The Carmack Amendment to the Interstate Commerce Act works in conjunction with the bill of lading, the basic transportation document used by carriers in this country today. The bill of lading is nothing more than a contract between the shipper and the carrier, and courts have held that its terms are also binding on the consignee. The bill of lading does not function as a proof of delivery, because it is considered to be only a movement document. The shipper prepares the bill of lading, and receives a copy once the carrier accepts the goods. The bill of lading must show the names of the consignor and consignee, the origin and destination points, the number of packages, a description of the freight, the weight, and the volume/measurement of the freight.

Applicable Law

The Carmack Amendment is the predominant source of law in the United States governing a carrier's liability for cargo loss or damage occurring during transit. By its terms, the Carmack Amendment applies to transportation in interstate commerce, and from the United States to a place in an adjacent foreign country when the property is transported on a through bill of lading. A through bill of lading is one, which covers the property from origin to final destination. The Carmack Amendment will not apply to transport under a foreign through bill of lading.

The federal Bills of Lading Act, also known as the Pomerene Act, is an important federal statute designed to harmonize the interpretation of bills of lading issued by common carriers. The reach of the Pomerene Act is similar to the Carmack Amendment, in that it will only apply to bills of lading issued in the United States, whether the goods move solely within the United States, or from the United States to an adjacent foreign country. The Pomerene Act will not apply to bills of lading issued in a foreign country.

Conclusion

The law governing carrier liability for cargo loss and damage may be summed up as follows: no matter how things change, they always stay the same. Although Congress has altered the statutory landscape, federal courts have nearly a century of case law to draw upon, and these rules will be used well into the foreseeable future.