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Agency Problems in Motor Carrier Cases

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SOME SPECIAL CONSIDERATIONS apply to the problems of agency in cases involving motor carriers. The questions here presented are viewed in the light of the operating practices which obtain in the industry.

Relatively few tractor-trailer or truck-trailer outfits are owned by the certified carrier. The equipment is usually owned by an individual, who may drive it himself as an owner-driver; or may hire his own driver and lease the equipment and driver together to the carrier. The lease may be for a single movement only, covering one trip from a stated origin to a stated terminal; or may be for a longer term. The long term leases are usually for one year, subject to cancellation on written notice by either party.

There seems to be no standard form of either single trip or long term lease. Some carriers reserve exclusive possession and control over the equipment and the driver; and some expressly disclaim right of control, designating the owner as an independent contractor and the driver as the servant of the owner alone. Although the form of lease may control the rights and liabilities as between the owner, operator, and the certificated carrier, it does not control rights and liabilities as between the carrier and such third persons as shippers, consignees, and travelers upon the highway.

Generally speaking, the carrier has the liability of a master for all conduct of the driver, as though he were a servant, if the conduct occurs in the course of the transportation service of the carrier. There are two different approaches which reach this same end. One concept is that there is a valid independent contract between the carrier and the owner-driver, but the carrier is nevertheless liable for the conduct of its hired contractor on the ground that it cannot delegate its duties nor its responsibility in an activity which it can carry on only by virtue of a franchise granted to it, and to it alone, by the public at large.

This concept is well expressed in the *Restatement, Law of Torts,* Sec. 428:

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> "An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do the work carrying on this activity."

It is sometimes said that the relation between carrier and owner-driver is, as a matter of law, deemed to be that of principal and agent, or master and servant, so that the liability of the carrier would follow traditional *respondeat superior* doctrines. The Ohio Supreme Court recently announced this as its view in *Thornberry v. Oyler Brothers, Inc.*,[1] but the statement of the rule must be qualified. It is limited to situations involving the rights of third persons against the carrier. Ohio clearly recognized that the carrier could create an independent contractor relationship with the owner-driver in *Commercial Motor Freight, Inc. v. Ebright*,[2] where it was held that the driver was not a servant under the lease involved therein for Workmen's Compensation purposes, even though he would be deemed a servant so far as the general public was concerned.

The difference in the rights accorded the various parties involved depends on their status, as is clearly illustrated in *War Emergency Co-op Assn. v. Widenhouse*.[3] There the lessor's driver, delivering a cargo of gasoline to a filling station, negligently caused the gasoline to explode, damaging the filling station and the truck, and injuring two persons. It was held that the carrier was liable for the injuries to the public, even though the driver was an independent contractor.

The owner of the equipment contended that he could recover for his property damage, on the ground that the driver was to be deemed a servant of the carrier as a matter of law. Held, not so. As between the owner-lessor and the carrier, the independent contract was recognized, and the driver held to be an employee of the owner-lessor for whose negligence the owner himself, and not the carrier, was liable.

In cases where the carrier is operating under certificate granted by the Interstate Commerce Commission, the rules of the Commission govern. In 1936, the Bureau of Motor Carriers,

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1 Thornberry v. Oyler Brothers, 164 Ohio St. 395, 131 N. E. 2d 383 (1955).

2 Commercial Motor Freight, Inc. v. Ebright, 143 Ohio St. 127, 54 N. E. 2d 297 (1944).

3 War Emergency Co-Op Assn. v. Widenhouse, 169 F. 2d 403 (C. C. A. 4, No. Car., 1948).

an agency of the Commission, announced its Administrative Rule No. 4, as follows:

> "Question: Under what circumstances may a carrier add to its equipment by leasing a vehicle and obtaining services of an owner driver?
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> "Answer: The lease or other arrangement by which the equipment of an authorized operator is augmented must be of such a character that the possession and control of the vehicle is, for the period of the lease, entirely vested in the authorized operator in such a way as to be good against the world, including the lessor; that the operation thereof must be conducted under the supervision and control of such carrier; that the vehicle must be operated by persons who are employees of the authorized operator, that is to say, who stand in the relation of servant to him as master."

The ruling as thus promulgated in 1936 was tentative and provisional, pending decision upon the subject by the Interstate Commerce Commission. It was modified by the Commission on August 9, 1939, in the *Dixie Ohio Express* case,[4] wherein the ruling was rephrased as follows (at 17 M. C. C. 752):

> "The lease or other arrangement under which the carrier utilizes in its operations a vehicle which it does not own, whether or not including the services of an owner-driver or his representative, must be of such a character that the carrier will have the right to direct and control the operation of the vehicle at all times and be fully responsible therefor in all respects under all applicable provisions of law governing the duties and obligations of the carrier to the shipper and to the public generally."

In explanation of the rephrased rule the Commission said (p. 752):

> "It is clear that a motor carrier cannot, by utilizing in its operations a vehicle which it does not own and the services of the owner, divest itself of any of its duties under the Motor Carrier Act or in any way defeat our powers of regulation thereunder. For the future, so far as the rates charged and the service furnished are concerned, *and also security for the protection of the public* . . . or any other duty imposed by or under the act, *the carrier must be* fully responsible for the operation of the vehicle."

It follows that so far as the public is concerned, any attempt by the carrier to divest itself of the right of control, and any attempt by the carrier to shift responsibility to the owner-

[4] Application of Dixie Ohio Express, 17 Motor Carrier Cases 735 (1939).

driver-lessor, is contrary to public policy, contrary to the Motor Carrier Act, and void. On any transportation project of the certificate holder, the certified carrier is liable to the general public irrespective of the details of the lease contract with the owner or driver.[5]

Some difficulty arises in determining what movements of the leased equipment are within the scope of the general transportation project of the carrier. It is sometimes contended that empty movements from the delivery point back to the home terminal are the responsibility of the owner-operator, not the carrier.

The leading case on this point is *United Truck Lines, Inc.*, Transfer of Empty Equipment, Application No. MC 7746.[6] United Truck Lines had a franchise between Portland and Spokane, and between Seattle and Spokane. It had no franchise between Portland and Seattle. The three cities are situated at three points of a triangle. Occasionally it would pile up too many of its trucks at Seattle (or Portland) and would want to move them only 200 miles to Portland (or Seattle) over the short leg of the triangle. If it had to move them around the two long legs of the triangle, from Portland to Spokane to Seattle, or from Seattle through Spokane to Portland, the trip would take 700 miles.

The Commission held that even empty or deadheading, the trucks had to be moved over the 700 mile certificated route rather than over the 200 mile direct route; but the Commission, on application, extended United's franchise to certificate the truck movements, *empty only,* from Seattle to Portland and from Portland to Seattle.

To like effect is *Application of Wasie,* Common Carrier Application No. MC 76,266.[7] The applicant operated empty trucks between two points in a single state to the interstate loading terminal, the trucks ultimately to be used in interstate shipments. The Commission held:

> "The empty movement of these vehicles clearly falls within this definition of the *services and transportation subject to the Act,* and consequently authority from us therefor is necessary." (Sec. 203(a)(19).)

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[5] Venuto v. Robinson, 118 F. 2d 679 (C. C. A. 3, N. J., 1941).

[6] United Truck Lines, Inc., 3 Federal Carrier Cases 188, Paragraph 30,218.

[7] Application of Wasie, 1 Federal Carrier Cases 187, Paragraph No. 7201.

The same rule was announced in *Motor Rail Co.*, Common Carrier Application No. MC 87,035,[8] where the Commission held:

> "Empty equipment movements in connection with, or incidental to, transportation of property in interstate or foreign commerce, requires appropriate authority from this commission."

The rule was reaffirmed in *Consolidated Freight Lines, Inc.*,[9] Common Carrier Application, wherein the Commission held:

> "The movement of empty equipment as an incident to the transportation of goods in interstate or foreign commerce *is a transportation service subject to the act and to our requirements for operating authority,* even though the empty movements are wholly within one state."

In determining liability for empty movements, both the type of lease and the type of operation becomes important. If the owner-operator enters into a single trip lease which by its terms terminates upon delivery of the cargo to the consignee or at the foreign terminal, and the owner-operator is then free to go to any other carrier and negotiate for a succeeding trip lease, the empty movement in search of another lease is not within the transportation service of the original carrier-lessee.[10]

It may be, however, that a course of conduct has developed in which the owner-lessor uniformly trip-leases for a particular run from one city to another, and uniformly returns empty to the original carrier's terminal to trip-lease again for the same journey. Where this uniform pattern obtains, the Court may look behind the trip-lease form to hold that the arrangement amounts to permanent lease, so that the empty return trip to the terminal is contemplated by the parties as a necessary incident to the outgoing loaded movement. In such situation, the carrier is liable for the operation of the equipment on the empty return movement, even though the loaded movement goes out under the trip-lease form.[11]

A further complication sometimes arises. If the carrier's operations are not balanced between different terminals, the driver may find no return load waiting for him. This is particularly true in steel hauling, where it would be unusual to have as much steel come in to a mill town as is shipped out.

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8 Motor Rail Co., 4 Federal Carrier Cases 36, Paragraph 30,048.

9 Consolidated Freight Lines, Inc., 11 Motor Carrier Cases, 131 at 133.

10 Costello v. Smith, 179 F. 2d 715 (C. A. 2, Conn., 1949).

11 Hodges v. Johnson, 52 F. Supp. 488 (D. C., W. Va., 1943).

Since the drivers are paid a percentage of the revenue, the empty return movement is uncompensated. The owner-operator cannot economically run half of his mileage empty and unpaid. It has become common practice for the owner-operator to enter into long term lease with the carrier at a particular home terminal, run loaded from that point to one of the various delivery terminals, and then trip-lease with any other carrier with available load going in the general direction of the home terminal. On the trip-lease run, the permanent decals and licenses of the long term lessee are covered over with the temporary placards of the single trip lessee. Upon delivery, the temporary placards are removed and the outfit, again emblazoned with the decals of the long term lessee, heads back to the home terminal.

If collision occurs while on the loaded trip-lease movement, the liability for the driver's conduct clearly rests with the trip-lessee carrier. But if collision occurs on the empty run while the operator is deadheading back to the home terminal of the long term lessee, where does liability rest?

The long term lessee will claim that the trip-lease was a complete departure or deviation from its business, and will seek to disclaim liability for the driver while on "a frolic of his own," until he has actually reached the home terminal.

It should be observed that in these cases the trip-lease movement is not unauthorized and not in defiance of the long term lessee's orders. The owner-operator trip-leases because he must do it for economic survival, and it is not difficult to establish from the carrier's records and the testimony of the drivers and dispatchers that either the carrier has given express approval to the practice, or has full knowledge of the practice and has acquiesced in it.

The public policy question is strong. The certificated carrier is enfranchised to make the loaded haul under the restriction of many safeguards designed to protect the public, including, among other things, minimum financial responsibility provisions. It is contemplated that empty return movements will be an essential part of the transportation project, and will be made with the same protection to the public.

If the operator makes a direct empty return, the carrier is responsible. If he makes his return partly under trip-lease and partly empty, should not the empty return to home terminal still be made with the same restrictions to safeguard the public? The empty phase of the final return movement may be from a

different direction, to be sure, but is likely to be of shorter duration. Policy considerations would seem to indicate that liability for the operator should attach as soon as the trip-lease terminates.

Logic would lead to the same conclusion. The operator is under the overriding control of the long term lease. He deviates from the mission of the long term lessee, but with his acquiescence. As soon as the deviation ends, he is again subject to the overriding control of the long term lessee, which had been suspended by the trip-lease.

The leading case on this point is *Marriott, et al. v. National Mutual Casualty Co., et al.*[12] There the owner-operator delivered his load for his long term lessee, found no return load available, drove to another city where he trip-leased to another carrier, completed that trip, and then started back empty to the original terminal. While on this empty return movement, collision occurred. Held, the empty return trip after completion of the trip-lease was a necessary incident to the transportation service of the long term lessee, and that the carrier was liable.

It must not be assumed that the long term carrier will always be liable. The principle herein discussed only serves to make the driver the servant of the long term leasing carrier except during the actual course of the trip-lease deviation.

The driver, as a servant, may nevertheless depart completely from the course and scope of his employment to go on a purely personal frolic of his own, and create new problems as to when he re-enters the course and scope of his employment. *Simon v. McCullough Transfer Co.*[13]

Even though the servant were on a mission of his own, the carrier might be liable if he were an incompetent driver. *Williamson v. Eclipse Motor Lines.*[14] If the driver should have been known to the carrier as incompetent, then liability follows his conduct even if he departs from course and scope, since the actionable negligence consists of the act of entrustment which necessarily occurs during the course and scope of the employment. In this respect the Interstate Commerce Commission regulations prescribing minimum age and minimum standards

[12] Marriott v. National Mutual Casualty Co., 195 F. 2d 462 (C. A. 10, Kans., 1952).

[13] Simon v. McCullough Transfer Co., 155 Ohio St. 104, 98 N. E. 2d 19 (1951).

[14] Williamson v. Eclipse Motor Lines, 145 Ohio St. 467, 62 N. E. 2d 339 (1945).

of both skill and experience with the particular type of equipment involved should be remembered.

A further refinement of the agency doctrine exists in Ohio. It may be that the mission of the driver is not such as to be part of the transportation business of the carrier. Suppose that the owner-operator has leased his outfit under the usual provision that the owner must provide all maintenance. At a time during the term of the lease, after completing a trip, the driver returns his outfit to his home and decides that his tractor should be repaired before going out on another trip. He drives the tractor to a repair shop in another city. Later, after repair, he is driving it to his home, where it would in normal course be coupled to the trailer for subsequent report to the terminal and loading. If collision occurs while he is driving it from the repair shop to his home, is the carrier liable?

The answer is not settled by the Federal Cases for carriers operating under I. C. C. permits. The repair of the vehicle might well be deemed a necessary incident to the transportation business of the carrier, so that even this type of empty movement would be deemed to be under the permits with the driver a servant of the carrier. In Ohio, under P. U. C. O. permits, the driver would not be a servant of the carrier, but would nevertheless be covered by the insurance policies filed by the carrier with the Commission. The Commission requires that the liability policies of insurance filed with it, to comply with the minimum financial responsibility standards, must contain a form of endorsement which insures not only the carrier, but also the lessor-owner and the driver of leased equipment while operating the vehicle in motor transportation service. The courts give this endorsement a liberal construction in order to safeguard the public, and hold that the test of coverage is not whether the conduct is in the course and scope of employment, but whether it may be deemed reasonably incidental to the practical necessities of running a motor carrier service.[15] Driving the tractor from a repair shop to the owner's home was held to be incidental to the transportation service.[16]

In such case it is of course necessary that the plaintiff bring his action directly against the driver, rather than against the carrier. The effect of the policy endorsement is not to extend

[15] Mitchell v. Great Eastern Stages, Inc., 140 Ohio St. 137, 42 N. E. 2d 771 (1942).

[16] Woods v. Vona, 147 Ohio St. 91, 68 N. E. 2d 80 (1946).

the liability of the carrier, but rather to extend the coverage of the insurance to the driver.

The above considerations would emphasize the wisdom, in all carrier cases where the slightest doubt exists on agency questions, of making early and exhaustive investigation of all the circumstances, so that proper action against the proper defendant may be instituted before the bar of the Statute of Limitations falls.