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THE LAW governing the liability of a carrier for loss or damage to interstate shipments is set out in the Carmack Amendment.[1] Prior to the enactment of this federal legislation, a body of law pertaining to this subject developed in the common law. The present law evolved from the earliest concepts of bailment relationship.[2] The early statutes preserved many aspects of the common law. This article will refer to common law principles but will not focus on law as it was prior to the Carmack Amendment. This subject has been dealt with at length elsewhere.[3]

The need for federal legislation in the area of interstate commerce should be apparent. Varying rules of many states would indeed confuse the liability of the potentially numerous carriers involved in the movement of a single carload of freight.

The problem of freight damage is a serious one. The vast amount of tonnage which moves each year is staggering. Though many technical advances have been made with respect to reducing damage in transit, the human element still remains a source of accidents. In 1960, for example, in a report by 107 rail carriers alone, representing 93.5% of United States, Canadian and Mexican mileage, approximately $120 million were paid in claims. In that year the number of new claims totaled 2,872,860. In 1964 the amount paid in claims climbed to $140 million.[4]

In view of the large number of claims processed by carriers in all modes of transportation, it is imperative that the carriers be afforded a clear law which will expedite the settling of these claims. This law further must coincide with the general transportation policy of Congress.

Hence, when viewing the Carmack Amendment one must also look at various other acts relating to carriers to obtain an understanding of the tenor of transportation policy. Not only was Congress interested in setting forth guidelines for liability, they also considered the problems of discrimination; for example, by favoring one shipper over another in

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1 49 U.S.C. § 20 (11) (1964).

2 Holmes, The Common Law 180-205 (1881).

3 Lust, Loss and Damage Claims (2d. ed. 1919) but see, Oleck, Cases on Damages, 60, 63 (1962).

4 Circular No. FCD-1803, Association of American Railroads; 11 The Chronicle 222 (Aug. 1965).

the area of freight claims a carrier could violate other parts of the Interstate Commerce Act.[5]

One practical problem of determining liability arises over the nature of interstate travel. Frequently several carriers are involved in a given shipment. The shipper who sent out the load is usually not in a position to be able to discover which of the involved carriers damaged his lading. The carriers themselves might dispute whether the damage was caused by a preceding or succeeding carrier in the chain of transportation. The Carmack Amendment seeks to solve this problem. This Amendment was enacted as a part of the Hepburn Act of 1906.[6]

Congressman Richardson, who spoke for the committee responsible for the draft of the Carmack Amendment, stated:

> We have made the initial carrier, the carrier that takes and receives the shipment, responsible for the loss of the article in way of damages. We save the shipper from going to California or some distant place to institute his suit. Why? The reasons for inducing us to do that were that the initial carrier has a through route connection with the secondary carrier, on whose route the loss occurred, and settlement between them will be an easy matter, while the shipper would be at heavy expense in the institution of a suit.[7]

The Carmack Amendment was subsequently amended by the Cummins Amendment of March 4, 1915,[8] a law called the "Second Cummins Amendment," [9] and by a number of later amendments that are not necessarily called by name.[10] Thus, in reading court decisions the same law might be called either the Carmack Amendment or the Cummins Amendment.

As a result of these various changes in the law the shipper has obtained a right of action against either the initial carrier or the delivering carrier. How this right is enforced is the subject of this article.

Though this article is concerned with one amendment, it is important to realize that it is merely a part of the Interstate Commerce Act[11] which dates back to 1887 and which has been amended on numerous occasions.[12] Inherent in the rationale behind the Act is its designed pur-

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[5] 49 U.S.C. § 1 (1964); one such provision against discrimination is the Elkins Act, 49 U.S.C. § 6 (7) (1964).

[6] 34 Stat. 595; Miller, The Legislative Evolution of the Interstate Commerce Act 256 (1930 ed.).

[7] 40 Cong. Rec. 9580 (1906).

[8] 38 Stat. 1196; see also Miller, *op. cit. supra* note 6 at 257.

[9] 39 Stat. 441 (1916).

[10] 41 Stat. 494 (1920); 44 Stat. 835 (1920); 44 Stat. 1446, 1448 (1920); 46 Stat. 251 (1930); 49 Stat. 543 (1940); 54 Stat. 916 (1948); 62 Stat. 295 (1949).

[11] 49 U.S.C. (1964).

[12] For a detailed discussion of the various periods of the Interstate Commerce Act see, 1 Knorst, Interstate Commerce Law and Practice 51-200 (1953 ed.).

pose to promote harmonious interstate transportation and thereby aid commerce.[13]

The primary evil which the Act aimed at averting was the practice of discrimination. In 1903 the Elkins Act[14] was enacted to give teeth to the Congressional resolve to prohibit discrimination. Aside from the sweeping purpose of the Elkins Act, various provisions of the Interstate Commerce Act pertain to specific aspects of potential discrimination; for example, a law relating to rates.[15]

Thus, when any case involving freight damage to an interstate shipment is read, the reader must keep in mind that the court is also considering the National Transportation Policy as set forth by Congress. The Supreme Court referred to it as having the aim to thwart ". . . the paramount evil chargeable against the transportation system of the United States . . . ," namely, unjust discrimination.[16]

Prima Facie Case of Plaintiff

The Carmack Amendment did not create any new substantive rights in the shipper.[17] It did, however, confer new remedial rights. Hence, in order to see what is necessary to prove a prima facie case, the common law rule must be reviewed.

Under the common law a carrier is liable as an insurer for loss to those goods which it holds itself out to handle.[18] Inherent in the law at its incipient stage was the principle that a carrier exercised a public employment for which it received compensation. The goods which it delivered were *entrusted* to it for transit. Once the shipper handed over its lading it was not in a position to know precisely how it was being handled. The law, therefore, developed a simple policy of holding the carrier as an insurer against all events except acts of God and of enemies of the King. This was considered reasonable by the English courts, otherwise carriers could work out clandestine arrangements with third parties to convert their shipper's goods and the shipper would be in a very unfortunate situation because of the obvious unequal access to information.[19] Some other defenses were later allowed a carrier and will be discussed below.

The carriers, of course, mitigated the sting of being an insurer by the adjustment of rates and various methods of limiting liability by contract. Aside from the principle just mentioned, another principle should

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[13] *Id.* at 21.

[14] 49 U.S.C. §§ 41-3 (1964).

[15] 49 U.S.C. § 3(1) (1964).

[16] A. L. Mechling Barge Lines v. United States, 376 U.S. 375 at 384 (1964).

[17] J&H Flyer Inc. v. Pennsylvania R.R., 316 F.2d 203 (2d Cir. 1963).

[18] *Id.*

[19] Lust, *op. cit. supra* note 3, at 32.

be viewed before the elements of a prima facie case are set out. This principle affects the problem of "going forward" with the evidence. While the first principle discussed deals with the burden of proof, this latter one affects who must begin the presentation of evidence to a court.

The relationship between a shipper and a carrier is essentially a bailor-bailee relationship. When such a relationship exists, the law recognizes that as to the damage sustained, the bailee is in a better position to know this than the bailor. The bailee, therefore, has the burden of "going forward" with the evidence. The burden of proof, however, does not shift and if the bailee can bring enough evidence to raise doubts, the bailor does not sustain the burden of persuasion which rested with him at the start of the trial.[20]

Under the common law, a plaintiff who is suing to recover damages for goods lost or damaged by a carrier, establishes a prima facie case of liability against such carrier where he shows that the goods were received by the carrier in good condition, and upon delivery were either missing or damaged. This proof, therefore, raises a presumption of negligence upon the part of the carrier and is enough to present the issues to a jury.[21]

This rule still prevails under the Carmack Amendment as amended.[22] If a shipper sues an initial or delivering carrier, then, even if he pleads specific acts of negligence, as long as he shows an interstate shipment, suit against the proper carrier, and the aforementioned aspects of a prima facie case he will get to the jury.[23]

In establishing his case, the shipper must sustain the burden of showing that the goods were received by the carrier in good condition. His obligation as far as the loading is concerned depends upon the method of shipment he chooses. Where he has a movement characterized as a "shipper's load and count" shipment, he then assumes the responsibility of loading.[24] Under these circumstances the shipper is liable for defects in loading which are latent and cannot be observed or discovered by the carrier through ordinary observation.[25]

If there is a misdescription in the bill of lading, in the absence of fraud, the shipper or consignee merely has the obligation to pay an addi-

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[20] Commercial Molasses Corp. v. New York Barge Corp., 314 U.S. 104 (1941).

[21] 5 Elliot, On Railroads 2738 (3d ed. 1922).

[22] Missouri P. R.R. v. Elmore & Stahl, 377 U.S. 134 (1946); Ohio law in accord may be found in Grosjean v. Pennsylvania R. Co., 146 Ohio St. 643, 67 N.E. 2d 623 (1946).

[23] Boh Bros. Constr. Co. v. Perry Heavy Haulers, 166 F.2d 719 (5th Cir. 1948); Snowden v. Tremont & G. R.R., 140 So. 122 (Ct. of App. La. 1932); cases turned, however, on improper loading by shipper.

[24] 49 U.S.C. § 101 (1964).

[25] Solway Metal Sales Ltd. v. Baltimore & O. R.R. Co., 344 F.2d 568 (D.C. Cir. 1965); see also Miller, Law of Freight Loss and Damage Claims 351-72 (2d ed. 1961).

tional charge in keeping with the tariff rate for the items actually shipped but there will be no effect as far as liability is concerned.[26]

The burden of the shipper to show that the goods were received in good order is minimized where the bill of lading contains a recitation that the lading is in apparent good condition. Hence, even where the contents of a shipment were marked "shipper's load and count," the shipper sustained the burden of establishing a prima facie case by introducing evidence that the bill of lading had a notation that the goods were in good order. This was not rebutted by evidence that other items of lading were also damaged. Thus, upon proving a damaged condition at destination the shipper proved the two essential facts he had the burden to prove.[27]

Parol evidence, however, has been permitted to show a carrier had not received a portion of a shipment even though it was listed on a straight bill of lading which was received by the carrier.[28] Though the common law has simplified the burden of proof that must be borne by the shipper, the basic theory of liability is founded in negligence. Hence, a shipper who stipulated that the carrier was free of negligence suffered a summary judgment in favor of the carrier.[29] Though this was decided as recently as 1961 there has been a significant change in the law which would leave the aforementioned rule of law in doubt. This will be discussed in the section dealing with the carrier's defenses.

It has already been shown how liability is affected where the shipper loads the shipment. There is also an effect upon liability where the consignee handles the shipment at the destination point. A shipment of mirrors was trucked from Louisville, Kentucky to Dayton, Ohio. Crates of the mirrors were deposited at the loading platform of the plaintiff. Thereafter, the plaintiff's employees moved them to the third floor of its building and some time later the damage was discovered. Plaintiff introduced no evidence that handling by its employees was proper. It was held that though the general rule is that a prima facie case is made where it is shown that goods were delivered to the carrier in good condition and delivered to the consignee in damaged condition, where the goods after receipt by the consignee are transported by his employees to another part of his premises and the damage is there discovered, the general rule has no application where there is no evidence as to the care exercised by such employees.[30]

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[26] Armour Research Foundation v. Chicago, R. I. & P. R.R., 297 F.2d 176 (7th Cir. 1961).

[27] Yeckes-Eichenbaum Inc. v. Texas Mex. R.R., 263 F.2d 791 (5th Cir. 1959), *cert. denied,* 361 U.S. 827 (1959).

[28] Detroit & T.S.L. R.R. v. United States, 105 F. Supp. 182 (N.D. Ohio 1952).

[29] United States v. Reading Co., 289 F.2d 7 (3d Cir. 1961).

[30] Elder & Johnston Co. v. Commercial Motor Freight Inc., 94 Ohio App. 358, 115 N.E. 2d 179 (1953).

Defenses of the Carrier

The common law recognized that damage could occur to shipments that were entirely outside the control of the carrier. Hence, there were certain defenses which were afforded the carrier and are still recognized under the Carmack Amendment.

> These are an act of God, such as an earthquake, avalanche and the like; an act of the public enemy, which means hostile troops, but not strikers; the fault of the shipper, such as defective loading of the goods, where the shipper loads; and the natural propensities of live stock, in case of such shipments, which exempts from injuries caused through goring, fighting and the like; the last exemption might be termed exemption through special laws, and refers only to exemptions in the navigation laws, under which, in certain cases, a vessel can throw its cargo overboard without incurring any liability therefor.[31]

This article will not dwell at length with the various defenses available to a carrier. Their proper treatment would alone form the basis for an entire article. The aforementioned quotation did not fully identify one defense, namely that a defense lies when the damage was caused by the inherent vice on the nature of the goods.[32] The author of the quotation had merely referred to one type of inherent vice, namely, the propensity of livestock to damage itself. Perishable commodities, also, have a nature that requires some additional safeguards, otherwise rot, mildew, etc., will lead to their destruction. Some discussion of a few aspects of the defense brought about by the fault of the shipper was entered into, but in the context that in the presentation of the prima facie case where there is definite handling by the shipper, he may have additional burdens while presenting his case.

The most recent case law has concerned itself with the so-called "inherent" vice defense. This defense will be discussed since the entire approach to a defense, regardless of which is chosen, has been affected.

One approach in the trial of a suit that a defendant to a freight claim case might have taken was that once a plaintiff had established a prima facie case, the carrier would prove that handling by it was proper.[33] If the issue was over compliance with a shipper's instructions the carrier had only to show that it had complied with the instructions. In a recent case, *Larry's Sandwiches, Inc. v. Pacific Electric Ry. Co.*,[34] an action lay for damage to a shipment of frozen sandwiches. The railroad asserted that it had complied with the shipping instructions and the Perishable Protective Tariff. The United States Circuit Court of Appeals for the

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[31] Lust, *op. cit. supra* note 3 at 333, 335-568; Miller, *op. cit. supra* note 25 at 115-503.

[32] Austin v. Seaboard Air Line R.R., 188 F.2d 239 (5th Cir. 1951).

[33] See, Donovan, Freight Claim Litigation—Preparation and Trial of a Freight Claim Case, 8 The Chronicle 6-19 (Oct. 1962).

[34] 318 F.2d 690 (9th Cir. 1963).

Ninth Circuit reiterated the rule that the Carmack Amendment has codified the common law and a carrier is an insurer unless the damage was due to one of the five acknowledged defenses. The court held, however, that where perishable goods are involved reference must be made to the tariff.[35] In this case the tariff stated that there was no guarantee as to the condition of perishables. The carrier would merely comply with the shipper's instructions to "retard deterioration". The tariff also stipulated that the carrier's duty was limited to furnishing, without negligence, reasonable protective service as requested by the shipper. There was to be no liability for loss either because of the acts of the shipper or if the directions of a shipper are inadequate. The court, therefore, ruled that where perishable goods are involved the carrier need only prove that it had complied with the tariff and the shipper's instructions. There was no obligation to affirmatively assert the defense of inherent vice.[36]

The United States Supreme Court recently had before it the case of *Missouri Pacific Rd. Co. v. Elmore & Stahl,*[37] which overruled the Ninth Circuit. This case arose in a Texas court and consisted of jury findings on special issues. The trial court on the basis of these findings found for the shipper and was affirmed by the Texas Court of Appeals[38] and the Texas Supreme Court.[39]

The jury found:

(1) the shipment of melons were in good condition when turned over to the carrier,

(2) they were damaged upon arrival,

(3) the carriers were not negligent, and

(4) the damage was not due solely to inherent vice.

Since the Texas courts established a rule of law entirely different from the Ninth Circuit, *Certiorari* was granted.

The Supreme Court pointed out that with the exception of injury to livestock, an exception to the common rules regarding defenses to freight claims based upon the natural propensity of animals to destroy themselves, the early federal cases did not distinguish between perishable and non-perishable goods. The Court found that though a number of states in the area of intra-state shipments absolved a carrier where he shows compliance with the tariffs, this is not the federal rule.

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[35] *Ibid.* Here the court held that frozen sandwiches are "perishable" as contemplated by the tariff.

[36] Compare, Illinois Packing Co. v. Atchison, T. & S. F. R.R., 236 F.2d 907 (7th Cir. 1956); see also cases *supra* note 3; Missouri P. R.R. v. Elmore & Stahl, *supra* note 22.

[37] *Supra* note 22.

[38] 360 S.W. 2d 839 (1962).

[39] 368 S.W. 2d 99 (1963).

It was held that the carrier has the burden of (1) showing no negligence and (2) that damage was due to an inherent vice. This ruling is a departure from earlier cases and in effect revolutionizes the approach a carrier must take in defending a freight claim case.[40] The Court was not persuaded that the carrier lacks adequate means to inform itself of the condition of shipments when picked up, but stated that it was the only one in a position to acquire the knowledge of what actually damaged a shipment in transit.

Thus, as a result of this decision the carrier must either know or find out later whether a shipper, for example, who may have decided to shave its expenses, incorrectly advised the carrier with respect to special instructions such as icing. Then the carrier must *prove* the defect was due to an inherent tendency in the goods to rot, decay, mildew, etc. In view of the incredible number of varieties of goods shipped, this places a considerable burden upon a carrier. If a carrier is less than diligent it may find itself in the business of purchasing spoiled perishables on hauls where the shipper availed himself of minimum rates.

The dissenters, normally not considered advocates for the carriers' cause, were Justices Douglas and Black. They pointed out that the shipper chose a lesser freight rate and the carrier had performed the duties that had been ordered and paid for. The dissent referred to the testimony of the railroad's expert witnesses which indicated that decay originated at harvesting or packing. Further testimony was introduced to indicate the decay was due to improper refrigeration. The dissenters held that the shippers could have chosen more protection had they so desired. They also felt that the federal rule did distinguish between perishable and non-perishable goods.

Thus, in their opinion, the Texas courts should have been reversed and the tariff should have been given the force and effect of a statute. Liability should have been limited to the service requested, paid for, and rendered. Hence, a shipper, under the guise of buying transportation services in effect consummates a sale of produce to the railroad.

The Supreme Court majority failed to consider the overall transportation policy as contemplated in the entire Interstate Commerce Act, the decisions of the federal courts, the Interstate Commerce Commission and the published, regulated and approved tariffs. The impact of this decision places upon the carrier an affirmative obligation not only to show proper handling and compliance with both its contract of carriage and the lawful tariff, but also requires it to become an expert with regard to innumerable commodities in order to prove that despite its lack of negligence the commodity was damaged because it perished due to its inherent nature.

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[40] Thomas, Freight Claim Cases, 11 The Chronicle 2-12 (Aug. 1965).

Thus, the basis of the carrier's liability is not merely negligence. The rule of convenience which simplified the shipper's prima facie case has been considerably strengthened. Once that case is made the carrier now has a considerable burden of proof to sustain in order to effectively defend the action.

Burden of Proving Damages

The subject of damages like that of a carrier's defenses is an extensive one and has been discussed at length elsewhere.[41] A short comment is appropriate to indicate who has the burden of proof of damages. Though this would seem obviously that of the shipper or consignee claimant, the problem has been the subject of litigation recently.

The general rule is that the measure of damages is determined by the Interstate Commerce Act and the decisions of the courts of the United States construing it.[42] Under the Carmack Amendment, as amended, the courts have found that the common law rule of actual compensatory damages should prevail.[43] This is true whether the damage is a physical loss[44] or due to a delay.[45]

In a recent case[46] a shipment of plums was delivered two days late and the plaintiff contended that since the shipment was late the measure of damages should be based upon the decline in wholesale market value between the day the shipment was supposed to arrive and the day it did arrive. The shipper argued that though the plums were intended for retail sale, it did not keep sufficient records to ascertain the differences in retail prices. Hence, the plaintiff contended that the burden was on the railroad to prove that the measuring stick of wholesale value was not the proper basis of actual loss.

The United States Circuit Court for the Seventh Circuit found that the plaintiff failed to sustain its burden of proof in establishing actual damages. The plaintiff had to prove whether the plums were sold at a lesser retail price than if they had been delivered on time.

This case was of considerable significance to the railroad industry and most of the major railroads had a hand in the stipulations that were utilized in this test case. Fortunately the result left the burden of proving damages where it should be, with the plaintiff.

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41 Miller, *op. cit. supra* note 25, at 522-805.

42 Missouri P. R.R. v. H. Rouw Co., 258 F.2d 445 (5th Cir. 1958); *cert. denied,* 358 U.S. 929 (1959).

43 Illinois Cent. R.R. v. Crail, 281 U.S. 57 (1929).

44 Olcovich v. Grand Trunk Ry. Co. of Canada, 179 Cal. 332, 176 P. 459 (1918). This case also indicates the problem of whether an item of damages is incidental or compensatory, the prior category being unrecoverable.

45 Cincis v. The New York, N. H. & H. R.R., 149 N.Y.S. 2d 602 (N.Y. City Ct. 1956).

46 The Great Atlantic and Pacific Tea Co. v. The Atchison, T. & S. F. R.R., 333 F.2d 705 (7th Cir. 1964); *cert. denied,* 379 U.S. 967 (1965).

The Requirement to File a Written Claim

Early decisions under the Carmack Amendment recognized that a carrier could contract with a shipper that written notice would be furnished within a given time after the damage was discovered. The Supreme Court held that a thirty-six hour period was not unreasonable with respect to perishable fruit.[47]

Congress incorporated a provision in the first Cummins Amendment which set a minimum standard of days that a carrier could choose as the period in which written notice must be given. This period was set as ninety days in which notice of a claim must be given. The actual claim had to be filed within four months. An exception was made to the notice and filing requirements where the loss was due to damage or delay either in the loading process or where the carrier was negligent.

Hence, under the 1915 Amendment where a shipper failed to file notice within four months, he could still prevail if he could show the railroad was negligent. The railroad, however, insofar as the law stood at that time rebutted even the ordinary prima facie presentation if it showed it was not negligent.[48]

The present law is that the carrier has nine months after delivery of the property to require the filing of a written claim. The exceptions to the filing requirements were also deleted. Hence, the carriers adopted standard bills of lading which incorporated this provision[49] and further incorporated the terms in the tariffs which govern particular moves.[50]

Where a shipper fails to comply with his obligation to file a written claim he cannot maintain a suit against the carrier.[51] Where there is more than one carload in a lot, even though there is only one bill of lading for a number of carloads, a written claim must be filed for each car within nine months after delivery.[52]

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[47] St. Louis, I. M. & S. R.R. v. Starbird, 243 U.S. 592 (1916).

[48] Chesapeake & O. R.R. v. Thompson Mfg. Co., 270 U.S. 416 (1926); see also, Delphi Frosted Foods Corp. v. Illinois C. R.R., 89 F. Supp. 55 (W.D. Ky. 1950), *aff'd*, 188 F.2d 343 (6th Cir. 1951), *cert. denied*, 342 U.S. 833 (1951); keep in mind the discussion of the latest rulings of the Supreme Court which places the dicta of this Sixth Circuit case in doubt.

[49] Miller, *supra* note 25, at 34; see Freight Traffic Red Book (1955). Section 2(b) of the uniform bill of lading form provides: "As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property . . . and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

[50] For an example see Freight Classification 5, I.C.C. No. A-5, effective Oct. 1, 1959, as supplemented in Supplement No. 8 effective March 1, 1960.

[51] Chesapeake & O. R.R. v. Martin, 283 U.S. 209 (1931).

[52] National Distillers Products Corp. v. Companhia Nacional De Navegacao, 99 F. Supp. 458 (E.D. Pa. 1951).

This requirement for filing a written claim is mandatory and the carrier cannot waive it nor by its action be estopped from asserting it. In a United States Circuit Court of Appeals decision for the Sixth Circuit[53] the contention was made that the carrier had actual notice of the damage, had waived the filing of a written claim and was estopped from asserting the defense of such a failure. In this case verbal notice was given by the plaintiff to the delivering carrier, which in turn had its agents make an inspection two days after the delivery was accomplished. The agents made a written report and forwarded a copy to the damaged party. In addition, the bill of lading returning the shipment to the consignor was shipped free of charge and recited "Damaged in transit. Returned free for repairs". A written claim was not filed until fifteen months after delivery.

In a terse opinion the court set forth the following principles of law:

> (1) Federal law makes it mandatory that a claim in writing must be filed with the carrier within nine months after delivery. Actual notice by the carrier of the damaged goods is not sufficient compliance on the part of the damaged party.
>
> (2) The carrier may not waive or be estopped to assert the requirements of the bill of lading as this would permit discrimination which is prohibited by law.[54]

The aforementioned rule of law prevails in more United States Circuit Courts than the dissimilar rule of the Seventh Circuit enunciated in *Hopper Paper Co. v. Baltimore & Ohio Ry. Co.*[55] In that case no written claim was filed. The shipper nonetheless prevailed. The facts, however, were quite overt and if ever the established rule of law was to be breached this case was loaded on the side of the shipper. The plaintiff in this case was the consignor of a load of paper for delivery to the Government Printing Office, Washington, D. C. The bill of lading contained the usual language with respect to filing a written claim within nine months.[56] While the shipment was in transit there was a derailment involving two Baltimore & Ohio Railway Company trains. The railroad took the salvaged paper and sold it for $100.00 sans acquiescence or even knowledge on the part of the consignor. Two days later the railroad notified both consignor and consignee of the destruction of the paper. Approximately eleven months after this notice a written claim for the damage was made.

The Seventh Circuit Court held that in a case similar to the facts in this case the requirement to file a written notice is not necessary

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[53] Walterman v. Pennsylvania R.R., 295 F.2d 627 (6th Cir. 1961).

[54] *Id.* at 628; see also, Atlantic Coast Line R.R. v. Pioneer Products, 256 F.2d 431 (5th Cir. 1958); East Texas Motor Freight Lines v. United States, 239 F.2d 417 (5th Cir. 1956); Northern P. R.R. v. Mackie, 195 F.2d 641 (9th Cir. 1952).

[55] 178 F.2d 179 (7th Cir. 1949).

[56] Section 2(b), *supra* note 49.

where the carrier ". . . has or is chargeable with actual knowledge of all the conditions as to the damages that a written notice could give".[57] The court urged that the purpose of the written claim provision was not to escape liability but to facilitate prompt investigation. The argument that this decision would open the doors to discrimination and preferences was rejected and the court commented that the mode of proof was available to shipper and carrier alike.

The facts in the *Hopper* case were indeed unusual, the legal rationale equally so. Since the damage that occurred was occasioned by a derailment, ordinary negligence would easily be established by the doctrine of res ipsa loquitur.[58] The further twist in the case is found in the sale of the lading by the carrier. Though counsel for the carrier cited numerous cases which should have convinced the court that it had diverged from the tenor and spirit of the National Transportation Policy, this court would not accept them. It made a remark, however, that its decision was made because of the peculiar facts of the case before it. It is for this reason that the *Hopper* decision has for the most part been limited to its quite unusual facts.[59]

The *Hopper* case has been followed where a carrier admitted liability with full knowledge of its agent along with an oral claim on the theory of a substantial compliance with the terms of the bill of lading.[60]

From the language of the past *Hopper* decisions it is apparent that there is a broad split of opinion among the Circuits and on this basis a case should eventually be certified to the United States Supreme Court from which one might expect to find another novel principle of law.

This split, however, is in the cases where (1) there is actual knowledge by the carrier and (2) admitted liability by the carrier, or in the case of *Hopper* a "sure thing" negligence situation. The additional fact of a sale of the lading by the carrier certainly aids a shipper who wishes to come under the exceptions where they are recognized. A full conversion of the lading by the carrier will, without invoking a *Hopper* exception, exempt the shipper from the written claim requirement.[61]

Though sufficient authority lies for the rule that a carrier may not waive the written claim requirement nor be estopped from asserting it, the United States Supreme Court left open the door in a 1931 decision and stated:

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[57] Hopper v. Baltimore & O. R.R., *supra* note 55, at 181.

[58] Fink v. New York Cent. R.R., 144 Ohio St. 1, 56 N.E. 2d 456 (1944).

[59] East Texas Motor Freight Lines v. United States, *supra* note 54; Northern P. R.R. v. Mackie, *supra* note 54; Delphi Frosted Foods v. Illinois Cent. R.R., *supra* note 48; Penn. State Laundry Co. v. Pennsylvania R.R., 134 F. Supp. 955 (W.D. Pa. 1955).

[60] Atlantic Coast Line R.R. v. Pioneer Products, *supra* note 54; Loveless v. Universal Carloading & Distributing Co., 225 F.2d 637 (10th Cir. 1955), wherein Judge Wallace dissented considering Hooper, "a maverick decision on its law and facts." Written notice was considered given by the fact of the carrier's written rejection of the claim.

[61] Dowling v. Seaboard Air Line R.R., 108 S.C. 186, 93 S.E. 863 (1917).

> Whether under any circumstances the shipper may rely upon that doctrine [estoppel] in avoidance of the time limitation clause of the bill of lading, we need not now determine.[62]

Through that "opened door" walked *Hopper* and other cases which cast a shadow of insecurity in absolute reliance upon the requirements of the bill of lading. The trend in the law seems to indicate more liberality in interpretation of the law as opposed to that great body of law which strove for a uniform rigidity in the construction and application of the Interstate Commerce Act which aims at facilitating the flow of commerce.

The Supreme Court, on the other hand, has said that:

> The federal courts have been consistent in holding that local rules of estoppel will not be permitted to thwart the purposes of statutes of the United States.[63]

If the Court continues to adhere to this philosophy the encroachments made by *Hopper* and other cases will be left as cul de sacs or possibly overruled.

Once it is established that a written claim must be filed some consideration must be given to what constitutes a claim. A New York State case which has been cited frequently and which based its determination upon federal law set out the essential elements of a claim in writing:

> . . . in order to constitute a claim the transfer agency should be advised by the consignor or the consignee that, first, a loss has occurred, second, the nature of the loss, third, the nature of the shipment involved, fourth, the approximate date of the shipment and its point of origin and destination, and finally, that the parties to the shipment expect restitution or reimbursement.[64]

The form of the claim is not important. Thus, a telegram which made a claim was sufficient.[65] Likewise, a written intention to make a claim in the future was proper.[66]

Though an exception was made in a case following the *Hopper* rationale where liability was admitted by the carrier and, therefore, the written communication to the shipper served the purpose of the written claim,[67] the inspection report of the carrier is generally not a sufficient compliance for the requirement of a written claim.[68] Handing an invoice

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[62] Chesapeake & O. R.R. v. Martin, *supra* note 51, at 222.

[63] Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 176 (1942).

[64] Bond Stores v. Overland Package Freight Service, 13 N.Y.S. 2d 928 (N.Y. Mun. Ct. 1939).

[65] Georgia, F. & A. R.R. v. Blish Milling Co., 241 U.S. 190 (1916).

[66] St. Louis, I. M. & S. R.R. v. Starbird, *supra* note 47; Delaware, L. & W. R.R. v. United States, 123 F. Supp. 579 (S.D. N.Y. 1954).

[67] Loveless v. Universal Carloading & Distributing Co., *supra* note 60.

[68] Union P. R.R. v. Denver-Chicago Trucking Co., 253 P.2d 437 (Colo. 1953); Texas & N. O. R.R. v. McNatt, 223 S.W. 2d 651 (Civ. App. Tex. 1949); Louisville & N. R.R. v. Home Fruit & Produce Co., 310 Ky. 269, 220 S.W. 2d 558 (1949).

indicating expected costs of repairs to the carrier's agent who inspected the damaged shipment is not a "written claim";[69] nor is a mere list of damaged items without an amount claimed.[70]

Either the consignor or the consignee may make the claim.[71] A designated agent can also make the claim on behalf of the shipper.[72] The claim must be filed against the carrier and must be specific enough so that it is clear against whom the claim is filed.[73] Hence, a claim filed with the Railroad Perishable Inspection Agency is invalid.[74]

It is apparent from this discussion that though the courts are lenient in interpreting a document as a written claim, nonetheless counsel for a shipper must watch out for the numerous pitfalls that may befall a shipper who fails to apprise himself of the nature of the claim required.[75]

Freight Forwarders

The freight forwarder is in the business of assembling less than carload shipments and then shipping them as carload shipments indicating destinations where the shipments are broken up and ultimately delivered to various consignees. The freight forwarder is regulated by federal law[76] and does not as a rule transport goods himself, but relies for a profit on the difference between "LCL" and carload rates. The freight forwarder issues a bill of lading to the individual shipper. The railroad who receives the shipment issues a second bill of lading naming the forwarder as both the consignor and consignee. The carrier is unaware of

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[69] Lucas Machine Div., New Britain Mach. Co. v. New York Cent. R.R., 236 F. Supp. 281 (N.D. Ohio 1964).

[70] Insurance Co. of North America v. Newtowne Mfg. Co., 187 F.2d 675 (1st Cir. 1951); Berg v. Schreiber, 337 Ill. App. 477, 86 N.E. 2d 125 (1949); *cert. denied,* 340 U.S. 851 (1950).

[71] United Mut. Fire Ins. Co. v. Railway Express Agency, 323 Mass. 354, 82 N.E. 2d 215 (1948); carrier prevailed, however, for the only letter received was one inquiring after the shipment.

[72] Franck v. Railway Express Agency, 159 Ohio St. 343, 112 N.E. 2d 381 (1953). This case also involves an exception to the general prerequisites for establishing a prima facie case in the case where there is live stock accompanied by the shipper's agent under a contract arrangement.

[73] Louda v. Prague Assurance-National Corp., 347 Ill. App. 211, 106 N.E. 2d 757 (1952).

[74] James G. McGarrick Co. v. Thompson, 227 S.W. 2d 832 (Civ. App. Tex. 1950).

[75] Annot., 175 A.L.R. 1162 (1948).

[76] 49 U.S.C. § 1002(a) (5) (1964) defines a forwarder as "any person which . . . holds itself out to the general public . . . to transport or provide transportation of property . . . and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapters 1, 8, or 12 of this title."

the identity of the individual shipper or the various intended ultimate destinations.

The question then is whether a freight forwarder who has received a claim from his shipper has a right against the carrier under the Carmack Amendment and, if so, whether recovery is subject to the terms of the bill of lading issued by the railroad. These terms would, of course, include the requirement to file a written claim.

The United States Supreme Court held that vis a vis the railroad, the freight forwarder is a shipper and must process its claim accordingly.[77] By making the Carmack Amendment applicable to freight forwarders Congress required them to issue bills of lading and made a federal law out of a uniform application of state law relating to liability for loss or damage. The passage of the Carmack Amendment instituted a significant change as far as the railroad industry was concerned since they could not limit liability to their own lines. The freight forwarder, however, even under the common law was liable for loss or damage to the consignment occurring at any time between pick up and destination.

The Court held that the freight forwarder is not in an unequal position because the provision of the Interstate Commerce Act which allows the initial or delivering carrier to recover against the intermediate or connecting carrier[78] does not apply to freight forwarders. The reason ascribed to explain no injustice was that the railroads simply do not avail themselves of that provision of the act.

If the freight forwarder were not held to a strict compliance with the established tariffs and the bill of lading he could contract to limit his liability with the railroad on its bill of lading and when sued by a shipper on the bill of lading between the shipper and forwarder sans limitation pay the full amount to the shipper and then proceed against the railroad even though a lower rate had been paid. The tenor of the Transportation Act would be vitiated since the freight forwarder would, in the opinion of the Court, receive discriminatory treatment as compared to other shippers. The freight forwarder is much like any other shipper since it can pick and choose a carrier.

The problem then remains in the situation where the "LCL" shipper waits to the last minute before he makes his claim against the freight forwarder. The forwarder, therefore, has a limited time in which to assert his written claim according to his bill of lading.[79] The Court found that this type of situation constituted an insignificant portion of

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[77] Chicago, M. St. P. & P. R.R. v. Acme Fast Freight Inc., 336 U.S. 465 (1948).

[78] 49 U.S.C. § 20 (12) (1964).

[79] 49 U.S.C. § 20 (11) (1964); § 2(b) uniform bill of lading form, *supra* note 49, provides for two years and a day. It should be observed that the Carmack Amendment merely states a minimum period that the carrier may contract for as an agreed statute of limitations.

the claims filed and the Interstate Commerce Commission could prescribe an appropriate remedy should this become significant.

Baggage Claims

Though the Carmack Amendment, as amended, prohibits a carrier from limiting its liability for loss to freight by contract, there are two exceptions allowed by the law.

The first exception involves the transportation of items, other than livestock, for which the Interstate Commerce Commission has issued an order. The Commission, therefore, is empowered to allow rates varying with the declared or agreed value which it finds to be fair and reasonable. These rates are called "released" rates[80] and are used most commonly for the movement of household goods.[81]

The second class of exception from the rule prohibiting the limitation of liability by the use of "stated value" is in the area of baggage which is carried on boats or trains carrying passengers. In an action before the Supreme Court for lost baggage[82] the carrier had filed a tariff which included an express valuation rate. The Court ruled that the rate when made and filed is notice even though it is not posted in the station. It held also that the provisions of the tariff had become part of the contract of shipment and where the owner of the baggage failed to choose another rate allowing him to state the actual value, the rate set out in the tariff applied along with its provision limiting liability.

The majority stated with respect to the filing of a tariff: "The effect of such filing is to permit the carrier by such regulations to obtain commensurate compensation for the responsibility assumed for the safety of the passenger's baggage. . . ." [83] The tariff before the Court required a passenger seeking more protection for his baggage to declare the value and pay an excess amount. The Court reasoned that this alternative was prudent since the value of the contents of the baggage was peculiarly within the knowledge of the passenger. The Court pointed out that if the charges filed are unreasonable the course of attack should be made in proceedings before the Interstate Commerce Commission. The Court sanctioned the use of baggage receipts instead of a formal bill of lading. Justice Pitney dissented on the grounds that the regulations and tariff provisions were not known to the shipper. The theory of the dissenter has never become law. If it would prevail it is apparent that the spirit of the Transportation Act which strives for a rigid uniformity of application in order to benefit both carrier and shipper would be vitiated and

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[80] 49 U.S.C. § 20(11) (1964).

[81] Miller, *supra* note 25, at 681-723.

[82] Boston and M. R.R. v. Hooker, 233 U.S. 97 (1914).

[83] *Id.* at 119.

each damage action would be determined and settled on an *ad hoc* basis, requiring litigation whether there was proper notice.

In a recent case[84] a salesman asked a "red cap" to stay and watch his bag. The "red cap" conducted his duties in a desultory manner and consequently was not present when the bag was stolen. The bag contained $50,000 worth of jewelry. The court found that the services of the "red cap" were in furtherance of interstate travel. Under the Carmack Amendment the carrier is not an insurer as such. The statutes as they relate to this situation do not confer new remedial rights upon the shipper as in the instance where liability was imposed upon the initial carrier.[85] The substantive rights which flow from the statute are not novel, but rather reflect the doctrines enunciated in the common law. Under the common law a carrier is liable as an insurer only for such goods as it holds itself out to handle. In this case, a salesman's sample case is not mere "baggage" and its care extends beyond a "red cap's" duties to passengers.

Baggage has been defined as ". . . such articles of apparel, ornament . . . as are in daily *use* by travelers for convenience, comfort, or recreation." [86] Where an item shipped falls within the definition of "baggage" federal law controls. Hence, in a situation where a trunk was missing liability was limited to declared value. This rule applies unless an actual conversion could be proven against the carrier.[87]

The requirement that an agreed value in writing shall prevail does not require a signature. The knowledge of the passenger-shipper that the rate is based upon the value is presumed from the bill of lading and the published schedules filed with the Commission. Since the Interstate Commerce Act is replete with penalties for failure to comply with the law, there is a presumption that the tariff which is relied upon by the carrier was duly approved by the Commission.[88] Collateral evidence to the contract of carriage would merely reward the passenger who undervalues his baggage.

In the case of *Atchison, Topeka & Santa Fe Ry. Co. v. Robinson,*[89] a race horse qualified as baggage under the facts of the case. The shipper of the race horse had obtained a verbal commitment that the horse would be loaded at a certain time and be shipped on a certain railway. The shipper was then assured that the horse would arrive on time for a given race. The car was not moved on the night indicated that it would be

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[84] J&H Flyer Inc. v. Pennsylvania R.R., 316 F.2d 203 (2nd Cir. 1963).

[85] *Id.* at 205.

[86] S. Nathan & Co. v. Red Cab Inc., 118 F.2d 864, 867 (7th Cir. 1941); *cert. denied,* 314 U.S. 642 (1941).

[87] Van Dyke v. Pennsylvania R.R., 46 Del. 529, 86 A. 2d 346 (1952).

[88] American Railway Express Co. v. Lindenburg, 260 U.S. 584 (1923).

[89] 233 U.S. 173 (1914).

and the horse consequently arrived at its destination too late for the races. A secondary aspect of damages occurred because not only was the horse delayed, it was also seriously injured during the shipment. The plaintiff argued that it had an oral contract which guaranteed the shipment and further argued that no mention was made of any particular valuation of the horse. The defendant relied upon the provisions of the tariff which did not guarantee a delivery date, and further limited liability to a stated value. The court held that the shipper was bound by the published tariffs, notwithstanding the fact that there may have been a misrepresentation and that the shipper probably was unaware of the terms of the tariff. The court stated that ". . . if oral agreements of this character can be sustained, then the door is open to all manner of special contracts, departing from the schedules and rates filed with the Commission." [90] In dicta the court indicated that a different rule might apply if there was an attempt on the part of the carrier to get around the published rates by a fraudulent agreement showing false billing of the property. This case was, of course, governed by the Carmack Amendment under the concept of pre-caption.

In the aforementioned case the plaintiff had not pressed for damages for the delay. The law with respect to this aspect of damages is that in a situation where there is no tariff authority for the guarantee of the arrival date of a given car, and there is no unreasonable delay, then a carrier is not liable upon a promise to deliver in a shorter period than reasonably expeditious transportation would require.[91] An action does not lie for mental suffering for delay in shipment,[92] and this issue was not presented in the aforementioned race horse case.

Hence, it is clear that any oral representation which deviates from the tariff is of no effect. Thus, in a case where an oral agreement was made between passengers and a railroad's baggagemen to ship baggage on a given train, the railroad was not liable for failure to deliver the baggage in time to enable the passengers to fulfill an ocean cruise. The baggage had been forwarded on a following train, but the railroad's baggage tariff had reserved the right to forward the baggage on the preceding or following train.[93]

The choice of a stated value lies entirely with the passenger. The legality of the contract for reduced rates depends upon the propriety of the rates filed and not upon a valuation which has a relationship to the true value of the property.[94]

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[90] *Id.* at 181.

[91] Kirchner v. New York Cent. R.R., 94 N.E. 2d 283 (Ohio Ct. App. 1949).

[92] Southern Express Co. v. Byers, 240 U.S. 612 (1916).

[93] Steindl v. New York Cent. R.R., 296 Ill. App. 70, 15 N.E. 2d 899 (1938).

[94] Pierce v. Wells Fargo Co., 236 U.S. 278 (1915).

Statute of Limitations

Where a shipper has complied with the written claim requirements of the bill of lading, he must commence his suit within two years after the rejection of his claim. This rejection need not be formal. In a case where a claim was made for one sum and the carrier stated it would pay a lesser sum, even though negotiations continued, the written disallowance begins the period of limitations and the statute of limitations will not be tolled.[95] This rejection of a claim will start the period of limitations running even if it is sent to the shipper's attorneys rather than the shipper himself.[96]

A carrier, discovering that its shipper—who incidentally may be a very lucrative source of freight revenue—has slipped up and has let the statute of limitations expire, may not waive the statute and must assert it.[97] The reason for this rule is to avoid discrimination and avoid awarding preferences by in effect consenting to a judgment.

Jurisdiction of the Federal Courts

Congress has extended original jurisdiction of any civil action arising under the Interstate Commerce Acts to the federal district courts.[98] Thus, regardless of the amount in controversy a case involving the Carmack Amendment may be brought in a federal court. Even though a small amount of money is involved the federal court is the proper forum.[99]

This rule is not a carte blanche as to the choice of forum among the various federal courts. Aside from the change of venue provisions of the United States Code,[100] the Carmack Amendment itself specifies that actions against a delivering carrier shall be brought in a district (where a federal court is involved) or in a state (in a state court case) where the carrier operates a line of railroad.[101]

A shipper may sue in a state court,[102] however, where the amount exceeds $3000.00 the case may be removed to a federal district court. It is interesting to note that though the jurisdictional amount in the usual diversity cases has been raised to an excess of $10,000.00,[103] the freight claim remains at $3000.00.

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[95] Burns v. Chicago, M. St. P. & P. R.R., 100 F. Supp. 405 (W.D. Mo. 1951).

[96] San Lorenzo Nursery Co. v. Western Carloading Co., 91 F. Supp. 553 (S.D. N.Y. 1950).

[97] A. J. Phillips v. Grand Trunk W. R.R., 236 U.S. 662 (1915).

[98] 28 U.S.C. § 1337 (1964).

[99] Peyton v. Railway Express Agency, 316 U.S. 350 (1942).

[100] 28 U.S.C. § 1404 (1964).

[101] 28 U.S.C. § 1445 (1964).

[102] Nelms, Kehoe & Nelms v. Davis, 277 Fed. 982 (S.D. Texas 1921); see also, Nelms, Kehoe & Nelms v. Davis, 277 Fed. 987 (S.D. Texas 1921).

[103] 28 U.S.C. § 1332 (1964).

Conclusion

The entire area of law regarding interstate commerce has the primary purpose of carrying out the National Transportation Policy of Congress. The Carmack Amendment, as amended, is only a part of a much larger act and, therefore, a myopic view of just its provisions is out of the question if one is to properly understand the cases which have interpreted the Carmack Amendment. Occasionally some courts fail to view the Act as a whole and have developed a rule of law that concerns itself more with the equities of one case than the general policy of the entire Act. A stringent, uniform rule of law paradoxically does create some unjust results, however, the pragmatic difficulties that are obviated are legion. To assert oral agreements and acts of estoppel would open the door to excessive litigation and grant ample opportunity to create preferences.

The railroads are not at a great disadvantage because of the imposition of liability upon the initial or delivering carrier. The fact that the law affords them a remedy against the connecting carrier[104] is not the balm, but rather the fact that long ago the railroads entered into an agreement to handle claims among themselves.[105] This industry solution has aided both carrier and shipper alike.

An appeal for rigidity, however, must not be taken on an entirely literal basis. Despite the statutory nature of this area of the law, no statute can avoid the human element and provide for every exigency. Overt actions on the part of the railroads may deprive them of some of the permissive contractual provisions they employ.[106]

The rule, however, should be to strive for stringency and the exceptions should be very rare even though at times the two edged sword sometimes bites into both shipper and carrier alike. The law, after all, is there to maintain harmony and facility in the prodigious, rapid flow of commerce.

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[104] 49 U.S.C. § 20 (12) (1964).

[105] See, Rules of Order, Principles and Practices, Freight Claim Rules, Association of American Railroads, Operations and Maintenance Dept., Freight Claim Division.

[106] New York, N. H. & H. R.R. v. Nothnagle, 346 U.S. 128 (1952).