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**International Warehouse Logistics Association
Comments on the Surface Transportation Board
Decision on Demurrage Liability**

Docket Number EP 707

**Prepared by:
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Public Record**

Retained Counsel for the IWLA

January 21, 2011





BACKGROUND

The International Warehouse Logistics Association (IWLA) is a trade association of more than 500 third-party warehouse based logistics providers (3PL Warehouses). The IWLA is rooted back to 1891 when it was known as the American Warehouse Association (AWA). In fact, the AWA is a founding member of the U.S. Chamber of Commerce. Companies represented by the IWLA range in size from 10,000-square-foot, single-city warehouses to international companies with more than 25 million square feet of warehouse space in cities all over North America and the world and serviced by rail, air, water, and truck. Our members employ nearly 100,000 people in North America and are a vital and growing component of the overall logistics industry. In fact, *Brampton Enterprises, LLC* is a member of the IWLA and was the defendant in the most recent key case on demurrage (*Norfolk Southern Railway Company v. Brampton Enterprises, LLC*, 586 F.3d 1273 (11th Cir. 2009)).

The IWLA recognizes that there is a purpose for demurrage. 3PL Warehouses cannot function without an efficient transportation system. Therefore, the IWLA recognizes that demurrage and detention contribute towards making that system more efficient. IWLA members benefit from demurrage that is computed and charged in a way that fulfills the national needs related to 1) freight car use and distribution, 2) maintenance of an adequate supply of freight cars, as required under 49 U.S.C. §10746, and 3) based on contractual liability. Demurrage is not the problem. The problem arises when carriers seek to impose demurrage and detention charges on 3PL Warehouses without their consent. A contract cannot exist without a meeting of the minds as to its essential terms.

**ISSUES**

1) Describe the circumstances under which intermediaries ought to be found liable for demurrage in light of the dual purposes of demurrage. Notwithstanding the ICC's decision in Eastern Central, is there a reason why we should not presume that a party that accepts freight cars ought to be the one that is liable regardless of its designation on the bill of lading, so long as it has notice of its liability it accepts cars?

RESPONSE: It is our position that 3PL Warehouses are not per se "intermediaries" as it relates to the transport of goods, including by rail. Instead, it is our position that as 3PL Warehouses, our function (contractually and otherwise) is outside the transport of the goods. It is our position that there is a separate and distinct relationship with our customers, whom we refer to as depositors. And while we acknowledge that in many instances our depositors are also shippers who contract with rail carriers, we have no beneficial interest in those goods that our depositors ship. Nor do we have any direct contractual relationship to the rail carriers.

The IWLA agrees that demurrage is a contractual liability that should not be imposed on any party, 3PL Warehouses included, without their consent. The IWLA endorses the 11th Circuit's decision in *Norfolk Southern Railway Company v. Brampton Enterprises, LLC*, 586 F.3d 1273 (11th Cir. 2009) (*Brampton*) because that decision reinforces the longstanding principal that demurrage and detention are contractual liabilities that should not be imposed on a party without its consent.

We should not presume that a party that accepts freight cars ought to be the one that is liable for demurrage, regardless of its designation on the bill of lading. 3PL Warehouses do not negotiate rates or volumes with railroads, nor do they control the timing and volume of the



freight cars into their facilities. For example, there is no denying that railroads on occasion “bunch” cars in transit in order to maximize the efficiency of their trains. Proof of this allegation is that cars leave a shipper/depositor’s facility on different days (sometimes as much as a week apart), yet arrive at the destination on the same train. In this instance, there is no data provided by the railroads that would allow for an investigation into which cars were “bunched,” and while this practice may promote efficient rail traffic, it can overflow the 3PL Warehouses. Such practices are beyond the control the 3PL Warehouse. There should be no liability for demurrage to the railroad by the 3PL Warehouse, regardless of the designation on the bill of lading.

The ICC’s decision in Eastern Central was and is well founded. It must still be unlawful to presume that a party that accepts freight cars ought to be the one that is liable regardless of its designation on the bill of lading. It should be argued that since Eastern Central (1969), 3PL Warehouses have substantially less information and paperwork to alert them to errors when misidentified by carriers.

2) Explain how the paperwork attending a shipment of property by rail is processed and how it gives (or does not give) all affected parties (rail carriers, shippers, consignee-owners, warehousemen, etc.) notice of the status they are assigned in the bill of lading. For purposes of assessing demurrage, should it be a requirement that electronic bills of lading accurately reflect the de facto status of each party in relation to other parties involved with the transaction? If so, and if electronic bills of lading do not accurately reflect the de facto status of each party in relation to other parties involved in the transaction, please suggest changes that will ensure that they do.



RESPONSE: 3PL Warehouses rarely, if ever, see the paperwork that accompanies the transport. There may be occasions where a packing slip is in an envelope taped to the side of the boxcar when the car arrives, but most often 3PL Warehouses receive no notification or copy of any of the paperwork. IWLA 3PL Warehouses have spent significant time and resources sending multiple notifications to their depositors that ship by rail that they should never be named as the consignee. In fact, the Standard Terms and Conditions promulgated by the IWLA specifically addresses demurrage issues and the improper characterization of 3PL Warehouses. Section 2 of the Standard Contract Terms and Conditions for Merchandise Warehouses (Approved and promulgated by American Warehouse Association, October 1968; revised and promulgated by International Warehouse Logistics Association, January 1998 and November 2008) states in part:

SHIPMENTS TO AND FROM WAREHOUSE – Sec. 2

Depositor agrees that all Goods shipped to Warehouse shall identify Depositor on the bill of lading or other contract of carriage as the named consignee, in care of Warehouse, and shall not identify Warehouse as the consignee. If, in violation of this Contract, Goods are shipped to Warehouse as named consignee on the bill of lading or other contract of carriage, Depositor agrees to immediately notify carrier in writing, with copy of such notice to Warehouse, that Warehouse named as consignee is the "in care of party" only and has no beneficial title or interest in the Goods.

Each bill of lading should accurately reflect the de facto status of each party in relation to the other parties involved with the transaction. Notwithstanding, non-contractual parties such as 3PL Warehouses cannot be held liable for being improperly named. The railroads must establish best practices for correcting their procedure of misidentifying parties.

3) With the repeal of the requirement that carriers file publicly available tariffs, how can a warehouseman or similar non-owner receiver best be made aware of its status vis a vis demurrage liability? Does actual placement of a freight car on the track of the shipper or receiver constitute adequate notification to a shipper, consignee or agent that a demurrage



liability is being incurred? What about constructive placement (placement at an alternative point when the designated placement point is not available)?

RESPONSE: As outlined above, 3PL Warehouses should only be liable for demurrage when they explicitly agree with their customers to be contractually liable. 3PL Warehouses, like other businesses, realize that their service level may directly affect the cost and efficiency of their customers' businesses. It should be noted that due to the extensive variety of customers and products, 3PL Warehouse contracts will vary by customer on issues like how many cars they will accept, how long they are allowed to unload, indemnity for demurrage claims by railroads, limits on amount of demurrage per day/month, etc. There is also a wide variety of service capacities for 3PL Warehouses along the rail lines. Therefore, each 3PL Warehouse tailors their contract to their individual capabilities and their individual customer requirements. It is impractical and unfair to allow rail carriers to unilaterally, systematically, and without contract assess demurrage liability on this widely diverse industry.

Notwithstanding, 3PL Warehouse liability for demurrage *to its* customers must only be based on actual placement of a freight car on the track. Claims based on constructive placement are near impossible for 3PL Warehouse to confirm or deny based on the railroad's systems and documentation.

4) Describe how agency principles ought to apply to demurrage. Are warehousemen generally agents or non-agents, or are their circumstances too varied to permit generalizations? How can a rail carrier know whether a warehouseman or similar non-owner receiver of freight is acting as an agent or in some other capacity?



RESPONSE: In many instances, 3PL Warehouses are acting as agents for their customers when receiving goods. A rail carrier should know the status of the receiving party through its contract with its customer. Notwithstanding, the IWLA has developed a standard notice letter for 3PL Warehouses to use which gives notice to the carriers and states:

PLEASE BE ADVISED that XYZ Warehouse Company is a warehouse operator, providing warehousing services for the account of its customers at its warehouse facility located at _____ (the "Warehouse"). XYZ Warehouse Company is not the shipper or consignee of any shipments to or from the Warehouse and is not a party to or beneficiary of any transportation contract between the shipper or consignee and your company or any other carrier. Further, XYZ Warehouse Company has no beneficial interest in the goods being transported to or from the Warehouse by your company or any other carrier and has no contract with and has no liability or other responsibility to your company or any other carrier regarding freight charges, demurrage, detention or other charges relating to such goods.

In the event XYZ Warehouse Company's name appears as consignee on any bill of lading or other contract of carriage in relation to goods being delivered to the Warehouse, it is a mistake. XYZ Warehouse Company is only the "in care of party" and is not the consignee.

XYZ Warehouse Company assumes no liability for freight charges, demurrage, detention or other charges relating to the equipment or services provided to the shipper/consignee by your company or any other carrier, notwithstanding that XYZ Warehouse Company allows your company to place its equipment at the Warehouse for the purpose of loading or unloading.

The IWLA has recommended this letter be sent "certified mail return receipt requested."

Unfortunately, many of the railroads have refused to accept or acknowledgement the notice letter.

5) *Given the discussions in Hub City and Hall, should § 10743 be read as applicable to demurrage charges at all? The ICC said it was in Eastern Central, but it did so with little*



discussion. Would general agency principles apply to demurrage liability even if § 10743 were found inapplicable?

RESPONSE: *Hub City* and *Hall* make clear that § 10743 should not be read as applicable to demurrage charges. As those cases discuss, § 10743 applies to freight charges in a situation where the consignee pays the freight charges billed at the time of delivery and later receives a bill from the carrier for additional charges. This situation arose with some frequency when the filed-rate doctrine was still in effect and the carrier billed less than the ICC-prescribed rate at the time of delivery. This situation worked a particular hardship on consignees who served as sales agents for consignors, taking delivery of goods for the purpose of selling them and remitting the proceeds to the consignor, less the freight charges and the consignee's commission. Congress passed § 10743(a)(1) to protect those particular consignees from undercharge claims by carriers arising long after the consignee had set its sales price and reimbursed the consignor based on the freight charges billed at the time of delivery. Simultaneously, Congress prevented the carrier from charging less than the ICC-prescribed rates by empowering carriers to pursue their undercharge claims against the consignor or beneficial owner of the goods.

Section 10743 only applies to freight charges where the consignee is "otherwise liable" for those charges. 49 U.S.C. § 10743 (a)(1). It does not determine when a consignee is "otherwise liable." *Id.* Rather, § 10743(a)(1) leaves that determination to the common law and the agreement of the parties. *E.g., Consolidated Freightways Corporation of Delaware v. Admiral Corporation*, 442 F.2d 56, 61-62 (7th Cir. 1971).

Congress left the initial determination of a party's liability for freight charges to express contractual agreement or implication of law. [citation omitted] So long as payment of the full tariff charges may be *demande*d from some party, the anti-discrimination policy of [an earlier ICA provision similar to 49 U.S.C. § 13706] is satisfied. Congress did not



undertake to settle all issues of collection with the enactment of [that provision]. Nor did Congress intend to fashion a sword to insure collection in every instance and a shield to insulate the carrier from otherwise negligent or inequitable conduct.

Id. Accord, In re Roll Form Products, Inc., 662 F.2d 150, 153-154 (2nd Cir. 1981) (italics added) (interpreting 49 U.S.C. § 10744, a previous provision of the ICA similar to the Section; holding that the Act was not intended to insure collection by carriers of freight charges nor to impose absolute liability on consignees for freight charges); *Dependable Cartage and Transportation Company, Inc. v. Sovereign Oil Company*, 1985 WL 2873 *5 (N.D. Ill. 1985) (interpreting an ICA provision similar to 49 U.S.C. § 13706; holding that when the issue is who has responsibility for paying the transportation charges, then discrimination is not involved and the ICA has no application); *In re Penn-Dixie Steel Corporation*, 6 B.R. 817, 820 (Bankr. S.D.N.Y. 1980) (interpreting 49 U.S.C. § 10744; “Nothing in the ICA suggests that Congress intended to impose absolute liability upon a consignee for freight charges.”); and *Lyon Van Lines, Inc. v. Cole*, 512 P.2d 1108, 1111-1112 (Wash. App. 1973) (interpreting 49 U.S.C. § 323, an ICA provision similar to 49 U.S.C. § 13706; “. . . the Interstate Commerce Act does not place absolute liability upon a consignee of goods, and any contractual liability of the consignee, express or implied, must be determined on the facts of each particular case.”).

6) *If § 10743 is applicable, would the Groves analysis (finding that liability does not attach unless the receiver agrees to accept liability) apply to the underlying shipping rate as well as demurrage charges? If it did, how would such a ruling affect industry practice?*

RESPONSE: Section 10743 does not determine when a consignee is liable for freight charges or any other charges, as discussed above. Rather, basic contract law determines when a consignee is liable for those charges. Basic contract law requires a manifestation of mutual assent (a



“meeting of the minds”) before imposing a contractual obligation. *See, generally*, Restatement (Second) of Contracts § 17 (1981). The *Groves* analysis is nothing more than a reiteration of this basic contract law. It requires no reference to § 10743. It applies equally to all contractual obligations, including the obligation to pay freight charges and demurrage charges. Enforcing those obligations where they exist, which is to say where they have been assented to, is the only viable option because the alternative (finding that no assent is required to create a contractual obligation) is unworkable.

7) Because the warehouseman or other receiver can reap financial gain by taking on as many cars as possible (and sometimes holding them too long), or by serving as a storage facility when the ultimate receiver is not ready to accept a car, should liability be based on an unjust enrichment theory? The court rejected such an approach in Middle Atlantic, 353 F. Supp. at 1124, principally because it found no benefit to the warehouseman from holding rail cars? Is that finding valid?

RESPONSE: 3PL Warehouses reap absolutely no financial gain by holding rail cars. In fact, 3PL Warehouses only reap financial benefit by loading/unloading cars as expeditiously as possible, as the movement and storage of goods trigger their charges. The truth is more likely that if abuse is taking place it is on the part of the rail carrier. They can and do place cars whenever they want, provide zero notice of placement, count days over weekends as unloading days, provide no documentation that 3PL Warehouses have successfully “called out” a car as empty, and so on. Warehouses are at the mercy of rail carriers - not the other way around!

Brampton is the latest in a long line of decisions by various courts, the STB and the STB’s predecessor, the ICC, to reach that same conclusion. Many of those decisions, especially



the court decisions, are cited in the Appellee Brampton's Brief in Opposition to the Petition for Writ of Certiorari. See, Respondents' Brief at p. 3 and p. 4. See also, *Philadelphia Belt Line Railroad Co. v. Holt Hauling & Warehouse Systems, Inc.*, 57 Pa. D. & C.2d 700, 1972 WL 16010 (Pa.Com.Pl.). The IWLA agrees with the 11th Circuit's decision in *Brampton*.

Norfolk Southern Railway Company (Norfolk Southern) is repeating the same arguments in *Brampton* that other carriers have made without success in the past. Norfolk Southern cites its own tariff as authority for billing a 3PL Warehouse for demurrage. That is, Norfolk Southern drafted a tariff that purports to impose demurrage liability on a 3PL Warehouse, regardless of whether the 3PL Warehouse is a party to the transportation contract and regardless of fault. Norfolk Southern's tariff argument ignores the fact that 3PL Warehouses are not party to the transportation contract and, consequently, not bound by any tariff terms made part of that contract.

The ICC rejected this exact same tariff argument when it was made by motor carriers in the early 1960s. E.g., *Detention of Motor Vehicles – Middle Atlantic and New England Territory* (I.C.C. Decision No. 33434, Served December 19, 1962) (*Detention I*). The ICC instituted an investigation into the rules, regulations and practices related to detention charges by motor carriers, specifically detention charges "incident to the loading or unloading of truckload shipments." *Id.* at p. 593. As part of that investigation, the ICC considered tariff language that would have subjected warehouses and other 3PLs to liability for detention charges. *Id.* at p. 607. Specifically, the ICC considered tariff language that imposed liability for detention on "consignors" and "consignees" and then "define[d] consignor and consignee as parties from (to) whom the carrier receives (delivers) the shipment 'whether he be original consignor (ultimate



consignee), or warehouseman, or connecting air, motor, rail, or water carrier with which the carrier does not maintain joint through rates, or other person to whom the bill of lading is issued.” *Id.* at p. 607 (quoting the tariff language under consideration). The ICC circulated that language among interested parties and solicited their comments. Trade associations representing more than 1,000 carriers voiced their support for the language, while trade associations representing warehouses and individual 3PL Warehouses voiced their opposition. The ICC issued an order rejecting the tariff language that purported to make 3PL Warehouses liable for the payment of detention charges, reasoning as follows:

The question is whether such persons [warehouses and other 3PLs], who are not parties to the contract for transportation, can be subjected to liability for the payment of detention charges. . . . Their status [as non-parties to the transportation contract] cannot be changed by publishing tariff provisions which purport to make them consignors-consignees for the purpose of assessing charges in connection with the transportation of a particular shipment.

Id. at p. 607 to p. 608.

Carrier associations brought an action to set aside that ICC order. *Middle Atlantic Conference v. United States of America and Interstate Commerce Commission*, 353 F. Supp. 1109 (D.C.D.C. 1972) (*Middle Atlantic*). The IWLA’s predecessor, the American Warehousemen’s Association, and others intervened on the ICC’s behalf. *Middle Atlantic*, 353 F. Supp. at 1111, n. 1. A three-judge panel of the United States District Court for the District of Columbia affirmed the ICC order. The District Court succinctly described the carrier’s intent:

In short, the scheme of the tariff proposal is to make warehousemen, agents, etc., liable for detention charges by a unilateral redefinition of consignors and consignees to include persons who are neither consignors nor consignees.

Id. at 1112. The District Court “agree[d] with the ICC’s determination that the proposed tariff was unlawful insofar as it attempted to impose liability for demurrage charges upon an agent



who was not a party to the contract of transportation.” *Id.* at 1116. **The ICC’s reasoning in *Detention I* still applies today.**

Respectfully Submitted,

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TABLE OF AUTHORITIES

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Consolidated Freightways Corporation of Delaware v. Admiral Corporation, 442 F.2d 56, 61-62 (7th Cir. 1971).....8

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In re Penn-Dixie Steel Corporation, 67 B.R. 817, 820 (Bankr. S.D.N.Y. 1980).....9

In re Roll Form Products, Inc., 662 F.2d 150, 153-154 (2nd Cir. 1981)9

Lyon Van Lines, Inc. v. Cole, 512 P.2d 1108, 1111-1112 (Wash. App. 1973)9

Middle Atlantic Conference v. United States of America and Interstate Commerce Commission, 353 F. Supp. 1109 (D.C.D.C. 1972) 12

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Philadelphia Belt Line Railroad Co. v. Holt Hauling & Warehouse Systems, Inc., 57 Pa. D. & C.2d 700, 1972 WL 16010 (Pa.Com.Pl.)..... 11

Statutes

49 U.S.C. § 107438

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Restatement (Second) of Contracts § 17 (1981)..... 10

Exhibit 1

Westlaw.

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(Cite as: 586 F.3d 1273)

H

United States Court of Appeals,
Eleventh Circuit.
NORFOLK SOUTHERN RAILWAY COMPANY,
Plaintiff-Appellant,

v.

Billy GROVES, individually, d.b.a. Savannah Re-
Load, Savannah Re-Load, et al., Defendants,
Brampton Enterprises, LLC, d.b.a. Savannah Re-
Load, Defendant-Appellee.
No. 08-15418.

Nov. 2, 2009.

Background: Rail carrier sued warehouseman for demurrage accrued over six month period. Warehouseman denied liability for demurrage charges and, despite being named as consignee on bills of lading, maintained it was not party to shipping contracts. The United States District Court for the Southern District of Georgia, No. 07-00155-CV-4, William T. Moore, Jr., Chief Judge, 2008 WL 4298478, granted summary judgment in favor of warehouseman. Rail carrier appealed.

Holding: The Court of Appeals, Fay, Circuit Judge, held that freight re-loader could not, without notice, be made consignee by unilateral action of third party.

Affirmed.

West Headnotes

[1] Carriers 70 ⇌ 53

70 Carriers

70II Carriage of Goods

70II(B) Documents of Title and Contracts

70k50 Construction and Operation of Bill of Lading

70k53 k. As a contract. Most Cited Cases

"Bill of lading" is basic transportation contract

between shipper-consignor and carrier; its terms and conditions bind shipper and all connecting carriers. 49 U.S.C.A. § 80101 et seq.

[2] Carriers 70 ⇌ 100(1)

70 Carriers

70II Carriage of Goods

70II(E) Delay in Transportation or Delivery

70k100 Demurrage, and Liability of Consignee or Owner for Delay

70k100(1) k. Right of carrier to charge demurrage, and persons liable. Most Cited Cases Carriers have right to assess charges against parties to transportation contract for delay in releasing transportation equipment; motor carriers term such "delay" as detention while rail carriers refer to it as "demurrage."

[3] Carriers 70 ⇌ 100(1)

70 Carriers

70II Carriage of Goods

70II(E) Delay in Transportation or Delivery

70k100 Demurrage, and Liability of Consignee or Owner for Delay

70k100(1) k. Right of carrier to charge demurrage, and persons liable. Most Cited Cases Unlike maritime law, railroad carrier can collect demurrage even if shipping contract contains no provision to that effect.

[4] Carriers 70 ⇌ 100(1)

70 Carriers

70II Carriage of Goods

70II(E) Delay in Transportation or Delivery

70k100 Demurrage, and Liability of Consignee or Owner for Delay

70k100(1) k. Right of carrier to charge demurrage, and persons liable. Most Cited Cases Demurrage charges are properly assessed even if cause for delay is beyond party's control, unless carrier itself is responsible for delay.

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EXHIBIT

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[5] Carriers 70 ⇨100(1)

70 Carriers
70II Carriage of Goods
70II(E) Delay in Transportation or Delivery
70k100 Demurrage, and Liability of Consignee or Owner for Delay
70k100(1) k. Right of carrier to charge demurrage, and persons liable. Most Cited Cases
"Consignor," for purposes of liability for demurrage charges, is one who dispatches goods to another on consignment. 49 U.S.C.A. § 80101(2).

[6] Carriers 70 ⇨100(1)

70 Carriers
70II Carriage of Goods
70II(E) Delay in Transportation or Delivery
70k100 Demurrage, and Liability of Consignee or Owner for Delay
70k100(1) k. Right of carrier to charge demurrage, and persons liable. Most Cited Cases
"Consignment," for purposes of liability for demurrage charges, is quantity of goods delivered by that act, especially in a single shipment.

[7] Carriers 70 ⇨100(1)

70 Carriers
70II Carriage of Goods
70II(E) Delay in Transportation or Delivery
70k100 Demurrage, and Liability of Consignee or Owner for Delay
70k100(1) k. Right of carrier to charge demurrage, and persons liable. Most Cited Cases
"Consignee," for purposes of liability for demurrage charges, is one to whom goods are consigned. 49 U.S.C.A. § 80101(1).

[8] Federal Courts 170B ⇨776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial de novo. Most Cited Cases

Federal Courts 170B ⇨802

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)3 Presumptions
170Bk802 k. Summary judgment.
Most Cited Cases
Court of Appeals reviews district court's grant or denial of summary judgment *de novo*, considering all facts and reasonable inferences in light most favorable to nonmoving party.

[9] Carriers 70 ⇨100(1)

70 Carriers
70II Carriage of Goods
70II(E) Delay in Transportation or Delivery
70k100 Demurrage, and Liability of Consignee or Owner for Delay
70k100(1) k. Right of carrier to charge demurrage, and persons liable. Most Cited Cases
Demurrage is considered part of transportation charge and under tariff system is imposed as matter of law; however, before such transportation-related assessments such as detention charges can be imposed on party there must be some legal foundation for such liability outside mere fact of handling goods shipped.

[10] Carriers 70 ⇨194

70 Carriers
70II Carriage of Goods
70II(J) Charges
70k194 k. Persons liable for charges.
Most Cited Cases
Liability for freight charges may be imposed only against consignor, consignee, or owner of property, or others by statute, contract, or prevailing custom.

[11] Principal and Agent 308 ⇨136(1)

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k130 Liabilities Incurred

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308k136 Liabilities of Agent
308k136(1) k. In general. Most

Cited Cases

Agent for disclosed principal is not liable to third person for acts within the scope of agency.

[12] Carriers 70 ↪100(1)

70 Carriers

70II Carriage of Goods

70II(E) Delay in Transportation or Delivery

70k100 Demurrage, and Liability of Consignee or Owner for Delay

70k100(1) k. Right of carrier to charge demurrage, and persons liable. **Most Cited Cases**
Agent-consignee can avoid demurrage liability by notifying carrier of its agency status and providing carrier with name and address of shipment's beneficial owner prior to accepting delivery. 49 U.S.C.A. § 10743(a)(1).

[13] Carriers 70 ↪104

70 Carriers

70II Carriage of Goods

70II(E) Delay in Transportation or Delivery

70k101 Actions for Delay

70k104 k. Evidence. **Most Cited Cases**

Statute governing liability for payment of rates does not establish presumption of liability for demurrage charges; statute applies only to agents who are also consignees and further speaks only to non-liability in certain narrow situations, but in no way can be read to impose liability on agent who is not party to contract. 49 U.S.C.A. § 10743(a)(1).

[14] Contracts 95 ↪15

95 Contracts

95I Requisites and Validity

95I(B) Parties, Proposals, and Acceptance

95k15 k. Necessity of assent. **Most Cited Cases**

In order for contract to be binding and enforceable, there must be meeting of the minds on all essential terms and obligations of contract.

[15] Carriers 70 ↪194

70 Carriers

70II Carriage of Goods

70II(J) Charges

70k194 k. Persons liable for charges.

Most Cited Cases

Party must assent to being named as consignee on bill of lading to be held liable as such, or at the least, be given notice that it is being named as consignee in order that it might object or act accordingly.

[16] Carriers 70 ↪100(1)

70 Carriers

70II Carriage of Goods

70II(E) Delay in Transportation or Delivery

70k100 Demurrage, and Liability of Consignee or Owner for Delay

70k100(1) k. Right of carrier to charge demurrage, and persons liable. **Most Cited Cases**
Warehouseman that received freight at its facility, unloaded it from containers in which it arrived, reloaded it into appropriate containers for export, and forwarded it to various ports according to instructions received from freight forwarder was not liable to rail carrier for demurrage charges, even though it was named consignee on bills of lading for freight shipments at issue, where it did not agree to be so named and was not aware of its designation as such; freight reloader could not, without notice, be made consignee by unilateral action of a third party. 49 U.S.C.A. § 10743(a)(1).

*1274 Paul D. Keenan, Keenan, Cohen & Howard, PC, Jenkintown, PA, for Plaintiff-Appellant.

Jason Carl Pedigo, Ellis, Painter, Ratterree & Adams, LLP, Savannah, GA, for Defendants.

Appeal from the United States District Court for the Southern District of Georgia.

Before CARNES, FAY and ALARCÓN,^{FM} Circuit Judges.

586 F.3d 1273, 22 Fla. L. Weekly Fed. C 237
(Cite as: 586 F.3d 1273)

FN* Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting by designation.

*1275 FAY, Circuit Judge:

This appeal arises from a dispute between a rail carrier and a warehouseman regarding liability for demurrage, *i.e.*, penalties assessed for the undue detention of rail cars. Norfolk Southern Railway Company sued Brampton Enterprises, LLC d/b/a Savannah Re-Load for demurrage accrued over the six month period from March to August 2007. Savannah Re-Load denied liability for the demurrage charges and, despite being named as consignee on the bills of lading, maintained it was not a party to the shipping contracts. Norfolk Southern asserts that as the named consignee Savannah Re-Load became a party to the contracts by accepting the shipments. The district court granted summary judgment in favor of Savannah holding that a freight re-loader cannot, without notice, be made a consignee by the unilateral action of a third party. We affirm.

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Brampton Enterprises operates a warehouse business under the trade name Savannah Re-Load ("Savannah"). As a warehouseman, Savannah receives freight at its facility, unloads it from the containers in which it arrives, reloads it into appropriate containers for export, and forwards it to various ports according to instructions received from the freight forwarder. Savannah has no ownership interest in the freight it handles and is not a party to the transportation contracts. The freight forwarding companies make transportation arrangements without input from or notice to Savannah.

In late 2006 Galaxy Forwarding ("Galaxy") began sending freight to Savannah's facility via railcar delivered by Norfolk Southern Railway Company ("Norfolk"). According to Savannah owner William "Billy" Groves, Galaxy was aware of Savannah's operational capacity and controlled the amount of

freight it received. Galaxy merely informed Savannah when shipments were en route and provided it with instructions regarding the export of the shipment. Galaxy was the only freight forwarder to send Savannah freight via rail and arranged transportation for all the freight shipments at issue. These freight shipments originated from various domestic shippers and were being exported to overseas recipients by Galaxy. Savannah had no knowledge of the origins or final destinations of the freight it handled.

[1] Norfolk transported the rail freight to Savannah pursuant to bills of lading^{FN1} received from Galaxy. Before rail cars were delivered, Norfolk would notify Savannah that rail cars from certain shippers had arrived and were ready for delivery. Once Savannah approved the delivery, Norfolk would perform a "switch" by removing any empty rail cars and replacing them with new rail cars to unload. Norfolk would perform only one "switch" per day delivering as many as five cars at a time.

FN1. A bill of lading is "the basic transportation contract between the shipper-consignor and the carrier; its terms and conditions bind the shipper and all connecting carriers." *Southern Pac. Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 342, 102 S.Ct. 1815, 1820, 72 L.Ed.2d 114 (1982).

Beginning in March 2007, Galaxy began sending rail freight to Savannah at such a volume that demurrage began to accrue. Pursuant to Norfolk's tariff, a customer is allowed two days to unload freight without incurring demurrage. At the end of each month, a customer's total demurrage days are netted against total credits. Credits are calculated by multiplying the number of rail cars delivered during a particular month by two, which accounts for the two "free" days all customers are given to unload*1276 delivered rail cars. If total demurrage exceeds total credits, those days are charged at the daily rate published in Norfolk's tariff.

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[2][3][4] The right to assess detention or demurrage charges against parties to a transportation contract for delay in releasing transportation equipment is well established at common law. Motor carriers term such a delay as detention while rail carriers refer to it as demurrage. Prior to rail transport, demurrage was recognized in maritime law as the amount to be paid for delay in loading, unloading, or sailing beyond the time specified. Unlike maritime law, a railroad carrier can collect demurrage even if the shipping contract contains no provision to that effect. In the railroad setting, demurrage charges serve a twofold purpose: "One is to secure compensation for the use of the car and of the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention." *Turner, Dennis & Lowry Lumber Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 271 U.S. 259, 262, 46 S.Ct. 530, 531, 70 L.Ed. 934 (1926). As such, demurrage charges are properly assessed even if the cause for the delay is beyond the party's control, unless the carrier itself is responsible for the delay.

[5][6][7] While demurrage remains a matter of contract, railroads are now required by federal statute to assess demurrage charges subject to oversight by the Surface Transportation Board. Norfolk seeks demurrage charges against Savannah pursuant to the Interstate Commerce Commission Termination Act (ICCTA), requiring rail carriers to "compute demurrage charges, and establish rules related to those charges ..." 49 U.S.C. § 10746 (1995). Norfolk publishes the applicable demurrage rules and charges in Freight Tariff NS 6004-B, which states in relevant part that "[d]emurrage charges will be assessed against the consignor^{FN2} at origin or consignee^{FN3} at destination who will be responsible for payment." Tariff NS 6004-B, Item 850(5) (2000) (footnotes added). Thus, Norfolk is required by the ICCTA and the terms of its own tariff to assess demurrage charges against the shipment's consignee for any delay in unloading the rail cars at their destination.

FN2. A consignor is "[o]ne who dispatches goods to another on consignment." BLACK'S LAW DICTIONARY 327 (8th ed. 2004). A consignment is "[a] quantity of goods delivered by this act, esp. in a single shipment." BLACK'S LAW DICTIONARY 327 (8th ed. 2004).

FN3. A consignee is "[o]ne to whom goods are consigned." BLACK'S LAW DICTIONARY 327 (8th ed. 2004). The Federal Bills of Lading Act and Norfolk's Tariff define consignee in a consistent manner. See 49 U.S.C. § 80101(1) (1994) (" 'consignee' means the person named in a bill of lading as the person to whom the goods are to be delivered"); Tariff NS 6004-B, Item 200(6) (2000) ("The party to whom a shipment is consigned or the party entitled to receive the shipment").

Savannah was a named consignee on the bills of lading for the freight shipments at issue. However, many of these bills of lading also named an ultimate consignee and printed copies of the electronic bill of lading data submitted by Norfolk did not actually contain the word consignee. Savannah maintains that it did not consent to being named on the bills of lading and was never informed that any bill of lading identified it as a consignee. The record indicates that neither Galaxy, Norfolk, nor any other entity provided Savannah with the bills of lading for the freight it handled. Thus, Savannah was a named consignee on the bills of lading without notice of, or consent to, such designation.

In addition to the freight at issue in this appeal, Norfolk routinely delivered freight to Savannah's facility pursuant to bills of *1277 lading where Savannah was not the named consignee. The instant dispute arose when Norfolk began invoicing Savannah for demurrage on all shipments delivered to Savannah's facility irrespective of whether Savannah was the named consignee. Savannah refused to pay and in late 2007 Norfolk sued for demurrage on all shipments, without regard for who was named as

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consignee. After Savannah moved for summary judgment, Norfolk amended its complaint, to exclude demurrage for freight shipments where Savannah was not named as consignee. This amendment had the effect of reducing Norfolk's demand from \$133,080.00 to \$70,680.00.

In early 2008 Savannah moved for summary judgment on all claims arguing that it was not liable for demurrage because Norfolk could "only recover demurrage against a consignee or a party to the transportation contract." Savannah stated that "the issue before the Court is whether another's unilateral act of identifying 'Savannah Re-Load' as the consignee without [its] knowledge or permission is sufficient to make it a consignee and therefore liable for demurrage." Norfolk moved for partial summary judgment as to the issue of Savannah's liability for demurrage. Norfolk argued that Savannah was liable for demurrage because Savannah was identified as consignee on the bills of lading at issue, Savannah accepted delivery of the rail cars and the freight, and Savannah did not notify Norfolk of its agent status.

The district court granted Savannah's motion for summary judgment and denied Norfolk's motion for partial summary judgment, holding that Savannah was not liable for demurrage. The court stated that a bill of lading is essentially a contract and Savannah could not be made a party to that contract without its knowledge or consent. In sum, the court held that Savannah "cannot be made a consignee by the unilateral action of a third party, particularly where Savannah Re-Load was not given notice of the unilateral designation in the bills of lading." Norfolk appeals the district court's denial of its motion for partial summary judgment and grant of summary judgment to Savannah.

II.

[8] We review a district court's grant or denial of summary judgment *de novo*, considering all the facts and reasonable inferences in the light most fa-

vorable to the nonmoving party. See *Owner-Operator Indep. Drivers Ass'n, Inc. v. Landstar Sys. Inc.*, 541 F.3d 1278, 1287 (11th Cir.2008). Under Fed.R.Civ.P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323, 106 S.Ct. at 2553 (internal quotations omitted). If the movant succeeds in demonstrating the absence of a material issue of fact, the burden shifts to the non-movant to show the existence of a genuine issue of fact. See *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1116 (11th Cir.1993).

A. Demurrage liability

[9][10] We begin our analysis by examining the basis for the district court's *1278 decision, and in doing so, review several fundamental principles of law that define demurrage liability. First, demurrage is considered part of the transportation charge and under the tariff system is imposed as a matter of law. However, "[b]efore such transportation-related assessments such as detention charges can be imposed on a party ... there must be some legal foundation for such liability outside the mere fact of handling the goods shipped." *Middle Atl. Conference v. United States*, 353 F.Supp. 1109, 1118 (D.D.C.1972) (three-judge panel).^{FN4} In *Evans Prods. Co. v. Interstate Commerce Comm'n*, the Seventh Circuit held that "[l]iability for freight charges may be imposed only against a consignor, consignee, or owner of the property, or others by statute, contract, or prevailing custom." 729 F.2d

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1107, 1113 (7th Cir.1984) (citations omitted); see also *S. Pac. Transp. Co. v. Matson Navigation Co.*, 383 F.Supp. 154, 156 (N.D.Cal.1974) ("The obligation to pay demurrage arises either out of contract, statute or prevailing custom"); *Middle Atl.*, 353 F.Supp. at 1118 (liability for demurrage "must be founded either on contract, statute or prevailing custom"). Norfolk has not offered any evidence of prevailing industry custom or applicable statute that would hold non-parties to a shipping contract liable for demurrage. Furthermore, it is undisputed that Savannah is neither consignor nor owner of the freight. Thus, Savannah is liable for demurrage only if it were the consignee or contractually assumed responsibility for the charges.

FN4. We note that research has disclosed very few opinions by federal circuit courts dealing with the narrow issue presented in this case. Thus, we have cited those authorities that are available.

A freight handler such as Savannah is free to contractually assume liability for demurrage charges and "this is sometimes done through average demurrage agreements to promote their own business and in some instances to obtain the benefits of lower detention costs for the benefit of their customers." *Middle Atl.*, 353 F.Supp. at 1122. However, in the instant case, there is no evidence to suggest that Savannah independently contracted with either Norfolk or Galaxy regarding demurrage charges. This leaves us only with the question of Savannah's consignee status to determine demurrage liability.

As mentioned previously, the bill of lading is the basic transportation contract between the shipper-consignor and the carrier. Thus, as an original party to the shipping contract, a consignor is clearly liable for demurrage. However, "a consignee's liability is quasi-contractual, and arises by operation of law when the consignee accepts delivery of the goods ..." *Consol. Rail Corp. v. Com., Pa. Liquor Control Bd.*, 90 Pa.Cmwlth. 595, 496 A.2d 422, 424 (1985). See also *Pittsburgh v. Fink*, 250 U.S.

577, 581, 40 S.Ct. 27, 63 L.Ed. 1151 (1919) ("The weight of authority seems to be that the consignee is prima facie liable for the payment of the freight charges when he accepts the goods from the carrier"). By accepting delivery of a shipment, the consignee's conduct assumes a quasi-contractual significance by virtue of the transportation contract, which identifies the parties and assigns responsibility for particular charges. The contract implied from the acceptance of a shipment extends no further than the conditions upon which its delivery is made dependant. Unless the bill of lading provides to the contrary, the consignor remains primarily liable for the freight charges and pursuant to the carrier's tariff, the consignee becomes liable for demurrage charges at the freight's destination. Thus, only an original party to the rail transportation *1279 contract, or a consignee by virtue of acceptance of the goods, may be liable for demurrage. As a district court in our circuit put it, "all the reported opinions agree that only a party to the rail transportation contract may be liable for demurrage." *CSX Transp., Inc. v. City of Pensacola, Fla.*, 936 F.Supp. 880, 884 (N.D.Fla.1995); see also *Union Pac. R.R. Co. v. Ametek, Inc.*, 104 F.3d 558 (3d Cir.1997) (holding demurrage could not be assessed against a warehouse that was not a consignee or other party to the transportation contract); *Matson*, 383 F.Supp. at 156 (the obligation to pay demurrage "arises out of the contractual relationship and may only be imputed to parties to the contract"); *Middle Atl.*, 353 F.Supp. 1109 (finding a carrier's proposed tariff unlawful to the extent that it attempted to impose liability for demurrage charges on non-parties to the transportation contract); *Missouri, K. & T. Ry. Co. of Texas v. Capital Compress Co.*, 50 Tex.Civ.App. 572, 110 S.W. 1014, 1016 (1908) (holding a cotton compress company not liable to carrier for demurrage because "[t]he findings of fact fail to show any contractual relation between them in reference to the shipment of the cotton").

[11][12] There are exceptions to a consignee's demurrage liability. A consignee may avoid demur-

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rage liability by notifying the carrier of its agency status prior to accepting delivery of the shipment. "The law is well settled that an agent for a disclosed principal is not liable to a third person for acts within the scope of agency." *Middle Atl.*, 353 F.Supp. at 1120-21; See also *Whitney v. Wyman*, 101 U.S. 392, 396, 25 L.Ed. 1050 (1879) ("Where the principal is disclosed, and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so"). The ICCTA recognizes the common law rule of agency and provides in relevant part:

When the shipper or consignor instructs the rail carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates that may be found to be due after delivery if the consignee gives written notice to the delivering carrier before delivery of the property-

(A) of the agency and absence of beneficial title; and

(B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

49 U.S.C. § 10743(a)(1) (1995). Thus, an agent-consignee can avoid demurrage liability by notifying the carrier of its agency status and providing the carrier with the name and address of the shipment's beneficial owner prior to accepting delivery.

Thus far our analysis has surveyed the undisputed aspects of demurrage liability. The parties agree that an entity must be a party to the transportation contract to be liable for demurrage charges, that a consignee becomes a party to the transportation contract upon accepting the freight consigned to it, and that a consignee may avoid demurrage liability by disclosing its agency status prior to accepting

delivery of the shipment. We now turn to the key question of whether Savannah was a consignee in the context of this case.

B. A consignee by any other name ...

The issue before the court is whether Savannah was a consignee of the freight delivered by Norfolk. Norfolk contends that Savannah was a consignee because it was identified as such on the bills of lading and accepted delivery of the shipments. *1280 Savannah argues that it cannot be made a consignee merely because a third party unilaterally listed it as such without its knowledge or consent. Both the Seventh and Third Circuits have addressed this issue in cases involving similar fact patterns. See *Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813 (7th Cir.2003); *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247 (3d Cir.2007), *cert. denied*, --- U.S. ---, 128 S.Ct. 1240, 170 L.Ed.2d 65 (2008). The Seventh and Third Circuits reached differing conclusions on this issue resulting in a conflict of authority among the two circuits. See *South Tec*, 337 F.3d at 821; *Novolog*, 502 F.3d at 262.

In *South Tec*, the Seventh Circuit reasoned that the preliminary issue was whether the defendant warehouseman was a consignee. Although the case was remanded to the district court for determination of the warehouseman's status, the Seventh Circuit stated that "being listed by third parties as a consignee on some bills of lading is not alone enough to make [a warehouseman] a legal consignee liable for demurrage charges ..." *South Tec*, 337 F.3d at 821.

Like *South Tec*, the defendant in *Novolog*, who was named as consignee without its authorization, argued that "the shipper's or carrier's unilateral decision to designate [it] as the consignee, without [it]'s permission and where [it] is not the ultimate consignee of the freight, cannot establish its status as a consignee for purposes of demurrage liability under the statute or otherwise." *Novolog*, 502 F.3d

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at 257. The Third Circuit disagreed for three reasons. *See id.* First, because “nothing in the statutory language [of section 10743(a)(1)] suggests that it intends to restrict the term ‘consignee’ to the ultimate consignee of the freight or use it to mean anything other than the person to whom the bill of lading authorized delivery and who accepts that delivery.” *Id.* Second, because “to hold that the documented designation of an entity as a consignee and that entity’s acceptance of the freight is insufficient to hold it presumptively liable for demurrage charges would frustrate the plain intent of the statute, which is to establish clear, easily enforceable rules for liability.” *Id.* Third, because it would be equitable to treat the named consignee as presumptively liable, as under the statutory scheme “the named consignee can avoid liability in two ways: first, by refusing the freight ... and second, by providing the carrier timely written notice of agency under Section 10743(a)(1), if appropriate.” *Id.* at 259.

The *Novolog* court declined to follow the Seventh Circuit’s conclusion in *South Tec* and held that “an entity named on a bill of lading as the sole consignee, without any designations clearly indicating any other role, is presumptively liable for demurrage fees on the shipment to which that bill of lading refers.” *Id.* at 262. A party may rebut that presumption by showing that it never accepted delivery of the shipment, or that it was acting as an agent and followed the notification provisions of 49 U.S.C. § 10743(a)(1). *See id.* at 250, 259. Ultimately, the *Novolog* court remanded the case because “the factual record was not sufficiently developed ... [t]o determine what the bills of lading showed.” *Id.* at 250.

Norfolk relies almost exclusively on the Third Circuit’s decision in *Novolog* and argues that as the named consignee on the bills of lading, Savannah was required to either refuse delivery of the shipments or comply with the agency notification requirements of the ICCTA to avoid demurrage liability. However, Norfolk incorrectly assumes that

Savannah is the consignee for the shipments at issue simply because it is listed as such on the *1281 bills of lading. Norfolk has made no effort to establish Savannah’s status as a consignee through either interrogatories or deposition testimony. In fact, Savannah’s status as a consignee was neither alleged nor admitted in the pleadings.

[13] Norfolk further argues that section 10743(a)(1) establishes a presumption of liability for demurrage charges. However, section 10743(a)(1) “applies only to agents who are also consignees, and not to agents who are not consignees.” *South Tec*, 337 F.3d at 817. Furthermore, that section “speaks only to the ‘nonliability’ in certain narrow situations ... but in no way can be read to impose liability on an agent not a party to the contract.” *Middle Atl.*, 353 F.Supp. at 1120. If we were to accept Norfolk’s assertion that section 10743(a)(1) establishes a presumption of liability, then we would also have to accept that merely naming an entity as consignee on a bill of lading creates a presumption of that status. We are unwilling to accept either proposition and agree with the district court that “the *Novolog* rule of presumptive liability cannot function in a situation where the receiver of freight is not given notice that it has been listed as a consignee by third parties.”

Norfolk maintains that Savannah had either actual or constructive knowledge of its designation as consignee on the bills of lading. Yet, Norfolk has failed to present any evidence that Savannah was informed of its consignee designation prior to delivery. Thus, no evidence of actual knowledge exists in the record. Norfolk asks: “if Savannah is neither the consignee nor a disclosed agent of a consignee, how or why is Savannah accepting delivery of the freight?” This question implies that Savannah should have known it was the named consignee because freight shipments may only be delivered to and accepted by the consignee. However, we find this argument inconsistent with the record, which indicates that Norfolk made numerous deliveries to Savannah where it was not the named consignee.

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Norfolk later amended its complaint to exclude these shipments from its claim for demurrage charges. Savannah cannot be expected to either refuse delivery or notify Norfolk of its agency status when it has no knowledge of which shipments, if any, it has been designated as consignee.

Norfolk emphasizes that it is "well-established and oft-repeated" that a "consignee becomes a party to the contract, and is therefore bound by it, upon accepting the freight" *Novolog*, 502 F.3d at 254. However, this does not answer the key question: how does an entity become a consignee in the first place?

[14][15] As previously defined, a consignee is the party designated to receive a shipment of goods. But, consignee status is more than a mere designation. The term takes on a legal significance due to the quasi-contractual relationship that arises between the consignee and the carrier. "Although a consignee's liability may rest upon quasi-contract, a party's status as consignee is a matter of contract and must be established as such." *Consol. Rail Corp. v. Com., Pa. Liquor Control Bd.*, 90 Pa.Cmwlth. 595, 496 A.2d 422, 424 (1985). Like any contractual relationship, there must be a meeting of the minds between the parties. This Circuit has previously recognized that "it is a fundamental principle of contracts that in order for a contract to be binding and enforceable, there must be a meeting of the minds on all essential terms and obligations of the contract." *Browning v. Peyton*, 918 F.2d 1516, 1521 (11th Cir.1990); *see also, e.g., REST (SECOND) OF CONTRACTS* § 17(1) (1981) ("the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration"). Furthermore, it is a tenet*1282 of contract law that "a third-party cannot be bound by a contract to which it was not a party." *Miles v. Naval Aviation Museum Found., Inc.*, 289 F.3d 715, 720 (11th Cir.2002); *see also E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002) ("It goes without saying that a contract can-

not bind a nonparty."); *Union Pac. R.R. Co. v. Carry Transit, Inc.*, No. 3:04-CV-1095B, 2005 U.S. Dist. LEXIS 45568, at *13 (N.D.Tex. Oct. 27, 2005) ("It is a fundamental tenet of contract law that parties to a contract cannot bind a non-party."). Thus, a party must assent to being named as a consignee on the bill of lading to be held liable as such, or at the least, be given notice that it is being named as a consignee in order that it might object or act accordingly.

[16] Given these legal principles, we agree with the district court's holding that Savannah was not a consignee, and thus not liable for demurrage charges. Savannah did not agree to be named as consignee on the bills of lading between Norfolk and the various shippers, and was not aware of its designation as such. Savannah cannot be made a party to shipping contracts without its consent or notice of such, and thus cannot be liable to Norfolk for demurrage.

Not only is this approach in keeping with the legal principles outlined above, it also has the greatest support in the case law. *See Matson*, 383 F.Supp. at 157 (reserving the question of whether a consignee who has played an active role in the railroad transportation contract or has an interest in or control over the goods may be liable for the demurrage, but stating: "[W]here, as here, a connecting carrier-consignee is merely named in the railroad bill of lading without either more involvement on its part, or some culpability for the delay, it cannot be held liable to the railroad for demurrage. To hold otherwise on these facts would be to place a connecting carrier's liability totally within the shipper's control, a result the Court cannot sanction."); *W. Maryland Ry. Co. v. S. African Marine Corp.*, No. 86 CIV 2059, 1987 WL 16153, at *4 (S.D.N.Y. Aug. 13, 1987) ("[W]e decline to hold, as plaintiff urges, that a connecting ocean carrier is liable for rail demurrage charges as a matter of law merely by virtue of being named by the shipper as the consignee in the rail bills of lading."); *Carry Transit, Inc.*, 2005 U.S. Dist. LEXIS 45568, at *14 (shipper's unilateral de-

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cision to list defendant as consignee on bills of lading without its consent did not transform defendant into an actual consignee liable for demurrage); *Capital Compress Co.*, 110 S.W. at 1016 (entity not liable for demurrage where mistakenly listed as consignee on bill of lading, because there was no contractual relationship between that entity and the carrier); *CSX Transp. v. Pensacola*, 936 F.Supp. at 884 (stating in dicta that “[t]he unilateral action of one party in labeling an intermediary as a consignee does not render the putative consignee liable for demurrage” and indicating that an agreement to be contractually bound is key to demurrage liability); *Evans Prods.*, 729 F.2d at 1113 (“No liability [for freight charges] exists merely on account of being named in the bill of lading”).

III.

For the foregoing reasons, the summary judgment of the district court is,

AFFIRMED.

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END OF DOCUMENT

Westlaw

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C

Effective:[See Text Amendments]

United States Code Annotated Currentness
 Title 49. Transportation (Refs & Annos)
 Subtitle IV. Interstate Transportation (Refs & Annos)
 Part A. Rail (Refs & Annos)
 Chapter 107. Rates (Refs & Annos)
 Subchapter III. Limitations
 → § 10746. Demurrage charges

A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to--

(1) freight car use and distribution; and

(2) maintenance of an adequate supply of freight cars to be available for transportation of property.

CREDIT(S)

(Added Pub.L. 104-88, Title 1, § 102(a), Dec. 29, 1995, 109 Stat. 821.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1995 Acts. House Report No. 104-311 and House Conference Report No. 104-422, see 1995 U.S. Code Cong. and Adm. News, p. 793.

Effective and Applicability Provisions

1995 Acts. Section effective Jan. 1, 1996, except as otherwise provided in Pub.L. 104-88, see section 2 of Pub.L. 104-88, set out as a note under section 701 of this title.

Prior Provisions

Provisions similar to those in this section were contained in section 10750 of this title prior to the general

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amendment of this subtitle by Pub.L. 104-88, § 102(a).

A prior section 10746, Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1393, related to transportation of commodities manufactured or produced by rail carrier, prior to the general amendment of this subtitle by Pub.L. 104-88, § 102(a).

LIBRARY REFERENCES

American Digest System

Carriers ↪ 26 to 31.

Key Number System Topic No. 70.

Corpus Juris Secundum

CJS Carriers § 144, Demurrage Charges.

RESEARCH REFERENCES

Encyclopedias

Am. Jur. 2d Carriers § 234, Penalties; State and Federal Powers.

Treatises and Practice Aids

West's Federal Administrative Practice § 5378, Substantive Responsibilities--Rail.

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1. Demurrage generally

Railroad's imposition of storage and demurrage charges for empty private freight cars remaining on railroad's tracks beyond a base "free time" period did not violate section of Interstate Commerce Commission Termination Act (ICCTA) governing demurrage charges, on alleged basis that charges did not provide shippers with adequate

relief from bunching delays caused by railroad's erratic service; railroad's straight private car storage program allowed for limited relief from bunching resulting from railroad's act or neglect, railroad's average demurrage plan did not offer any error relief in accordance with longstanding practice, railroad was not required to provide error relief or allow shippers to choose between straight or average plans, and there were no specific claims of bunching. *North America Freight Car Ass'n v. Surface Transp. Bd.*, C.A.D.C.2008, 529 F.3d 1166, 381 U.S.App.D.C. 462. Carriers ⇨ 100(1); Carriers ⇨ 191

"Demurrage" is a daily rate charged by railroad to consignee on each railroad car which consignee fails to unload within a certain time after car has been either actually or constructively placed by railroad at consignee's disposal for unloading. *Illinois Cent. R. Co. v. Ready-Mix Concrete, Inc.*, E.D.La.1971, 323 F.Supp. 609. Carriers ⇨ 100(1)

2. Line haul rate charges distinguished

Demurrage charges are collectible together with line haul freight charges, but the two are separate items, and each has a separate rate and serves a different purpose. *Pennsylvania R. Co. v. Moore-McCormack Lines, Inc.*, S.D.N.Y.1965, 246 F.Supp. 143, affirmed 370 F.2d 430. Carriers ⇨ 100(1)

3. Computation

Demurrage is computed to include two elements—compensation for use of equipment and a penalty designed to prevent undue detention—but carrier's recovery could not be limited to value of actual loss of use of equipment where tariff provided otherwise. *Pennsylvania R. Co. v. Moore-McCormack Lines, Inc.*, S.D.N.Y.1965, 246 F.Supp. 143, affirmed 370 F.2d 430. Carriers ⇨ 100(1)

4. Fault

The assessment of demurrage charges in no way depends upon finding of shipper or consignee fault. *Union Pac. R. Co. v. U. S.*, Ct.Cl.1974, 490 F.2d 1385, 203 Ct.Cl. 368. Carriers ⇨ 100(1)

It was immaterial to carrier's right to recover demurrage that consignee's inability to receive, which relieved carrier of its duty to unload before demurrage charges could accrue, was not of consignee's making. *Pennsylvania R. Co. v. Moore-McCormack Lines, Inc.*, S.D.N.Y.1965, 246 F.Supp. 143; affirmed 370 F.2d 430. Carriers ⇨ 100(1)

In order for a liability for demurrage to exist, the failure to load or unload the cars within the free time must be the fault of the shipper or consignee; and, conversely, demurrage cannot be charged where such failure was due to the fault of the carrier. *St. Louis, Southwestern Ry. Co. v. Mays*, E.D.Ark.1959, 177 F.Supp. 182. Carriers ⇨ 100(1)

5. Compromise or settlement

Where demurrage charges are prescribed by a tariff and a liability for such charges accrues, the carrier is under a duty to collect and the consignee is under a duty to pay and, under such circumstances, the carrier and consignee have no choice and payment of demurrage is not a legitimate subject for compromise or settlement between them. *City of New Orleans By and Through Public Belt R.R. Commission v. Southern Scrap Material Co., Ltd.*, E.D.La.1980, 491 F.Supp. 46. Carriers ⇨ 100(1)

Where demurrage charges are prescribed by tariff and where a liability for such charges accrues, the carrier is under a duty to collect and the shipper or consignee is under a duty to pay the same; they have no choice in the matter, and it is not a legitimate subject for compromise or settlement between them. *St. Louis, Southwestern Ry. Co. v. Mays*, E.D.Ark.1959, 177 F.Supp. 182. Carriers ⇨ 100(1); *Compromise And Settlement* ⇨ 3

6. Contracts or stipulations

By reason of public policy requiring rates charged to be in accord with established tariffs, stipulation for demurrage charge inconsistent with prevailing tariffs would not be enforceable. *Furniture Forwarders of St. Louis, Inc. v. Chicago, R. I. & P. R. Co.*, C.A.8 (Mo.) 1968, 393 F.2d 537. Carriers ⇨ 100(1)

Railroad and shipper have no freedom of contract to vary or modify demurrage tariff as the parties might desire. *Chicago, B. & Q. R. Co. v. Edward Hines Lumber Co.*, N.D.Ill.1970, 320 F.Supp. 194. Carriers ⇨ 32(2.3)

7. Defenses

Consignee had actual knowledge that demurrage charges were accruing while it was in possession of consigned railroad cars and thus, in railroad's action to recover such charges, its claim that railroad failed to mitigate its damages by improperly delaying in informing consignee of accruing demurrage was unavailing. *Illinois Cent. Gulf R. Co. v. Southern Rock, Inc.*, C.A.5 (Miss.) 1981, 644 F.2d 1138. Damages ⇨ 62(1)

Impossibility of performance and other defenses grounded in the law of contract are not available as defenses to liability for demurrage. *City of New Orleans By and Through Public Belt R.R. Commission v. Southern Scrap Material Co., Ltd.*, E.D.La.1980, 491 F.Supp. 46. Carriers ⇨ 100(1)

Where demurrage charges were assessed against consignee by railroad under provisions of tariff which provided, inter alia, that no extension of free time would be allowed unless claim stating conditions which prevented loading or unloading within free time was presented in writing to railroad within 30 days after date on which demurrage bill was rendered, and it was undisputed that consignee failed to comply with such provision, consignee was precluded from asserting its weather interference defense since the filing of such claim was a condition precedent to a consignee obtaining relief under the adverse weather provision or rule; no compromise or settlement is permitted. *Colorado & S. Ry. Co. v. Southwestern Roofing & Sheet Metal Co.*, W.D.Okla.1974, 374 F.Supp. 24. Carriers ⇨ 100(1); *Compromise And Settlement* ⇨ 3

Snowstorm of sudden and unprecedented severity was an act of God which excused shipper from liability for demurrage which accrued as a consequence of the storm when it failed to return railroad cars to railroad within

"free time" required by demurrage tariff. *Chicago, B. & Q. R. Co. v. Edward Hines Lumber Co.*, N.D.Ill.1970, 320 F.Supp. 194. Carriers ⇌ 100(1)

In suit by railroad seeking recovery of demurrages which accrued on cars consigned to defendant, defenses of estoppel and waiver were not available to defendant with respect to claimed reductions in demurrages due to delays in unloading caused by rain, bunching of cars by railroad and run-arounds within meaning of freight tariff. *Illinois Cent. Gulf R. R. v. Stevens Ready-Mix Concrete, Inc.*, La.App. 1 Cir.1980, 381 So.2d 840, writ refused 384 So.2d 800. Carriers ⇌ 101.1

8. Review

Given consistent policy of Commission [now Board] to enforce average agreements for assessment of demurrage charges by railroads, issue on judicial review was whether decision of Commission to deviate from that policy was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. *Illinois Cent. Gulf R. Co. v. I.C.C.*, C.A.7 1983, 702 F.2d 111. Commerce ⇌ 167; Commerce ⇌ 169

9. Particular cases liability found

Railroad, which shipped grain belonging to the Commodity Credit Corporation to Denver, Colorado, for inspection, was entitled to recover from CCC unpaid demurrage charges on carloads of wheat, which, because of congestion at Denver inspection yard, were held short of the Denver terminal area and overstayed the "free time" allotted by tariff for inspection purposes. *Union Pac. R. Co. v. U.S.*, Ct.Cl.1974, 490 F.2d 1385, 203 Ct.Cl. 368. Carriers ⇌ 100(1)

Where railroad was prevented from delivering numerous carloads of material to consignee because of an accident which caused structural damage to a bridge and prevented any rail crossing and where neither the railroad nor the consignee caused, contributed to or was responsible for the damage to the bridge and the railroad complied with the provisions of the applicable tariff when it forwarded to the consignee various constructive placement notices, all of which were received by the consignee, the consignee was liable to pay demurrage. *City of New Orleans By and Through Public Belt R.R. Commission v. Southern Scrap Material Co., Ltd.*, E.D.La.1980, 491 F.Supp. 46. Carriers ⇌ 100(1)

10. Particular cases liability not found

Demurrage cannot be charged where cars are kept upon the property of shipper for convenience of carrier until they are appropriated to the use of shipper. *Chicago & N. W. Ry. Co. v. Union Packing Co.*, D.C.Neb.1971, 326 F.Supp. 1304. Carriers ⇌ 100(1)

49 U.S.C.A. § 10746, 49 USCA § 10746

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

49 U.S.C.A. § 10746

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Standard Contract Terms and Conditions for Merchandise Warehouses

(Approved and promulgated by American Warehouse Association, October 1968; revised and promulgated by International Warehouse Logistics Association, January 1998 and November 2008)

ACCEPTANCE - Sec. 1

(a) This Contract, including accessorial charges that may be attached hereto, must be accepted within 30 days from the proposal date by signature of Depositor. In the absence of written acceptance, the act of tendering goods described herein for storage or other services by Warehouse within 30 days from the proposal date shall constitute acceptance by Depositor. Depositor has had the opportunity to review and inspect the warehouse facility ("Facility").

(b) In the event that goods tendered for storage or other services do not conform to the description contained herein, or conforming goods are tendered after 30 days from the proposal date without prior written acceptance by Depositor as provided in paragraph (a) of this section, Warehouse may refuse to accept such goods. If Warehouse accepts such goods, Depositor agrees to rates and charges as may be assigned and invoiced by Warehouse and to all terms of this Contract.

(c) Any goods accepted by Warehouse shall constitute Goods under this Contract.

(d) This Contract may be canceled by either party upon 30 days written notice and is canceled if no storage or other services are performed under this Contract for a period of 180 days.

SHIPMENTS TO AND FROM WAREHOUSE - Sec. 2

Depositor agrees that all Goods shipped to Warehouse shall identify Depositor on the bill of lading or other contract of carriage as the named consignee, in care of Warehouse, and shall not identify Warehouse as the consignee. If, in violation of this Contract, Goods are shipped to Warehouse as named consignee on the bill of lading or other contract of carriage, Depositor agrees to immediately notify carrier in writing, with copy of such notice to Warehouse, that Warehouse named as consignee is the "in care of party" only and has no beneficial title or interest in the Goods. Furthermore, Warehouse shall have the right to refuse such Goods and shall not be liable for any loss, misassignment, or damage of any nature to, or related to, such Goods. Whether Warehouse accepts or refuses Goods shipped in violation of this Section 2, Depositor agrees to indemnify and hold Warehouse harmless from all claims for transportation, storage, handling and other charges relating to such Goods, including undercharges, rail demurrage, truck/intermodal detention and other charges of any nature whatsoever.

TENDER OF GOODS - Sec. 3

All Goods shall be delivered at the Facility properly marked and packaged for storage and handling. The Depositor shall furnish at or prior to such delivery, a manifest showing marks, brands, or sizes to be kept and accounted for separately, and the class of storage and other services desired.

STORAGE PERIOD AND CHARGES - Sec. 4

(a) Unless otherwise agreed in writing, all charges for storage are per package or other agreed unit per month.

(b) The storage month begins on the date that Warehouse accepts care, custody and control of the Goods, regardless of unloading date or date of issue of warehouse receipt.

(c) Except as provided in paragraph (d) of this section, a full month's storage charge will apply on all Goods received between the first and the 15th, inclusive, of a calendar month; one-half month's storage charge will apply on all Goods received between the 16th and the last day, inclusive, of a calendar month, and a full month's storage charge will apply to all Goods in storage on the first day of the next and succeeding calendar months. All storage charges are due and payable on the first day of storage for the initial month and thereafter on the first day of the calendar month.

(d) When mutually agreed in writing by the Warehouse and the Depositor, a storage month shall extend from a date in one calendar month to, but not including, the same date of the next and all succeeding months. All storage charges are due and payable on the first day of the storage month.

TRANSFER, TERMINATION OF STORAGE, REMOVAL OF GOODS - Sec. 5

(a) Instructions to transfer Goods on the books of the Warehouse are not effective until delivered to and accepted by Warehouse, and all charges up to the time transfer is made are chargeable to the Depositor. If a transfer involves rehandling the Goods, such will be subject to a charge. When Goods in storage are transferred from one party to another through issuance of a new warehouse receipt, a new storage date is established on the date of transfer.

(b) The Warehouse reserves the right to move, at its expense, 14 days after notice is sent by certified mail or overnight delivery to the Depositor, any Goods in storage from the Facility in which they may be stored to any other of Warehouse's Facilities. Warehouse will store the Goods at, and may without notice move the Goods within and between, any one or more of the warehouse buildings which comprise the Facility identified on the front of this Contract.

(c) The Warehouse may, upon written notice of not less than 30 days to the Depositor and any other person known by the Warehouse to claim an interest in the Goods, require the removal of any Goods. Such notice shall be given to the last known place of business of the person to be notified. If Goods are not removed before the end of the notice period, the Warehouse may sell them in accordance with applicable law.

(d) If Warehouse in good faith believes that the Goods are about to deteriorate or decline in value to less than the amount of Warehouse's lien before the end of the 30-day notice period referred to in Section 5(c), the Warehouse may specify in the notification any reasonable shorter time for removal of the Goods and if the Goods are not removed, may sell them at public sale held one week after a single advertisement or posting as provided by law.

(e) If as a result of a quality or condition of the Goods of which the Warehouse had no notice at the time of deposit the Goods are a hazard to other property or to the Facility or to persons, the Warehouse may sell the Goods at public or private sale without advertisement on reasonable notification to all persons known to claim an interest in the Goods. If the Warehouse after a reasonable effort is unable to sell the Goods it may dispose of them in any lawful manner and shall incur no liability by reason of such disposition. Pending such disposition, sale or return of

the Goods, the Warehouse may remove the Goods from the Facility and shall incur no liability by reason of such removal.

HANDLING - Sec. 6

(a) The handling charge covers the ordinary labor involved in receiving Goods at warehouse door, placing Goods in storage, and returning Goods to warehouse door. Handling charges are due and payable on receipt of Goods.

(b) Unless otherwise agreed in writing, labor for unloading and loading Goods will be subject to a charge. Additional expenses incurred by the Warehouse in receiving and handling damaged Goods, and additional expense in unloading from or loading into cars or other vehicles not at warehouse door will be charged to the Depositor.

(c) Labor and materials used in loading rail cars or other vehicles are chargeable to the Depositor.

(d) When Goods are ordered out in quantities less than in which received, the Warehouse may make an additional charge for each order or each item of an order.

(e) The Warehouse shall not be liable for any demurrage or detention, any delays in unloading inbound cars, trailers or other containers, or any delays in obtaining and loading cars, trailers or other containers for outbound shipment unless Warehouse has failed to exercise reasonable care.

DELIVERY REQUIREMENTS - Sec. 7

(a) No Goods shall be delivered or transferred except upon receipt by the Warehouse of Depositor's complete written instructions. Written instructions shall include, but are not limited to, FAX, EDI, E-Mail or similar communication, provided Warehouse has no liability when relying on the information contained in the communication as received. Goods may be delivered upon instruction by telephone in accordance with Depositor's prior written authorization, but the Warehouse shall not be responsible for loss or error occasioned thereby.

(b) When Goods are ordered out a reasonable time shall be given the Warehouse to carry out instructions, and if it is unable because of acts of God, war, public enemies, seizure under legal process, strikes, lockouts, riots or civil commotions, or any reason beyond the Warehouse's control, or because of loss of or damage to Goods for which Warehouse is not liable, or because of any other excuse provided by law, the Warehouse shall not be liable for failure to carry out such instructions and Goods remaining in storage will continue to be subject to regular storage charges.

EXTRA SERVICES (SPECIAL SERVICES) - Sec. 8

(a) Warehouse labor required for services other than ordinary handling and storage will be charged to the Depositor.

(b) Special services requested by Depositor including but not limited to compiling of special stock statements; reporting marked weights, serial numbers or other data from packages; physical check of Goods; and handling transit billing will be subject to a charge.

(c) Dunnage, bracing, packing materials or other special supplies, may be provided for the Depositor at a charge in addition to the Warehouse's cost.

(d) By prior arrangement, Goods may be received or delivered during other than usual business hours, subject to a charge.

(e) Communication expense including postage, overnight delivery, or telephone may be charged to the Depositor if such concern more than normal inventory reporting or if, at the request of the Depositor, communications are made by other than regular United States Mail.

BONDED STORAGE - Sec. 9

(a) A charge in addition to regular rates will be made for merchandise in bond.

(b) Where a warehouse receipt covers Goods in U.S. Customs bond, Warehouse shall have no liability for Goods seized or removed by U.S. Customs.

MINIMUM CHARGES - Sec. 10

(a) A minimum handling charge per lot and a minimum storage charge per lot per month will be made. When a warehouse receipt covers more than one lot or when a lot is in assortment, a minimum charge per mark, brand, or variety will be made.

(b) A minimum monthly charge to one account for storage and/or handling will be made. This charge will apply also to each account when one customer has several accounts, each requiring separate records and billing.

LIABILITY AND LIMITATION OF DAMAGES - Sec. 11

(a) WAREHOUSE SHALL NOT BE LIABLE FOR ANY LOSS OR DAMAGE TO GOODS TENDERED, STORED OR HANDLED HOWEVER CAUSED UNLESS SUCH LOSS OR DAMAGE RESULTED FROM THE FAILURE BY WAREHOUSE TO EXERCISE SUCH CARE IN REGARD TO THEM AS A REASONABLY CAREFUL PERSON WOULD EXERCISE UNDER LIKE CIRCUMSTANCES AND WAREHOUSE IS NOT LIABLE FOR DAMAGES WHICH COULD NOT HAVE BEEN AVOIDED BY THE EXERCISE OF SUCH CARE.

(b) GOODS ARE NOT INSURED BY WAREHOUSE AGAINST LOSS OR DAMAGE HOWEVER CAUSED

(c) THE DEPOSITOR DECLARES THAT DAMAGES ARE LIMITED TO _____ PER _____ PROVIDED, HOWEVER, THAT SUCH LIABILITY MAY AT THE TIME OF ACCEPTANCE OF THIS CONTRACT AS PROVIDED IN SECTION 1 BE INCREASED UPON DEPOSITOR'S WRITTEN REQUEST ON PART OR ALL OF THE GOODS HEREUNDER IN WHICH EVENT AN ADDITIONAL MONTHLY CHARGE WILL BE MADE BASED UPON SUCH INCREASE.

(d) WHERE STORED NOT LIABLE FOR THE COST AND THE SITE REPAIR DAMAGES

EXHIBIT

3

TENDERED, WAREHOUSE IS LIABLE FOR SUCH GOODS TAKEN UP AND LOSS OR

NOTICE OF CLAIM AND FILING OF SUIT - Sec. 12

(a) Claims by the Depositor and all other persons must be presented in writing to the Warehouse within a reasonable time, and in no event any later than the earlier of: (i) 60 days after delivery of the Goods by the Warehouse or (ii) 60 days after Depositor is notified by the Warehouse that loss or damage to part or all of the Goods has occurred.

(b) No lawsuit or other action may be maintained by the Depositor or others against the Warehouse for loss or damage to the Goods unless timely written claim has been given as provided in paragraph (a) of this section and unless such lawsuit or other action is commenced by no later than the earlier of: (i) nine months after date of delivery by Warehouse or (ii) nine months after Depositor is notified that loss or damage to part or all of the Goods has occurred.

(c) When Goods have not been delivered, notice may be given of known loss or damage to the Goods by mailing of a letter via certified mail or overnight delivery to the Depositor. Time limitations for presentation of claim in writing and maintaining of action after notice begin on the date of mailing of such notice by Warehouse.

LIABILITY FOR CONSEQUENTIAL DAMAGES - Sec. 13

Warehouse shall not be liable for any loss of profit or special, indirect, or consequential damages of any kind

LIABILITY FOR MISSHIPMENT - Sec. 14

If Warehouse negligently misships Goods, the Warehouse shall pay the reasonable transportation charges incurred to return the misshipped Goods to the Facility. If the consignee fails to return the Goods, Warehouse's maximum liability shall be for the lost or damaged Goods as specified in Section 11 above, and Warehouse shall have no liability for damages due to the consignee's acceptance or use of the Goods whether such Goods be those of the Depositor or another.

MYSTERIOUS DISAPPEARANCE - Sec. 15

Warehouse shall be liable for loss of Goods due to inventory shortage or unexplained or mysterious disappearance of Goods only if Depositor establishes such loss occurred because of Warehouse's failure to exercise the care required of Warehouse under Section 11 above. Any presumption of conversion imposed by law shall not apply to such loss and a claim by Depositor of conversion must be established by affirmative evidence that the Warehouse converted the Goods to the Warehouse's own use.

RIGHT TO STORE GOODS - Sec. 16

Depositor represents and warrants that Depositor is lawfully possessed of the Goods and has the right and authority to store them with Warehouse. Depositor agrees to indemnify and hold harmless the Warehouse from all loss, cost and expense (including reasonable attorneys' fees) which Warehouse pays or incurs as a result of any dispute or litigation, whether instituted by Warehouse or others, respecting Depositor's right, title or interest in the Goods. Such amounts shall be charges in relation to the Goods and subject to Warehouse's lien.

ACCURATE INFORMATION - Sec. 17

Depositor will provide Warehouse with information concerning the Goods which is accurate, complete and sufficient to allow Warehouse to comply with all laws and regulations concerning the storage, handling and transporting of the Goods. Depositor will indemnify and hold Warehouse harmless from all loss, cost, penalty and expense (including reasonable attorneys' fees) which Warehouse pays or incurs as a result of Depositor failing to fully discharge this obligation.

SEVERABILITY AND WAIVER - Sec. 18

(a) If any provision of this Contract, or any application thereof, should be construed or held to be void, invalid or unenforceable, by order, decree or judgment of a court of competent jurisdiction, the remaining provisions of this Contract shall not be affected thereby but shall remain in full force and effect.

(b) Warehouse's failure to require strict compliance with any provision of this Contract shall not constitute a waiver or estoppel to later demand strict compliance with that or any other provision(s) of this Contract.

(c) The provisions of this Contract shall be binding upon the heirs, executors, successors and assigns of both Depositor and Warehouse; contain the sole agreement governing Goods tendered to the Warehouse; and, cannot be modified except by a writing signed by Warehouse and Depositor.

LIEN - Sec. 19

Warehouse shall have a general warehouse lien for all lawful charges for storage and preservation of the Goods; also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, cooperating, and other charges and expenses in relation to such Goods, and for the balance on any other accounts that may be due. Warehouse further claims a general warehouse lien for all such charges, advances and expenses with respect to any other Goods stored by the Depositor in any other facility owned or operated by Warehouse. In order to protect its lien, Warehouse reserves the right to require advance payment of all charges prior to shipment of Goods.

DOCUMENTS OF TITLE - Sec. 20

Documents of title, including warehouse receipts, may be issued either in physical or electronic form at the option of the parties.

GOVERNING LAW AND JURISDICTION - Sec. 21

This Contract and the legal relationship between the parties hereto shall be governed by and construed in accordance with the substantive laws of the state where the Facility is located, including Article 7 of the Uniform Commercial Code as ratified in that state, notwithstanding its conflict of laws rules. Any lawsuit or other action involving any dispute, claim or controversy relating in any way to this Contract shall be brought only in the appropriate state or federal court in the state where the Facility is located.

The parties acknowledge the Limitation of Liability and Damages in Section 11.

Via Overnight Mail (or Certified Mail Return Receipt Requested)

[Carrier Name]
[Address]

Notification To Carrier Of Status As Warehouse Operator Only

Date:

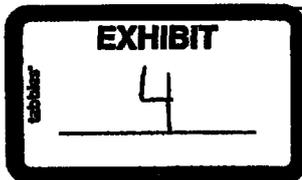
Dear _____,

PLEASE BE ADVISED that XYZ Warehouse Company is a warehouse operator, providing warehousing services for the account of its customers at its warehouse facility located at _____ (the "Warehouse"). XYZ Warehouse Company is not the shipper or consignee of any shipments to or from the Warehouse and is not a party to or beneficiary of any transportation contract between the shipper or consignee and your company or any other carrier. Further, XYZ Warehouse Company has no beneficial interest in the goods being transported to or from the Warehouse by your company or any other carrier and has no contract with and has no liability or other responsibility to your company or any other carrier regarding freight charges, demurrage, detention or other charges relating to such goods.

In the event XYZ Warehouse Company's name appears as consignee on any bill of lading or other contract of carriage in relation to goods being delivered to the Warehouse, it is a mistake. XYZ Warehouse Company is only the "in care of party" and is not the consignee.

XYZ Warehouse Company assumes no liability for freight charges, demurrage, detention or other charges relating to the equipment or services provided to the shipper/consignee by your company or any other carrier, notwithstanding that XYZ Warehouse Company allows your company to place its equipment at the Warehouse for the purpose of loading or unloading.

Date



XYZ Company

Printed Name

Signed Name

Westlaw

49 U.S.C.A. § 10743

Page 1

C

Effective:[See Text Amendments]

United States Code Annotated Currentness
 Title 49. Transportation (Refs & Annos)
 Subtitle IV. Interstate Transportation (Refs & Annos)
 Part A. Rail (Refs & Annos)
 Chapter 107. Rates (Refs & Annos)
 Subchapter III. Limitations
 → § 10743. Liability for payment of rates

(a)(1) Liability for payment of rates for transportation for a shipment of property by a shipper or consignor to a consignee other than the shipper or consignor, is determined under this subsection when the transportation is provided by a rail carrier under this part. When the shipper or consignor instructs the rail carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates that may be found to be due after delivery if the consignee gives written notice to the delivering carrier before delivery of the property--

(A) of the agency and absence of beneficial title; and

(B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

(2) When the consignee is liable only for rates billed at the time of delivery under paragraph (1) of this subsection, the shipper or consignor, or, if the property is reconsigned or diverted, the beneficial owner, is liable for those additional rates regardless of the bill of lading or contract under which the property was transported. The beneficial owner is liable for all rates when the property is reconsigned or diverted by an agent but is refused or abandoned at its ultimate destination if the agent gave the rail carrier in the reconsignment or diversion order a notice of agency and the name and address of the beneficial owner. A consignee giving the rail carrier, and a reconsignor or diverter giving a rail carrier, erroneous information about the identity of the beneficial owner of the property is liable for the additional rates.

(b) Liability for payment of rates for transportation for a shipment of property by a shipper or consignor, named in the bill of lading as consignee, is determined under this subsection when the transportation is provided by a rail carrier under this part. When the shipper or consignor gives written notice, before delivery of the property, to the line-haul rail carrier that is to make ultimate delivery--

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(1) to deliver the property to another party identified by the shipper or consignor as the beneficial owner of the property; and

(2) that delivery is to be made to that party on payment of all applicable transportation rates;

that party is liable for the rates billed at the time of delivery and for additional rates that may be found to be due after delivery if that party does not pay the rates required to be paid under paragraph (2) of this subsection on delivery. However, if the party gives written notice to the delivering rail carrier before delivery that the party is not the beneficial owner of the property and gives the rail carrier the name and address of the beneficial owner, then the party is not liable for those additional rates. A shipper, consignor, or party to whom delivery is made that gives the delivering rail carrier erroneous information about the identity of the beneficial owner, is liable for the additional rates regardless of the bill of lading or contract under which the property was transported. This subsection does not apply to a prepaid shipment of property.

(c)(1) A rail carrier may bring an action to enforce liability under subsection (a) of this section. That rail carrier must bring the action during the period provided in section 11705(a) of this title or by the end of the 6th month after final judgment against it in an action against the consignee, or the beneficial owner named by the consignee or agent, under that section.

(2) A rail carrier may bring an action to enforce liability under subsection (b) of this section. That carrier must bring the action during the period provided in section 11705(a) of this title or by the end of the 6th month after final judgment against it in an action against the shipper, consignor, or other party under that section.

CREDIT(S)

(Added Pub.L. 104-88, Title I, § 102(a), Dec. 29, 1995, 109 Stat. 819.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1995 Acts. House Report No. 104-311 and House Conference Report No. 104-422, see 1995 U.S. Code Cong. and Adm. News, p. 793.

Effective and Applicability Provisions

1995 Acts. Section effective Jan. 1, 1996, except as otherwise provided in Pub.L. 104-88, see section 2 of Pub.L. 104-88, set out as a note under section 701 of this title.

Prior Provisions

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Provisions similar to those in this section were contained in section 10744 of this title prior to the general amendment of this subtitle by Pub.L. 104-88, § 102(a).

A prior section 10743, Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1391; Pub.L. 99-521, § 7(i), Oct. 22, 1986, 100 Stat. 2995, related to payment of rates, prior to the general amendment of this subtitle by Pub.L. 104-88, § 102(a). See section 13707 of this title.

LIBRARY REFERENCES

American Digest System

Carriers  194.

Key Number System Topic No. 70.

Corpus Juris Secundum

CJS Carriers § 478, Persons Liable--Consignee as Agent.

CJS Carriers § 479, Persons Liable--Consignor as Consignee.

CJS Carriers § 482, Actions for Charges.

RESEARCH REFERENCES

Encyclopedias

Am. Jur. 2d Carriers § 174, Federal Statutes.

Am. Jur. 2d Carriers § 504, Effect of Direction for Collection from Consignee.

Am. Jur. 2d Carriers § 508, Where Consignee is Agent.

Am. Jur. 2d Carriers § 510, Effect of Reconsignment.

Forms

Federal Procedural Forms § 61:1, Statutes of Limitation, and Other Time Limits, Within United States Code.

Federal Procedural Forms § 66:173, Actions Involving Disputed Freight or Demurrage Charges.

Treatises and Practice Aids

Federal Procedure, Lawyers Edition § 76:680, Jurisdiction of Private Action.

West's Federal Administrative Practice § 5382, Substantive Responsibilities—Liability of Carriers Under Receipts and Bills of Lading.

NOTES OF DECISIONS

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1. Consignee liability

A consignee of interstate shipments who received the shipments and paid all charges claimed, which were less than the lawful established rates as a matter of law assumed liability for the only lawful rate which it had a right to pay or the carrier a right to charge, and could not escape liability therefor through any contract with the carrier, and its liability was not a question of fact to be determined from circumstances tending to show an implied agreement. *New York Cent. & H. R.R. Co. v. York & Whitney Co.*, U.S.Mass.1921, 41 S.Ct. 509, 256 U.S. 406, 65 L.Ed. 1016. Carriers ⇨ 35

As to general rule, a consignee, by accepting the shipment, becomes liable as a matter of law, for the full amount of the tariff charges, whether they all demanded at the time of delivery or later. *Pittsburgh, C., C. & St. L. R. Co. v. Fink*, U.S.Ohio 1919, 40 S.Ct. 27, 250 U.S. 577, 63 L.Ed. 1151. See, also, *Louisville & N.R.R. v. Central Iron Co.*, Ala.1924, 44 S.Ct. 441, 265 U.S. 59, 68 L.Ed. 900; *New York Central & H.R. Ry. Co. v. York & Whiting Co.*, Mass.1921, 41 S.Ct. 509, 256 U.S. 406, 65 L.Ed. 1016.

Recipients of rail freight who are named as consignees on bills of lading are subject to liability for demurrage charges arising after they accept delivery unless they act as agents of another and comply with notification procedures established in consignee-agent liability provision of Interstate Commerce Commission Termination Act (ICCTA). *CSX Transp. Co. v. Novolog Bucks County*, C.A.3 (Pa.) 2007, 502 F.3d 247, as amended, certiorari denied 128 S.Ct. 1240, 552 U.S. 1183, 170 L.Ed.2d 65, on remand 2008 WL 4613862. Carriers ⇨ 100(1)

Freight forwarding company's exercise of dominion and control over goods shipped by railroad did not make it a consignee liable for payment of freight charges, where neither original freight bills nor corrected freight bills named forwarder as consignee. *Southern Pacific Transp. Co. v. Oscar Perez Forwarding Co.*, Tex.App.-Corpus Christi 1986, 712 S.W.2d 596. Carriers ⇨ 194

2. Consignor liability

Unless bill of lading provides to contrary, consignor remains primarily liable for freight charges. *Southern Pac. Transp. Co. v. Commercial Metals Co.*, U.S.Tex.1982, 102 S.Ct. 1815, 456 U.S. 336, 72 L.Ed.2d 114, on remand 686 F.2d 264. Carriers ⇨ 194

3. Shipper liability

By accepting delivery of coal consigned to itself, shipper became bound to pay the tariff charges. *Baldwin v. Scott County Milling Co.*, U.S.Mo.1939, 59 S.Ct. 943, 307 U.S. 478, 83 L.Ed. 1409, rehearing denied 60 S.Ct. 65, 308 U.S. 631, 84 L.Ed. 526. Carriers ⇐ 30

Where bill of lading acknowledged receipt of goods from the shipper but provided for delivery to the order of another as consignee, was not signed by the shipper, and contained no express agreement on his part to pay or guarantee payment of the freight charges, and there was evidence that the goods were sold and shipped by the shipper to the consignee upon agreement between them that the latter should pay those charges, and were transferred by the consignee with the bills of lading to a third party who received delivery from the carrier, a finding that the shipper did not assume the primary obligation to pay the freight charges was justified. *Louisville & N.R. Co. v. Central Iron & Coal Co.*, U.S.Ala.1924, 44 S.Ct. 441, 265 U.S. 59, 68 L.Ed. 900.

4. Agreements, contracts or stipulations

Bill of lading is basic transportation contract between shipper-consignor and carrier, and its terms and conditions bind shipper and all connecting carriers. *Southern Pac. Transp. Co. v. Commercial Metals Co.*, U.S.Tex.1982, 102 S.Ct. 1815, 456 U.S. 336, 72 L.Ed.2d 114, on remand 686 F.2d 264. Carriers ⇐ 53

The parties to an interstate shipment by rail, as between themselves, are free to stipulate who shall pay the charges subject to the prohibition against unlawful discrimination and the limitations imposed by the uniform bill of lading. *Illinois Steel Co. v. Baltimore & O. R. Co.*, U.S.Ill.1944, 64 S.Ct. 322, 320 U.S. 508, 88 L.Ed. 259. Carriers ⇐ 26

No provision of Interstate Commerce Act imposes any absolute liability upon the shipper or consignor to pay the freight, and where freight is not paid in advance, and the tariff schedule does not provide by whom the freight is to be paid, parties are free to contract. *Louisville & N.R. Co. v. Central Iron & Coal Co.*, U.S.Ala.1924, 44 S.Ct. 441, 265 U.S. 59, 68 L.Ed. 900. See, also, *American Ry. Express Co. v. Mohawk Dairy Co.*, 1924, 144 N.E. 721, 250 Mass. 1; *Chicago Junction Ry. Co. v. Duluth Log Co.*, 1925, 202 N.W. 24, 161 Minn. 466; *King v. Van Slack*, 1916, 159 N.W. 157, 193 Mich. 105; *T.S. Faulk & Co. v. Chicago, I. & L.R. Co.*, 1926, 111 So. 196, 21 Ala.App. 617, certiorari denied 111 So. 199, 215 Ala. 488.

Unilateral decision by shipper or rail carrier to designate transloader as consignee, without transloader's permission and when transloader was not ultimate consignee of freight, could establish transloader's status as consignee for purposes of demurrage liability under consignee-agent provision of Interstate Commerce Commission Termination Act (ICCTA), which subjected recipient of rail freight named as consignee on bill of lading to liability for demurrage charges arising after acceptance of delivery unless recipient acted as agent of another and complied with ICCTA's notification procedures. *CSX Transp. Co. v. Novolog Bucks County*, C.A.3 (Pa.) 2007, 502 F.3d 247, as amended, certiorari denied 128 S.Ct. 1240, 552 U.S. 1183, 170 L.Ed.2d 65, on remand 2008 WL 4613862. Carriers ⇐ 100(1)

Warehouse to which rail shipments were delivered for storage before their ultimate delivery to shipper could be held liable for demurrage charges assessed by rail carrier only if warehouse was consignee or if it contractually

49 U.S.C.A. § 10743

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assumed responsibility for demurrage charges. *Illinois Cent. R. Co. v. South Tec Development Warehouse, Inc.*, C.A.7 (Ill.) 2003, 337 F.3d 813. Carriers ⇌ 100(1)

Fact that consignor had privately agreed with consignee to return two leased railway dump cars prepaid did not prevent consignee from being held liable to railroad for cost of shipping when cars were not sent prepaid but consignee nonetheless accepted them; railroad was not party to agreement between consignee and consignor, nonrecourse clause on bill of lading was not signed by consignor, and bill of lading was not marked "prepaid." *Consolidated Rail Corp. v. Briggs & Turivas, Inc.*, S.D.Ohio 1987, 678 F.Supp. 1298. Carriers ⇌ 194

49 U.S.C.A. § 10743, 49 USCA § 10743

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

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▷ United States Court of Appeals, Seventh Circuit.
CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, Plaintiff-Appellant.
v.
ADMIRAL CORPORATION, Defendant-Appellee.
No. 18340.

April 27, 1971, Rehearing Denied May 14, 1971.

Action by carrier against consignee seeking to recover unpaid freight charges. The United States District Court for the Northern District of Illinois, William J. Lynch, J., granted judgment for consignee at close of carrier's case, and carrier appealed. The Court of Appeals, Cummings, Circuit Judge, held that carrier was estopped from collecting unpaid freight charges from consignee where delivery receipts of waybills showed that consignor was the party to be billed, where delivery receipts of the 'Weight and Charges Ahead Bills' indicated that the 'Revenue Bill is Prepaid,' where 'Memorandum' for each shipment acknowledging issuance of a bill of lading also bore a stamped statement that the freight charges were prepaid, and where consignee accepted delivery of the shipments upon those representations and promptly paid consignor's invoices for the freight charges.

Affirmed.

Stevens, Circuit Judge, concurred and filed opinion.

Swygert, Chief Judge, dissented and filed opinion.

West Headnotes

[1] Carriers 70 ↪ 194

70 Carriers
70II Carriage of Goods
70II(J) Charges
70k194 k. Persons Liable for Charges. Most Cited Cases
Carrier was estopped from collecting unpaid freight charges from consignee where delivery receipts of waybills showed that consignor was the party to be billed, where delivery receipts of the "Weight and Charges Ahead Bills" indicated that the "Revenue Bill is Prepaid," where "Memorandum" for each shipment acknowledging issuance of a bill of lading also bore a stamped statement that the freight charges were prepaid, and where consignee accepted delivery of the shipments upon those representations and promptly paid consignor's invoices for the freight charges.

[2] Carriers 70 ↪ 194

70 Carriers
70II Carriage of Goods
70II(J) Charges
70k194 k. Persons Liable for Charges. Most Cited Cases
Consignee would not be found to have acted improperly, in suit against it by carrier seeking to recover unpaid shipping charges, in settling invoices of consignor without demanding receipts from consignor evidencing actual payment of freight charges to carrier, where consignee was justified in



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giving weight to representations made on shipping documents which indicated that freight charges had been prepaid by the consignor.

[3] Carriers 70 ↪194

70 Carriers

70II Carriage of Goods

70II(J) Charges

70k194 k. Persons Liable for Charges. Most Cited Cases

Carrier was estopped to recover from consignee for unpaid shipping charges where carrier's transactions with consignor involved credit extension well beyond the seven-day limit imposed upon such transactions by Interstate Commerce Commission, and where carrier contributed substantially to its ultimate inability to recover payment from consignor through its unlawful and lax credit extensions, which practices also increased amount of loss resulting from financial failure of consignor and which effectively prevented consignee from protecting itself from conversions of consignor. Interstate Commerce Act, § 223, 49 U.S.C.A. § 323.

[4] Carriers 70 ↪194

70 Carriers

70II Carriage of Goods

70II(J) Charges

70k194 k. Persons Liable for Charges. Most Cited Cases

Nothing in language or policies of motor carrier statute relating to collection of rates and charges, extension of credit, and liability of agent of beneficial owner, suggested that Congress intended to impose absolute liability upon a consignee for freight charges; rather, Congress was concerned with eliminating rate and credit discrimination in col-

lection of lawful charges from the party otherwise liable, wherever he might be, and statute was not primarily addressed to establishing or locating liability for payment of freight charges. Interstate Commerce Act, § 223, 49 U.S.C.A. § 323.

[5] Carriers 70 ↪194

70 Carriers

70II Carriage of Goods

70II(J) Charges

70k194 k. Persons Liable for Charges. Most Cited Cases

There was no discernible conflict, in action by carrier against consignee seeking to recover unpaid freight charges, between application of equitable principles to bar carrier's recovery and the statutory proscription against discriminatory treatment of shippers, since requiring double payment of freight charges by consignee would not further the statutory policy of preventing unjust discrimination or undue preference, in situation where carrier's shipping documents indicated that consignor had prepaid shipping charges, and where carrier's unlawful credit extensions to consignor contributed substantially to carrier's ultimate inability to recover such charges from consignor. Interstate Commerce Act, § 223, 49 U.S.C.A. § 323.

[6] Carriers 70 ↪196

70 Carriers

70II Carriage of Goods

70II(J) Charges

70k196 k. Actions for Charges. Most Cited Cases

Finding that consignor was an independent customs broker rather than an agent of defendant consignee, in action against consignee by carrier seeking to recover unpaid

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shipping charges, was proper where consignor selected the carrier and made all preparations for shipment, including preparation of bills of lading, and where consignee exercised no control over consignor's business methods and reimbursed him on the basis of shipments received; whether consignor was licensed as a freight forwarder under Interstate Commerce Act, and whether he performed such forwarding services in all respects for consignee, were irrelevant considerations. Interstate Commerce Act, §§ 223, 403, 410, 49 U.S.C.A. §§ 323, 1003, 1010.

*57 Francis James Higgins, Edward H. Hickey, John P. Scotellaro, Chicago, Ill., for plaintiff-appellant; Bell, Boyd, Lloyd, Hadad & Burns, Chicago, Ill., of counsel.

George W. Hamman, Robert F. Finke, Chicago, Ill., for defendant-appellee; *58 Mayer, Brown & Platt, Chicago, Ill., of counsel.

Before SWYGERT, Chief Judge, and CUMMINGS and STEVENS, Circuit Judges.

CUMMINGS, Circuit Judge.

Plaintiff, an interstate motor carrier, sued Admiral Corporation to recover for freight charges. According to the complaint, Admiral was the consignee of goods transported by plaintiff. It was alleged that under Part II of the Interstate Commerce Act (49 U.S.C. § 301 et seq.) Admiral owed plaintiff almost \$93,000 for services for the period January 21, 1966, through April 30, 1966.

In its answer, Admiral averred that William A. Rogers was the shipper of these goods under plaintiff's prepaid bills of lading, and that Admiral did not learn that plaintiff was

having difficulty in collecting freight charges from Rogers until May 1966. Prior to then, Admiral assertedly had paid Rogers for these and other charges. The answer also alleged that the shipments were under tariffs providing for the charges to be prepaid by the shipper.

According to the evidence, Admiral started to import electrical components and other products from Japan in the early 1960's. These goods were shipped from Japan to western United States ports and were then transported by truck to Admiral's plants in Illinois. In 1963, Admiral retained the services of William A. Rogers for freight and customs clearance. He agreed to advance all necessary charges for inland and ocean freight, to effect proper customs entry into Chicago, and to pay all import duties due. He would then invoice Admiral for these costs and for his services.

When the goods reached Seattle or San Francisco, Admiral would notify Rogers. He would choose the motor carrier to transport the goods to Chicago, and that carrier would advance payment for the ocean freight charges and later include them in its inland freight invoice to Rogers.

Commencing in September 1965, Rogers selected plaintiff as the motor carrier to transport Admiral's import freight. The goods moved on plaintiff's bills of lading which showed Admiral as the consignee and Rogers as the shipper and party to be billed. The bills of lading were also marked by Rogers as 'prepaid' or 'to be prepaid,' meaning that Rogers, the shipper, was to be billed by plaintiff and pay its charges.^{FN1}

FN1. The testimony showed that

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'prepared' meant paid in advance by the shipper or to be billed to the shipper. After Rogers became affiliated with Intercontinental Transport Company early in 1966, some of the bills of lading showed that the shipper was 'Intercontinental for Wm. A. Rogers,' but Rogers was shown as the party to be billed.

After delivery of the goods to Admiral, plaintiff billed Rogers for the inland and ocean freight charges through invoices stating that under Interstate Commerce Commission regulations payment was required within 7 days of delivery. Prior to April 1966, Rogers often failed to make payment of plaintiff's invoices within that time limit, but plaintiff did not enforce the provision.

The record contains no indication that Admiral had authorized Rogers to obtain credit from plaintiff or that Admiral was aware that Rogers was obtaining such credit beyond the permissible period. Rather, Rogers sent Admiral his own invoices which were paid in full and without question. Admiral did not learn of Rogers' delinquencies until notified by plaintiff during the first week of May 1966. At that time Admiral changed its payment practices to insure that plaintiff would be paid for such future charges. Rogers ultimately went out of business in November 1966.

Plaintiff unsuccessfully attempted to recover these freight charges from Rogers as consignor. In early 1968, plaintiff demanded that Admiral undertake payment. When it refused, plaintiff brought this suit against Admiral on the *59 theory that it was liable for the shipping charges as consignee.

The district court granted judgment for Admiral at the close of plaintiff's case. The court concluded: (1) plaintiff had not shown Rogers' inability to pay the freight charges; (2) he was a freight forwarder under Part IV of the Interstate Commerce Act, so that Admiral's payments to him discharged any obligations to plaintiff imposed upon Admiral by the Act; and (3) plaintiff was estopped to proceed against Admiral on these shipments.

I

Admiral does not contend that the provision for prepayment by Rogers altered the contractual terms of the bills of lading and relieved it, as consignee, from any obligation of payment of the freight charges. Instead, Admiral urges that notwithstanding any such liability, plaintiff is estopped to collect the freight charges in this case.

In Missouri Pacific RR. Co. v. National Milling Co., 276 F.Supp. 367 (D.N.J. 1967), affirmed, 409 F.2d 882 (3d Cir. 1969), the principles of estoppel were applied to bar a carrier from imposing a double payment upon a consignee that accepted delivery of a shipment under a uniform straight bill of lading marked 'freight prepaid' and then reimbursed the consignor for the full amount of freight charges in accordance with their separate agreement. By marking the bills of lading 'prepaid,' the carrier was held to have represented satisfaction of its freight charges upon which the consignee reasonably relied in paying the same amount to the consignor. See also Davis v. Akron Feed & Milling Co., 296 F. 675 (6th Cir. 1924), reaffirmed in United States v. Mason & Dixon Line, Inc., 222 F.2d 646, 647-650 (6th Cir. 1955).

[1] We find the principles enunciated in those

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cases applicable to the instant controversy. Here the delivery receipts of the waybills showed William A. Rogers as the party to be billed. The delivery receipts of the 'Weight and Charges Ahead Bills' indicated that the 'Revenue Bill is Prepaid.' The 'Memorandum' for each shipment acknowledging the issuance of a bill of lading also bore a stamped statement that the freight charges were 'Prepaid- Bill W. A. Rogers.' Admiral accepted delivery of the shipments upon those representations and promptly paid Rogers' invoices for the freight charges. These representations thus deprived Admiral of its ability to protect itself from possible double liability by paying the freight charges itself directly to the carrier upon acceptance of the shipment. Having indicated upon delivery that payment was sought and received from Rogers, plaintiff invited Admiral to discharge its obligations under its agreement with Rogers. Equity will not ignore plaintiff's participation in securing Admiral's detrimental reliance in supposedly reimbursing Rogers for freight bills already paid.

Plaintiff objects that Admiral may not assert estoppel since it did not in fact rely upon any representation of prepayment when it accepted delivery and then satisfied Rogers' invoices. We find this contention factually unsupported in the record. There was no evidence that Admiral was actually aware of the falsity of those representations, either at the time of delivery or subsequently when it paid Rogers. Admiral's action after receiving notification of Rogers' delinquencies strongly supports the contrary inference. Nor does Admiral's apparent awareness that Rogers engaged in credit transactions with various shippers indicate that Admiral knew the true basis upon which the instant shipments were handled. Rogers dealt with other

carriers and other companies. We decline to charge defendant with knowledge of falsity.

[2] Plaintiff also urges that Admiral acted improperly in settling Rogers' invoices without demanding receipts from Rogers evidencing actual payment on the charges to the carrier. In that manner, it is claimed, Admiral could *60 have prevented any fraud by Rogers and protected itself against possible double liability for those charges. Plaintiff ignores, however, the weight which Admiral could justifiably attach to the representations made on the shipping documents. We see no reason, however, for a double check by Admiral in the face of the representations of prepayment supplied by the carrier itself. Plaintiff could have indicated on those documents the exact nature of its credit transactions with Rogers. Its extensions of credit to Rogers neither involved nor benefited the unsuspecting consignee. Plaintiff may not now shift the risk of its own credit transactions to an innocent party acting in reliance upon plaintiff's incorrect representations of prepayment.

[3] The present controversy offers additional grounds for intervention of the principles of equity. Plaintiff's transactions with Rogers involved credit extensions well beyond the seven-day limit imposed upon such transactions by the Interstate Commerce Commission.^{FN2} Through its unlawful and lax credit extensions, plaintiff contributed substantially to its ultimate inability to recover payment from that shipper. These practices also increased the amount of loss which resulted from Rogers' financial failure. Plaintiff continued shipping goods for Rogers on credit and did not deign to notify Admiral, from whom it now seeks recompense, until well after a reasonable time had elapsed.

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FN2. Pursuant to the powers delegated by Congress under Section 223, the Interstate Commerce Commission enacted regulations governing credit extensions by motor carriers, Billing practices, and payments of bills for freight charges. 9 C.F.R. § 1322.1 contains the Commission's limitations on credit extended by motor carriers:

'Upon taking precautions deemed by them to be sufficient to assure payment of the tariff charges within the credit period herein specified, common carriers by motor vehicle may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay them, such persons herein being called shippers, for a period of 7 days excluding Saturdays, Sundays, and legal holidays. When the freight bill covering a shipment is presented to the shipper on or before the date of delivery, the credit period shall run from the first 12 o'clock midnight following delivery of the freight. When the freight bill is not presented to the shipper on or before the date of delivery, the credit period shall run from the first 12 o'clock midnight following the presentation of the freight bill. In regard to traffic of nonprofit shippers' associations and shippers' agents, within the meaning of section 402(c) of part IV of the Interstate Commerce Act, the carriers shall require such organizations to furnish the names of the beneficial owners of

the property in the bills of lading or at least have the bills of lading incorporate by reference a document containing the names of the beneficial owners.'

Plaintiff thus created the risk of loss by its credit practices. It contributed to the gravity of the loss by allowing Rogers' unsatisfied debts to accumulate beyond the lawful and reasonable time for credit. Finally, it effectively prevented Admiral from protecting itself from Rogers' conversions, first through the misrepresentations of prepayment, and then through its failure to notify Admiral until May 1966. Under these circumstances, we find no difficulty in holding plaintiff estopped to collect payment of the freight charges from Admiral.

II

In order to avoid estoppel as to its claim, plaintiff raises two additional contentions. First, it strenuously urges that Section 223 of the Motor Carrier Act (49 U.S.C. § 323) imposes absolute statutory liability upon the consignee and that its policies may not be defeated by equitable principles. Second, it asserts that Admiral's payment to Rogers failed to discharge Admiral's liability to plaintiff on the ground that Rogers was merely Admiral's agent.

*61 A. Section 223 does not bar application of estoppel in this case.

[4] We discern nothing in the language or policies of Section 223 to suggest that Congress intended to impose absolute liability upon a consignee for freight charges. Nor do we believe that the application of equitable estoppel against plaintiff's claim circumvents

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the policies of that Section.

In addition to direct agency regulation of carrier charges and tariff rates, civil actions, and criminal penalties, Congress enacted Section 223 of the Motor Carrier Act in 1935 to curb prejudicial or preferential discrimination among shippers by interstate motor carriers.^{FN3} Like the 1920 Transportation Act pertaining to railroad carriers from which it was derived,^{FN4} this Section attacks discriminatory handling of rate collection and credit practices by requiring prompt and uniform collection of full tariff rates and charges. It provides in pertinent part:

FN3. Section 216(d) (49 U.S.C. § 316(d)) states the general prohibition against making, causing or giving 'any undue or unreasonable preference or advantage' to any shipper by an interstate motor vehicle carrier. In order to enforce this policy, Congress empowered the Interstate Commerce Commission to adjust unlawful rates and charges, 49 U.S.C. § 316(e), (f). Congress also required published tariffs stating applicable rates, thus insuring uniformity of charges and permitting parties liable for payment to check the legality of the payment demanded. 49 U.S.C. § 317. In addition to agency intervention, Congress also created criminal penalties for discriminatory conduct, and authorized civil actions for redress in federal courts. 49 U.S.C. § 322.

FN4. 49 U.S.C. § 3(2); see also Shipping Act of 1916, 46 U.S.C. §§ 812, 814-817.

'No common carrier by motor vehicle shall

deliver or relinquish possession at destination of any freight transported by it in interstate or foreign commerce until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges, including rules and regulations for weekly or monthly settlement, and to prevent unjust discrimination or undue preference or prejudice: * * *.' 49 U.S.C. § 323.^{FN5}

FN5. The remainder of the Section excepts credit extensions favoring the United States Government and its political subdivisions, and provides special rules governing liability in cases of agency by the consignee on behalf of another where additional transportation charges are necessary. These provisions are inapplicable to the instant controversy.

Congress was concerned with eliminating rate and credit discrimination in the collection of the lawful charges from the party otherwise liable, whether it be the consignor, consignee, or another shipper with a beneficial interest in the goods shipped. The statute is not primarily addressed to establishing or locating liability for payment of freight charges. No attempt was made to specify from whom payment should be collected under ordinary circumstances.

The relationship between Section 223 and the definition of liability under contract and common law is evident in Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Fink, 250 U.S. 577, 40 S.Ct. 27, 63 L.Ed. 1151, and Louisville & Nashville R.R. Co. v. Central Iron & Coal Co., 265 U.S. 59, 44 S.Ct. 441, 68 L.Ed. 900, relied upon by plaintiff. In each

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case, the Court ascertained the existence of the party's liability for freight charges apart from consideration of the statutory requirements for collection of the full tariff rate.

In *Fink*, the carrier undercharged the consignee at the time of delivery of a shipment of goods and subsequently sued him for the unpaid balance of the lawful tariff rate. Despite the apparent absence of an agreement with the consignor under the bill of lading imposing liability upon *Fink*, the Court determined that acceptance of delivery rendered the consignee prima facie liable for charges at common law. The Court *62 then held that in light of Section 6 of the Act to Regulate Commerce (49 U.S.C. § 6(7)), the extent of the consignee's liability must be deemed to be the full sum fixed by the tariff, whether or not the full charges were demanded prior to the carrier's relinquishment of the goods:

'The transaction, in the light of the act, amounted to an assumption on the part of *Fink* to pay the only legal rate the carrier had the right to charge or the consignee the right to pay.' 250 U.S. at p. 582, 40 S.Ct. at p. 28.

The distinction between the imposition of liability for freight charges and the impact of the statutory prohibition against discrimination by carriers is even more apparent in *Central Iron*. The Court there looked to the contractual terms stated in the bills of lading to determine whether the consignor-defendant was liable for the uncollected balance of the required tariff. The bills of lading expressly placed primary responsibility for payment of freight charges upon the consignee. The Court stated the consignee. The Court stated that although the shipper ordinarily assumes the obligation to pay such

charges, the bills of lading could alter the shipper's obligation to provide only secondary liability or no liability whatsoever for freight charges. Finally, the Court held that,

'if a secondary obligation of the *Central Company* was to be implied from the fact of its causing the coke to be received for transportation, the promise was not necessarily one to pay at any time any freight charges which the carrier might find it impossible to collect from the consignee or his assign. The court might have concluded that it guaranteed merely that the consignee or his assign would accept the shipment. For under the rule of the *Fink Case*, if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of delivery, or not until later. His liability satisfies the requirements of the Interstate Commerce Act.' 265 U.S. at pp. 69-70, 44 S.Ct. at pp. 443-444 (emphasis supplied).

The undercharge cases are thus consistent with and, indeed, support our conclusion that Section 223 was not intended to fasten a rigid liability upon a consignee. Congress left the initial determination of a party's liability for freight charges to express contractual agreement or implication of law. Cf. *Illinois Steel Co. v. Baltimore & Ohio R.R. Co.*, 320 U.S. 508, 64 S.Ct. 322, 88 L.Ed. 259. So long as payment of the full tariff charges may be demanded from some party, the anti-discrimination policy of the Section is satisfied. Congress did not undertake to settle all issues of collection with the enactment of Section 223. Nor did Congress intend to fashion a sword to insure collection in every instance and a shield to insulate the carrier from the legal consequences of otherwise

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negligent or inequitable conduct.

These same considerations lead us to reject plaintiff's claim that the principles of equitable estoppel have no application in any action for the collection of freight charges. Plaintiff relies on the holding in Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Fink, 250 U.S. 577, 582-583, 40 S.Ct. 27, 28, 63 L.Ed. 1151, that the defendant could not interpose the doctrine of estoppel to bar recovery of the balance of the lawfully required freight rate since.

'estoppel could not become the means of successfully avoiding the requirement of the Act as to equal rates, in violation of the provisions of the statute.'

That holding of course must be considered in the context of the facts of that case. The crucial question is not whether estoppel is urged as a bar to collection of the tariff rate as such, but whether the use of estoppel to prevent recovery on the facts of the particular case contradicts the statutory policy of Section 223 to curb discriminatory treatment of shippers.

*63 [5] In this case, there is no discernible conflict between the application of equitable principles to bar the carrier's recovery and the statutory proscription against discriminatory treatment of shippers. Requiring double payment of the charge by Admiral would not further the statutory policy of preventing 'unjust discrimination or undue preference.' As Judge Cohen perceptibly observed in Missouri Pacific RR. Co. v. National Milling Co., 276 F.Supp. 367, 372 (D.N.J.1967), affirmed, 409 F.2d 882 (3d Cir. 1969):

'the defendant consignee here, even consi-

dered as an agent or trustee for the public interest, has discharged in full measure its obligation to pay its debt as required by law. The Act does not make him an insurer of the carrier's business. * * * It was not the intention of Congress to overturn the law of concomitant equities of transportation contracts and arrangements; rather, the genius of the Act was the abolition of preferential treatment of shippers despite any guise, intention, or accident resulting in or designed to defeat this legislative objective of uniform rates. When the Act is focused upon the circumstances of this case, no preferential treatment, intentional, collusive, coincidental, or otherwise, appears to have been secured by the defendant consignee.' See also Davis v. Akron Feed & Milling Co., 296 F. 675 (6th Cir. 1924).

In Fink, the application of estoppel would have led to the unconscionable result of permitting the party liable for full tariff charges to retain the benefits of the unlawful undercharge even though, as a matter of law, he was held to have knowledge of the correct rates. Unlike Fink and the other undercharge cases, estoppel here would involve no such judicial sanction of a preferential discrimination in the face of the carrier's attempt to comply with the Act. Admiral does not seek to employ equity to defeat the statute or shift its payment obligations to another while retaining unlawful benefits. The full rate was charged. The only unlawful discrimination was the plaintiff's extension of credit to Rogers. The preferential practices indulged in here are not susceptible to retroactive correction as is the case with an unlawful undercharge. Plaintiff's conduct benefited none but Rogers, and Admiral's payment of the full tariff rate removes any possible contention of preferential advantage.

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In considering Admiral's plea for equitable relief, this Court should not blind itself to plaintiff's unlawful conduct in violating the credit regulations enacted by the Commission under Section 223. Admiral cannot be charged as a matter of law with knowledge of the preference. Cf. Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Fink, 250 U.S. 577, 581, 40 S.Ct. 27, 63 L.Ed. 1151. Permitting recovery in this case would serve only to reward the carrier for its unlawful as well as inequitable conduct. We decline to turn Section 223 inside out to achieve that anomalous result.

B. Rogers was not merely Admiral's agent.

[6] Finally, plaintiff seeks to avoid the district court's judgment on the ground that Rogers was simply Admiral's agent and that payment to him did not discharge Admiral's underlying liability. Our review of the record, however, persuades us that the district court was correct in finding Rogers to be an independent customs broker rather than an agent of Admiral. Rogers performed the same or similar services for other customers as he did for Admiral. He selected the carrier and made all preparations for shipment, including preparation of the bills of lading. Admiral exercised no control over his business methods and reimbursed him on the basis of shipments received. Cf. Farrell Lines Incorporated v. Titan Industrial Corporation, 306 F.Supp. 1348 (S.D.N.Y.1969). Whether Rogers was licensed as a freight forwarder under the Interstate Commerce Act (49 U.S.C. §§ 1003, *64 1010), and whether he performed such forwarding services in all respects for Admiral are irrelevant considerations. ^{EN6}

FN6. In light of our holding on estoppel, we need not consider plaintiff's contentions concerning Rogers' inability to pay.

The judgment is affirmed.

SWYGERT, Chief Judge (dissenting).

My reading of section 223 of the Motor Carrier Act, 49 U.S.C. § 323, and the cases decided under it and under 49 U.S.C. § 3(2), the counterpart statute pertaining to railroad carriers, makes Admiral as the consignee liable for the freight charges which Rogers failed to pay. This liability is clearly stated in the bill of lading under which the shipments were transported, the pertinent part reading: 'The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property. * * *' Only if he is an agent with no beneficial interest in the property which was shipped and has notified the carrier of that fact may a consignee avoid his liability for payment of the freight charges.

Pittsburgh, C.C. & St. L. Ry. v. Fink, 250 U.S. 577, 40 S.Ct. 27, 63 L.Ed. 1151 (1919), established that the policy of the Interstate Commerce Act demands that the carrier receive full payment in every case. To effectuate that policy, Fink established the rule that regardless of contract and equitable principles, a consignee who accepts delivery cannot avoid liability for freight charges. Unlike the majority, I believe that Fink, and the legion of cases following it, do 'suggest that Congress intended to impose absolute liability upon a consignee.' As Mr. Justice Brandeis stated in Louisville & N.R.R. v. Central Iron & Coal Co., 265 U.S. 59, 70, 44 S.Ct. 441, 444, 68 L.Ed. 900 (1924):

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If a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of delivery, or not until later. His liability satisfies the requirements of the Interstate Commerce Act.

The liability of the consignee is statutory. It is irrelevant that the consignee may have demanded that the consignor agree to pay freight charges, or that the bill of lading provided that the freight was to be paid by the consignor. If the consignor, for whatever reason, fails to pay the charges, the carrier may proceed directly against the consignee. Boston & Me. R.R. v. Hannaford Bros., 144 Me. 306, 68 A.2d 1 (1949); Central Warehouse Co. v. Chicago, R.I. & P. Ry., 20 F.2d 828 (8th Cir. 1927); see Southern Railway System v. Leyden Shipping Corp., 290 F.Supp. 742, 744 (S.D.N.Y.1968).

A consignee who has accepted delivery of goods cannot raise the defense of estoppel to avoid his statutory duty to pay the freight charges. 'Estoppel could not become the means of successfully avoiding the requirement of the act as to equal rates, in violation of the provisions of the statute.' Fink, supra at 583, 40 S.Ct. at 28. Mr. Justice Brandeis reiterated this principle in Central Iron, supra at 65, 44 S.Ct. at 442:

No contract of the carrier could reduce the amount legally payable; or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor.

The majority rules that the carrier's illegal

action in extending credit for a period in excess of the seven-day maximum provided by the regulations under section 323 prevents its recovering any freight charges. Permitting this defense allows consignees to assert a species of estoppel against carriers. I believe Fink intended to preclude this possibility. In that case, the Supreme Court recognized that the carrier's action*65 in failing to collect the entire freight charge before it released the goods was a violation of the Act; but the Court did not allow this illegal action by the carrier to be used by the consignee as a means of avoiding his statutory obligation to pay the full freight charge.

I believe the correct rule was stated in East Texas Motor Freight Lines v. Franklin County Distilling Co., 184 S.W.2d 505, 507 (Tex.Civ.App.1944):

The consignor of freight under bill of lading, such as is here in question, failing to sign the nonrecourse provision, is liable for the legitimate freight charges on the shipment. This is true, even though the carrier makes delivery in violation of Section 323 of Title 49, U.S.C.A., and violates the Rules of the Commission as to extending credit to the consignee. * * *

Nothing in the Motor Carrier Act provides that a carrier's failure to comply with section 323 or the Interstate Commerce Commission's credit regulation should result in the carrier's forfeiting its right to collect freight charges. Indeed, the conclusion that a violation of the credit regulation results in a forfeiture appears to be inconsistent with the Act's policy of assuring that no consignee can avoid the ultimate responsibility for paying the full freight charges provided for in the carrier's tariff. A consignee is always pri-

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marily liable to the carrier regardless of any contractual liability of others.

I would reverse.

STEVENS, Circuit Judge (concurring).

The petition for rehearing prompts me to add an additional word further explaining my agreement with Judge Cummings.

A primary purpose of the Interstate Commerce Act as originally enacted in 1887 was to protect shippers, consignees and consumers from what was feared to be undue monopolistic power of certain carriers.^{FN1} In time the primary purpose of the legislation was converted into the protection of carriers from competition among themselves and from other forms of transportation.^{FN2} In this case a carrier seeks to extend the protective policy of the statute in order to be held harmless from credit losses resulting directly from its own flagrant disregard of regulations promulgated under the statute. To accomplish this noble end it would require an innocent consignee to defray freight costs exactly double the amount contemplated by the applicable tariffs. As Judge Cummings' opinion demonstrates, the cases of which appellant relies do not remotely justify any such perverse result.

FN1. 24 Stat. 379 et seq.; see Huntington, 'The Marasmus of the I.C.C.: The Commission, the Railroads and the Public Interest,' 61 Yale L.J. 467, 470-71 (1952).

FN2. See Transportation Act of 1920, 41 Stat. 456 et seq.; Motor Carrier Act, 1935, 49 Stat. 543 et seq.; Reed-Bulwinkle Act of 1948, 62 Stat. 472 et seq.

C.A.III. 1971.

Consolidated Freightways Corp. of Del. v. Admiral Corp.
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(Cite as: 662 F.2d 150)

Michael J. Siris, New York City, for defendants-appellees All State Trucking Co. and Baltimore & Ohio Railroad Co.

Arthur Toback, New York City (Horwitz, Toback & Hyman, New York City, of counsel), for defendant-appellee Newman Bros. Trucking Co.

Before OAKES and MESKILL, Circuit Judges, and BLUMENFELD, District Judge. [FN*]

FN* Honorable M. Joseph Blumenfeld, United States District Judge for the District of Connecticut, sitting by designation.

MESKILL, Circuit Judge:

Roll Form Products, Inc., a Chapter XI debtor, appeals from an order of the United States Bankruptcy Court for the Southern District of New York, Lewittes, J.,[FN1] denying its motion for preliminary relief and dismissing its suit to enjoin defendants, interstate carriers, from collecting shipping charges from Roll Form's customers and to compel repayment of charges already collected. The bankruptcy court's decision was premised upon the applicability of the Interstate Commerce Act to this case. Because we conclude that the Act has no bearing upon the issues presented, we reverse and remand.

FN1. Title IV of the Bankruptcy Reform Act, s 405(c)(1) provides for direct appeal from a "judgment, order, or decree of a United States bankruptcy judge" to this Court during the transition period between the former Bankruptcy Act and the Reform Act

(B) if the parties agree to a direct appeal to the court of appeals for such circuit, then to such court of appeals.

See generally *Riddervold v. Saratoga Hospital*, 647 F.2d 342 (2d Cir. 1981).

Background

The present case arises from Roll Form's activities as a manufacturer of fabricated steel products. As a business procedure, Roll Form would bill its customer-consignees in advance for freight costs and in turn contract with carriers to transport the purchased goods. All shipping orders and bills of lading introduced into evidence were accordingly marked "prepaid" as to shipping charges. Furthermore, as part of this arrangement, the carriers extended credit to Roll Form for the freight charges, allowing monthly payment. The record does not indicate whether this arrangement was established contractually or informally for the convenience of the parties, and the issue was never determined by the bankruptcy court. However, since we are reviewing a dismissal on the pleadings, we must accept as true the material facts alleged by Roll Form. *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 740, 96 S.Ct. 1848, 1850, 48 L.Ed.2d 338 (1976). We therefore proceed upon the assumption that all parties to this action were contractually bound to an arrangement which provided for the customer-consignees to pay freight *152 charges exclusively to Roll Form, and for the carriers to look solely to Roll Form for payment.

Roll Form was beset by financial difficulties in the late 1970s and filed a petition for reorganization under Chapter XI of the former Bankruptcy Act, 11 U.S.C. ss 701 et seq., on August 1, 1979.[FN2] At that time, Roll Form owed over \$48,000 of freight charges. Soon thereafter, most of the defendants, carriers which had delivered goods to Roll Form's customers, filed claims for unpaid freight charges with the bankruptcy court. Unsatisfied with the prospects for full recovery from those proceedings, however, the carriers attempted to, and in many instances did, recover charges directly from the customers. As a result freight charges were withheld from Roll Form's estate.

FN2. Title IV of the Bankruptcy Reform Act of 1978, s 403(a) provides:

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A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted.

Since this petition was filed on August 1, 1979, prior to the October 1, 1979 effective date of the Reform Act, the former Bankruptcy Act is applicable to this case.

Roll Form, believing that the carriers were depriving the bankruptcy estate of the freight charges, and fearing that the collection activities would have a devastating effect upon future business relations with the badgered customers, commenced the present proceeding by order to show cause on December 11, 1980. Roll Form secured a temporary restraining order to enjoin further collections by the defendants pending a hearing on its motion for a preliminary injunction, and filed a complaint in an adversary suit seeking a permanent injunction as well as recovery of amounts already collected by defendants.[FN3]

FN3. Roll Form also sought to obtain an accounting, compensatory and punitive damages and a penalty for contempt. Prior to the decision of the bankruptcy court, defendants David Graham Co. and Hall's Motor Transit Co. settled with Roll Form, agreeing to look solely to Roll Form's Chapter XI proceeding for recovery of freight charges.

The 1980s, however, fared no better for Roll Form. The bankruptcy judge not only denied the preliminary injunction, but also determined that Roll Form's complaint was "so clearly insufficient" that he con-

solidated the adversary suit with the motion for preliminary relief, dismissing the entire proceeding without prior notice or hearing. 8 B.R. 479, 485 (S.D.N.Y.1981) (Bankruptcy Court).

In considering Roll Form's request for preliminary relief, Judge Lewittes found that neither irreparable harm had been shown nor a substantive claim alleged. Roll Form had argued that defendants' "harassment" of its customers for payment of freight charges would impair future business relationships. Judge Lewittes held, however, that the evidence at the preliminary hearing had shown that only two customer-consignees had threatened to sever business dealings with Roll Form as a result of defendants' collection activities. He therefore concluded that the claims of irreparable injury were "speculative." 8 B.R. at 482.

In considering the substance of the complaint, Judge Lewittes found even less merit, holding that defendants' activities were simply not, as Roll Form contended, unlawful. Roll Form's entire action was premised upon the assumption that, by contract, the freight charges being pursued by defendants were exclusively owed to Roll Form's estate and were thus protected by the automatic stay provisions of the Bankruptcy Act.[FN4] Judge Lewittes concluded, however, that section 10744 of the Interstate Commerce Act, 49 U.S.C. s 10744 (Supp.III 1979), renders a consignee independently liable to a carrier for freight charges upon his acceptance of the delivery of goods and *153 that Roll Form's property was therefore not implicated in the collection activities. 8 B.R. at 483.

FN4. Rule 11-44(a) of the former Bankruptcy Act provides:

A petition filed under Rule 11-6 or 11-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding

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to enforce any lien against his property, or of any court proceeding ... for the purpose of the rehabilitation of the debtor or the liquidation of his estate.

If the customer-consignees owed freight charges exclusively to Roll Form, then Rule 11-44(a) would operate to bar the carriers from proceeding directly against the customers, limiting them instead to the bankruptcy proceeding for recovery.

Since Judge Lewittes' legal analysis precluded any possibility of relief for Roll Form, he consolidated the underlying adversary suit with the preliminary hearing, dismissing the entire proceeding without availing the parties of either notice or an opportunity for further hearing. In dismissing the adversary suit, Judge Lewittes observed that such a sua sponte consolidation would constitute reversible error "unless the affected party fails to demonstrate surprise or prejudice occasioned by the consolidation." 8 B.R. at 485 (footnote omitted). However, he concluded,

Here, although no notice of consolidation has been ordered, because the instant complaint is, as noted above, so clearly insufficient and "entirely destitute of equity", dismissal, on the merits, of the underlying adversary proceeding is proper.

Id. (footnote omitted). From that dismissal, Roll Form appeals.

DISCUSSION

On this appeal, Roll Form seeks reversal on several grounds. First, Roll Form asserts that Judge Lewittes erred in finding that the customer-consignees were independently liable to the carriers for freight charges under the Interstate Commerce Act. Roll Form also contends that the carriers, in view of their participation in the prepayment procedure, should be estopped from collecting freight charges directly from the customer-consignees. Finally, Roll Form argues that Judge Lewittes' consolidation

of the motion for a preliminary injunction with the adversary suit without notice or an opportunity for hearing constituted a denial of due process. Since we agree with Roll Form's first contention, we find it unnecessary to resolve the latter considerations.

Judge Lewittes based his holding that the customer-consignees owed an independent liability for freight charges to the carriers upon section 10744 of the Interstate Commerce Act, *supra*. That section, and the prior sections which it codifies, [FN5] were designed to insure that uniform rates would apply to all interstate shipments of like character. To that end, the section as a general rule renders "the consignee ... prima facie liable for the payment of the freight charges when he accepts the goods from the carrier." *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Fink*, 250 U.S. 577, 581, 40 S.Ct. 27, 63 L.Ed. 1151 (1919). Judge Lewittes found that this statutory basis for liability is independent of any debts which the customer-consignees may owe the consignor and therefore that the carriers were pursuing charges owed directly to themselves. As a result, Judge Lewittes concluded that Roll Form's property had not been implicated in the collection activities.

FN5. Section 10744 codifies the now repealed 49 U.S.C. ss 3(2) and 323. In codifying these sections, as well as the entire Interstate Commerce Act, Congress made clear that

Like other codifications undertaken to enact into positive law all titles of the United States Code, this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a co-

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dification statute, however; the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged.

H.R. Rep. No. 1395, 95th Cong., 2d Sess. 9 (1978), reprinted in (1978) U.S. Code Cong. & Ad. News 3009, 3018.

The principal purpose of section 10744 as well as the entire Interstate Commerce Act unquestionably was to eliminate all forms of rate discrimination on interstate shipments. *Id.*; *154 Southern Pacific Transportation Co. v. Campbell Soup Co., 455 F.2d 1219, 1220 (8th Cir. 1972). The Act, in our view, was not intended to "fashion a sword" to insure collection by carriers of freight charges. Nor do we think the Act was intended to impose an absolute liability upon consignees for freight charges. Its sole purpose was "to secure equality of rates to all and to destroy favoritism." In *Re Penn-Dixie Steel Corp.*, 6 B.R. 817, 820 (S.D.N.Y.1980) (Bankruptcy Court), *aff'd*, 10 B.R. 878 (S.D.N.Y.1981). Accordingly, in the absence of discriminatory practices, we agree with the Seventh Circuit that "Congress left the initial determination of a party's liability for freight charges to express contractual agreement or implication of law." *Consolidated Freightways Corp. v. Admiral Corp.*, 442 F.2d 56, 62 (7th Cir. 1971). Of course, where parties fail to agree, or where discriminatory practices are present, the Interstate Commerce Act will bind the consignee to pay freight charges to the carrier on goods he accepts, this obligation being independent of the consignor's own obligations.

We find no evidence in the record, nor has there been any allegation that the procedures employed in this case for payment of freight charges were discriminatory. Prepayment by Roll Form of shipping charges was a perfectly acceptable means of conducting business under the Interstate Commerce Act. Moreover, the extension of credit by the carriers to Roll Form for payment of these charges is expressly sanctioned by 49 C.F.R. s 1320 (1980).

[1] That Roll Form has subsequently sought Chapter XI relief, we think, does not in itself activate the provisions of the Interstate Commerce Act. As the bankruptcy court recently stated in *Penn-Dixie*, a case which similarly involved a carrier's collection of "prepaid" freight charges from consignees,

The fact that *Penn-Dixie* is now in a Chapter 11 reorganization changes nothing. As pointed out earlier, the ICA does not insure collection in every instance. The possibility that under the scheme of bankruptcy reorganization, *Penn-Dixie* may be able to satisfy its indebtedness to (the carrier) by paying a lesser amount is simply not violative of the ICA's policy and purpose. Surely, any deficiency incurred by (the carrier) because of the bankruptcy law's important and cornerstone policy of equality of distribution ... is not discriminatory in any sense of the word as used in, and comprehended by, the ICA. "The rights and duties created by the Interstate Commerce Act are for the protection of the public against secret rebates and discriminations rather than for the enrichment of the carrier." 13 C.J.S. Carriers s 393.

6 B.R. at 821-22.[FN6] In affirming *Penn-Dixie*, the United States District Court for the Southern District of New York observed, "(a)pplying hindsight, the credit to *Penn-Dixie* proved a poor choice given the unanticipated intervening insolvency proceeding." 10 B.R. at 879. Similarly, the carriers in this case gambled that Roll Form's credit would remain unimpaired. We do not believe that the carriers, having lost this gamble, should now be permitted to avail themselves of the Interstate Commerce Act, which seeks only to insure uniform tariffs for all shipments of like character, see *Fink*, 250 U.S. at 581, 40 S.Ct. at 27, as a collection device.[FN7]

FN6. The *Penn-Dixie* case was unreported as of the date of Judge Lewittes' opinion. Subsequently, Judge Lewittes, upon learning of the case, amended footnote 28 of his opinion, 8 B.R. at 484 n. 28, in an attempt to distinguish *Penn-Dixie* upon the ground

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that it was decided under the Bankruptcy Reform Act while the present case falls under the former Act. Since the focus of both cases is on the impact of the Interstate Commerce Act upon contractual obligations, we find Judge Lewittes' distinction unpersuasive.

FN7. Roll Form also contends that defendants, in view of their participation in the prepayment arrangement, should be estopped from proceeding against the customers for freight charges. While many courts have invoked this estoppel theory to prevent recovery of freight charges by carriers, see, e. g., Consolidated Freightways Corp. v. Admiral Corp., 442 F.2d 56, 59-62 (7th Cir. 1971); Southern Pac. Transp. Co. v. Campbell Soup Co., 455 F.2d 1219 (8th Cir. 1972), we observe that in each case the carriers were suing the customers. We do not believe that Roll Form has standing here to raise this equitable defense as an offensive weapon.

[2] We therefore hold that, in the absence of discriminatory practices, the parties in this action were free to allocate freight charges by contract as they wished unaffected by section 10744 of the Interstate Commerce Act. In view of the bankruptcy court's interpretation of the legal *155 issues in this case it never reached the question of whether the prepayment arrangement had been established informally for the convenience of the parties or by definitive contract. Neither is the answer clear to us from the record. We therefore remand to the bankruptcy court for a determination of the parties' contractual obligations concerning the freight charges. [FN8]

FN8. Because we must remand in any event for further proceedings, we find it unnecessary to consider Roll Form's claim that the bankruptcy court's consolidation of the preliminary hearing with the adversary suit without prior notice constituted a deni-

al of due process. We also make no comment on the appropriateness of injunctive relief in this case inasmuch as Roll Form has not challenged the bankruptcy court's finding that no irreparable injury exists.

Reversed and remanded.
OAKES, Circuit Judge (concurring):
I concur in the result.

C.A.N.Y., 1981.
In re Roll Form Products, Inc.
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Not Reported in F.Supp., 1985 WL 2873 (N.D.Ill.)
(Cite as: 1985 WL 2873 (N.D.Ill.))

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois,
Eastern Division.

DEPENDABLE CARTAGE AND
TRANSPORTATION COMPANY, INC.,
Plaintiff,

v.

SOVEREIGN OIL COMPANY, et al., De-
fendants.

No. 84 C 4949.

September 30, 1985.

Richard L. Lucas Richard L. Lucas & Asso-
ciates Addison, IL, for plaintiff.

Bruce Spitzer Gorham, Metge, Bowman &
Hourigan Chicago, IL, for defendant.

Elaine K. B. Siegel Sonnenschein Carlin
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dant.

Harry C. Goplerud Keck, Mahin & Cate
Chicago, IL, for defendant.

Cleta Glen Chicago, IL, for defendant.

Irwin D. Rozner Chicago, IL, for defendant.

Steven B. Teplinsky Latham & Watkins
Chicago, IL, for defendant.

MEMORANDUM OPINION AND ORDER

ROVNER, District Judge.

*1 Dependable Cartage and Transportation

Company, Inc. ('Dependable') filed a com-
plaint against numerous defendants^{FN1} alleg-
ing that defendant Sovereign Oil is liable
under the Interstate Commerce Act for
freight charges which were incurred between
May, 1981 and July, 1982. Additionally,
Dependable alleges that Sovereign Oil is
guilty of racketeering, common law fraud,
and breach of a fiduciary relationship. Fi-
nally, Dependable alleges in its complaint
that all other defendants are jointly and sev-
erally liable with Sovereign Oil under the
Interstate Commerce Act, 49 U.S.C. §§
10101, et seq., for the freight charges which
were incurred between May, 1981 and July,
1982.

On May 10, 1985, defendants Zayre, K-Mart,
Silco, and Mid-Ohio filed motions pursuant
to Fed. R. Civ. P. ('Rule') 56 for summary
judgment on Counts VII, VIII, IX, and XI of
Dependable's second amended complaint.^{FN2}

Dependable does not dispute the facts set
forth in defendants' motions for summary
judgment. Absent a material issue of fact, the
question becomes whether defendants are
entitled to summary judgment as a matter of
law. For the following reasons, summary
judgment is granted in favor of Zayre,
K-Mart, Silco, and Mid-Ohio Automotive,
and against Dependable.

Facts

Dependable is an Illinois corporation with its
principal place of business in Cook County,
Illinois. Dependable is duly certified by the
Interstate Commerce Commission ('I.C.C.')

as a motor common carrier of goods in in-



Not Reported in F.Supp., 1985 WL 2873 (N.D.Ill.)
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terstate commerce. In accordance with the Interstate Commerce Act, Dependable has placed on file with the I.C.C. the rates and tariffs that it will charge for the transportation of commodities as an interstate carrier. Pursuant to the provisions of the Interstate Commerce Act, 49 U.S.C. §§ 10741, 10744, and 10761, Dependable is required to charge these rates and tariffs to all customers who contract with it as an interstate carrier.

At various times between May, 1981 and July, 1982, Dependable transported commodities in interstate commerce for defendant Sovereign Oil. These commodities were transported to various states and delivered to Sovereign Oil's customers, including Zayre, K-Mart, Silco-Oil, and Mid-Ohio. Prior to shipment, Dependable and Sovereign Oil, in admitted violation of the Interstate Commerce Act, negotiated the freight rate and tariff to be charged. Dependable and Sovereign Oil agreed to a rate substantially less than that on file with the Interstate Commerce Commission. They agreed that Sovereign Oil would correct the rate differential at a later date through stock or by having the freight bills audited.

In accordance with the agreement, Dependable transported Sovereign Oil's goods in interstate commerce to Sovereign Oil's consignees, defendants Zayre, K-Mart, Silco-Oil, and Mid-Ohio, as well as to numerous other distributors and retailers. It was understood and agreed by Sovereign Oil and its consignees that all sales made by Sovereign Oil were on a prepaid basis. The sales agreements between Sovereign Oil and these customers provided that all goods would be delivered to the consignees and Sovereign Oil alone would be responsible for the cost of transportation. Pursuant to this understand-

ing, all products sold by Sovereign Oil were shipped freight prepaid, and the carrier, Dependable, was to bill Sovereign Oil for all freight charges.

*2 Sovereign Oil loaded and prepared the trailers for transportation and then issued the bills of lading for the shipments. The bills of lading used by Sovereign Oil in connection with the transportation of goods to the consignees were either preprinted with the notation 'Freight Prepaid,' 'Prepaid,' or a similar notation. Dependable billed all freight charges to Sovereign Oil, and Sovereign Oil paid all freight bills as invoiced.

During the years 1981 and 1981, Sovereign Oil's accounts with respect to sales made to the defendant consignees in this suit were paid in full. In addition, when each consignee paid Sovereign Oil for goods sold, each payment included all freight charges.

I. The Carrier Is Estopped To Recover Unpaid Freight Charges From Consignees

The Seventh Circuit has explicitly held that interstate carriers are estopped to recover I.C.C.-regulated freight charges from consignees who accept delivery of goods in reliance upon the carrier's representation that freight has been prepaid by the party (the consignor) that sent the property. Consolidated Freight Ways Corp. v. Admiral Corp., 442 F. 2d 56 (7th Cir. 1971). This Court is, of course, bound by the holding of the Seventh Circuit in Consolidated Freightways, and thus applies its principles to this case.

In Consolidated Freightways, a carrier that had been unable to recover unpaid freight charges from the consignor brought an action

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to recover the charges from the consignee (Admiral). The consignee, which had accepted delivery of the shipments and reimbursed the consignor for the 'prepaid' freight charges in reliance upon the carrier's representations that freight had been fully prepaid, argued that the carrier was estopped to proceed against it. The Seventh Circuit agreed, stating:

Admiral accepted delivery of the shipments upon [the carrier's] representation and promptly paid [the shipper] for the freight charges. These representations thus deprived Admiral of its ability to protect itself from possible double liability by paying the freight charges itself directly to the carrier upon acceptance of the shipment. Having indicated upon delivery that payment was sought and received from [the shipper], [the carrier] invited Admiral to discharge its obligations under its agreement with [the shipper]. Equity will not ignore [the carrier's] participation in securing Admiral's detrimental reliance in supposedly reimbursing [the shipper] for freight bills already paid.

Id. at 59. Case law from other jurisdictions also supports the use of estoppel to prohibit recovery from these consignees.^{FN3}

Here too, permitting Dependable to recover from these consignees would deprive them of their ability to protect themselves from accepting delivery of products which they had purchased at prices that were negotiated to include all freight charges and other costs of delivery. The evidence is uncontroverted that Dependable presented to these consignees bills of lading marked 'Freight Prepaid,' 'Prepaid,' or with a similar notation. De-

pendable negotiated exclusively with Sovereign Oil for the applicable freight charges. Moreover, Dependable billed Sovereign Oil and only Sovereign Oil for all freight charges. There is no indication from the evidence and facts before the Court that Dependable put these consignees on notice before filing suit that they might be liable for any portion of the transportation costs. Allowing Dependable to recover from these consignees would only serve to reward Dependable's unlawful and inequitable conduct.^{FN4}

*3 Dependable contends that estoppel does not apply based on the naked proposition that courts in general have refused to apply estoppel even where there was intentional fraud, illegal credit, or 'prepaid' type bills of lading, and have refused to relieve a consignee of paying the tariff rate. Dependable's contention that contractual defenses, estoppel, and other equitable defenses never apply in tariff undercharge cases has no basis in law. Indeed, Dependable fails to cite a single federal court decision that supports its contention. Each case cited by Dependable concerns the primary contractual liability of a shipper to a carrier and is thus inapposite to this case.^{FN5}

Dependable contends next that because Sovereign Oil rather than Dependable prepared all of the bills of lading and invoices, the doctrine of estoppel cannot be invoked. This argument is also without merit. Indeed, it merely emphasizes that Dependable intended to and did look to Sovereign Oil for reimbursement of the freight charges.

Third, Dependable argues that defendant Zayre 'is not free of 'unclean hands.' In support of this argument, Dependable pro-

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vides excerpts from the deposition taken of its own representative, Stienmann. These excerpts refer to a meeting at which representatives from Dependable, Sovereign Oil, and Zayre were present. The testimony given by Dependable's representative is that Zayre was to pay Sovereign Oil for the freight charges and Sovereign Oil would be primarily liable to Dependable for transportation costs. Moreover, it indicates that the arrangement between Sovereign Oil and Dependable was a completely separate matter. This evidence does not support the argument that Zayre engaged in illegal conduct; nor does it indicate that Zayre was ever contractually liable for the freight charges.

Finally, Dependable argues that it did not intentionally undercharge the shipper, Sovereign Oil, for freight. The question of Dependable's intent in imposing freight charges on Sovereign Oil is, however, irrelevant to the determination of whether to apply the doctrine of estoppel against Dependable. Dependable openly admits that it conducted its business with Sovereign Oil illegally by extending credit. 'The carrier must be presumed to know the law and to have understood that the rate charged could lawfully be only the one fixed by the tariff.' Aero Trucking, Inc. v. Regal 'Tube Co., 594 F.2d 619, 621 (7th Cir. 1979), quoting Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Fink, 250 U.S. at 577, 581 (1919). Implicit in Dependable's presumptive knowledge of the law is its knowledge of its contractual liability. Dependable contracted with Sovereign Oil for payment, and thus should demand any additional charges only from Sovereign Oil. Dependable is estopped to recover against the defendant consignees.

II. The Interstate Commerce Act Provides No

Basis for Recovery Against Consignees

The Interstate Commerce Act, 49 U.S.C. §§ 10101, et seq., establishes a regulatory scheme to prohibit unjust, discriminatory transportation practices, such as kickbacks or rebates. It requires common carriers to publish freight rates in tariffs filed with the I.C.C. The carrier must then determine freight charges in accordance with the published tariff rates. The objective of the Interstate Commerce Act is 'to curb prejudicial or preferential discrimination among shippers by interstate motor carriers.' Consolidated Freightways Corp. v. Admiral Corp., 442 F. 2d 56, 61 (7th Cir. 1971).

*4 Dependable's second amended complaint is premised upon an alleged contract between Dependable and Sovereign Oil providing that Dependable would transport products to the consignees on behalf of Sovereign Oil, which would be liable for the freight charges. Dependable, a licensed motor carrier in interstate commerce, published its tariff rates with the I.C.C. Dependable, however, negotiated and billed Sovereign Oil lower rates for its shipments than those on file with the I.C.C. Rates on file are fixed by law.

Under the Interstate Commerce Act, a shipper and carrier retain the right to enter into a contract allocating responsibility for freight charges. Louisville & N.R. Co. v. Central Iron & Coal Co., 265 U.S. 59, 65-66 (1924). Allocation of responsibility for payment of the freight is not discriminatory as long as someone is liable for the applicable freight. Farrell Lines, Inc. v. Titan Industrial Corp., 306 F. Supp. 1348, 1349 (S.D.N.Y.), aff'd, 419 F.2d 835 (2d Cir. 1969), cert. denied, 397 U.S. 1042 (1970). Thus, carriers

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may not proceed against consignees for freight charges they have contracted to collect from shippers.

On the facts in this case, liability for freight charges must be determined through the principles of contract law, not under the Interstate Commerce Act. Dependable's allegations do not justify recourse against the defendant consignees under the Interstate Commerce Act for amounts contractually due from Sovereign Oil.

Dependable has alleged that Sovereign Oil, not the consignees, was initially responsible for transportation charges. Dependable has failed to allege any agreement, facts, or conduct to substantiate its contention that these consignees are now 'jointly and severally liable' for payment. Absent any contractual obligation on the part of the consignees, the 'joint and several liability' which Dependable would have this Court impose on the consignees would have to arise solely from the Interstate Commerce Act itself.

Dependable relies on the case of Southern Pacific Transportation Co. v. Commercial Metals Co., 456 U.S. 336 (1982), to support its contention that the consignees are liable at law. The Court in Southern Pacific, *supra*, 456 U.S. at 343-44, stated, 'it is perhaps appropriate to note that a carrier has not only the right but also the duty to recover its proper charges for services performed . . . to achieve uniformity in freight transportation charges, and thereby eliminate the discrimination and favoritism . . .'^{EN6} Moreover, Dependable cites in its brief in opposition to the motion for summary judgment, the case of Western Transportation Company v. Wilson & Co., 682 F.2d 1227 (7th Cir. 1982), for the proposition that

No contract of the carrier could reduce the amount legally payable; to release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor.

*5 682 F.2d at 1229 (emphasis added).

This Court agrees. A carrier has a duty under the Interstate Commerce Act to recover all freight charges for services it has performed. Implicit in the ruling of both the Supreme Court and the Seventh Circuit, however, is the availability of a contract defense. Dependable can sue and has sued the shipper, Sovereign Oil, with whom it contracted for freight charges. Neither Dependable's allegations nor its reliance on Southern Pacific, however, furnish a basis for proceeding against the defendant consignees to recover amounts that Dependable failed to collect from the party who was contractually liable for payment, Sovereign Oil.

Although it is true that where a carrier charges and collects a rate lower than its tariff rates, it is the carrier's duty to use every lawful method to collect the difference, this Court too discerns 'nothing in the language or policies of [the Act] to suggest that Congress intended to impose absolute liability upon a consignee for freight charges.' Consolidated Freightways, *supra*, 442 F. 2d at 61. The purpose of the Act was to prevent unjust discrimination among shippers by interstate motor carriers. Congress did not intend to provide statutory insurance for all carriers transporting goods in interstate commerce from the legal

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consequences of their otherwise negligent or inequitable conduct. Consolidated Freightways, supra, 442 F. 2d at 59.

The law is well settled that a carrier will be debarred from recovering from a consignee when the policy of the Act is not violated. In re Penn-Dixie Steel Corp., 6 Bank. L. Rep. 817 at 820 (B.C. S.D.N.Y. 1980), aff'd, 10 Bank. L. Rep. 878 (B.C. S.D.N.Y. 1981). 'The rights and duties created by the Act are for the public rather than for the enrichment of the carrier.' In re Penn-Dixie Steel Corp., supra, 6 B.R. at 821-22.

As the Seventh Circuit observed in New York Central Railway Co. v. Trans-American Petroleum Corp., 108 F.2d 994 (7th Cir. 1939), 'plaintiff's theory would place at the disposal of the carrier a means of practicing rather than preventing discrimination.' The Seventh Circuit also succinctly stated in Consolidated Freightways:

Congress was concerned with eliminating rate and credit discrimination in the collection of the lawful charges from the party otherwise liable, whether it be the consignor, consignee, or another shipper with a beneficial interest in the goods shipped. The statute is not primarily addressed to establishing or locating liability for payment of freight charges. No attempt was made to specify from whom payment should be collected under ordinary circumstances.

442 F. 2d at 61.

In this case, the only real issue relates to who is to be responsible for payment, and thus discrimination is not involved. In re Penn-Dixie Steel, supra, 6 B.R. at

820-21. So long as payment of the full tariff charges may be demanded from some party, the anti-discrimination policy of the Interstate Commerce Act is satisfied. Consolidated Freightways, supra, 442 F. 2d at 62. Dependable can demand payment from Sovereign Oil, the party with whom it originally contracted for payment.

*6 The goal of the Interstate Commerce Act cannot be furthered by permitting carriers to contractually undercharge shippers and then extract all additional freight charges from unsuspecting consignees. The purpose of the Act is effectuated by demanding payment from the party contractually liable for any and all transportation costs, in this case, the shipper, Sovereign oil. ^{FN1}

Conclusion

Because there are no genuine issues of material fact, this Court grants summary judgment as a matter of law in favor of defendants Zayre, K-Mart, Silco Oil Company, Inc. and Mid-Ohio Automotive on Counts VII, VIII, IX, and IX, and against plaintiff, Dependable Cartage and Transportation, Inc. These defendants are dismissed from those Counts. Moreover, Dependable's motion for leave to file a surreply brief on the defendants' motions for summary judgment is denied. All parties will bear their own costs on these motions. It is so ordered.

FN1 Defendants include Sovereign Oil Company ('Sovereign Oil'), Sovereign Chemical and Petroleum Products, Inc., Renuzit-Sovereign Sovereign Oil, Zayre Corporation ('Zayre'), K-Mart Corporation ('K-Mart'), Mid-Ohio Automotive (now known as Nationwide, Inc.)

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('Mid-Ohio'), Silco Oil Co., Inc. ('Silco'), Motor Oils Refining Technology Company, Rubbermaid, Inc., Atlas Coatings, Ltd., Westville Oil Company, Steego Auto Parts, R.A.L. Auto Parts, Chicago & Northwestern Railroad Co., Louisville Bear Safety Service, Inc., Farmer Jacks Supermarket, Cooper Lewis, Inc., Automotive Color & Supply, Conoco, Inc., Spartan Stores, and Lloyds Shopping Center.

FN2 To prevail on a motion for summary judgment, a party has the burden of establishing that there is no genuine issue of material fact. Korf v. Ball State University, 726 F.2d 1222 (7th Cir. 1984). Any inferences to be drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. Hermes v. Hein, 742 F.2d 350 (7th Cir. 1984). The existence of a factual dispute, however, only precludes summary judgment if the disputed fact is outcome determinative. Big O Tire Dealers, Inc. v. Big O Warehouse, 741 F.2d 160, 163 (7th Cir. 1984). 'A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth.' Korf, 726 F.2d at 1226, quoting Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1306 (9th Cir. 1982).

FN3 Consolidated Freightways Corp. v. Eddy, 266 Or. 385, 513 P.2d 1161 (1973) (en banc) (a carrier may be estopped to collect from a consignee when the carrier has

represented that the freight charges were prepaid by the shipper, and the consignee, in reliance on that representation, accepted ment); Checker Van Lines v. Siltek International, Ltd., 169 N.J. Super. 102, 404 A.2d 333 (1979) (carrier estopped from demanding the payment by a consignee of unpaid freight charges).

FN4 Dependable contends that the defendant consignees have an alternative remedy because if they are found liable, the consignees could sue Sovereign Oil to recover. This argument is irrelevant to the defendant consignees' present motion for summary judgment. If a party should not be included in a suit, that party should be granted summary judgment dismissing it as a matter of law.

FN5 Siegal v. Converters Transportation, Inc., 714 F.2d 213 (2d Cir. 1983) (carrier who contractually undercharged shipper could later recover additional freight charges and the Act); Missouri Pacific Railroad Co. v. Rutledge Oil Co., 669 F.2d 557 (8th Cir. 1982) (carrier allowed to recover unpaid demurrage charges even though it had assured shipper that no demurrage charge would be assessed); Consolidated Freightways Corp. of Delaware v. Terry Truct, Inc., 612 F.2d 465 (9th Cir. 1980), cert. denied, 447 U.S. 907 (1980) (shipper held liable for freight charges even though carrier knowingly misquoted them prior to shipment); Aero Trucking, Inc. v. Regal Tube Co., 594 F.2d 619 (7th

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Cir. 1979) (a shipper could not rely on carrier's manager's erroneous statement that no detention charges would be assessed; applicable tariffs were incorporated by law into the contract between shipper and carrier); Consolidated Freightways Corp. of Delaware v. Forty-Eight Insulations, Inc., 501 F.2d 1400 (7th Cir. 1974) (carrier was allowed to recover additional freight charges from a shipper even though it had mistakenly misquoted the applicable rate prior to shipment); Locust Cartage Co. v. Transamerican Freight Lines, Inc., 430 F.2d 334 (1st Cir. 1970), cert. denied, 400 U.S. 964 (1970) (a shipper who had contracted with a carrier for rates lower than those published by the carrier was held liable for the difference); Farrell Lines, Inc. v. American Motorists Insurance Co., 572 F. Supp. 939 (S.D.N.Y. 1983), aff'd, 728 F.2d 147 (2d Cir. 1982) (dealt with liability of the party to whom the carrier actually looked for payment; as long as someone is liable for the full amount of the freight, public interest is protected and statute is satisfied).

FN6 13 C.J.S. Carriers § 393.

FN7 After the briefing on the motions for summary judgment was completed, plaintiff Dependable requested leave to file a surreply brief. The Local Rules of the United States District for the Northern District of Illinois clearly allow a party opposing a motion for summary judgment one opportunity to respond by filing a brief not exceeding 15 pages, unless

leave of court is obtained to exceed that page limit. Dependable fined a responsive brief opposing the motions for summary judgment consisting of only 6 pages. Apparently realizing, albeit too late, that its brief was inadequate, Dependable now seeks another opportunity to do what it should have done in the first place. In accordance with the Local Rules of this District, Dependable has had an adequate opportunity to present its arguments. Moreover, Dependable gives no indication of what it is that it seeks to add. Dependable does not contend in its motion for leave to file a surreply that additional law will be cited. Nor did the moving defendants raise new matters in their reply briefs which would require a response. The sole support for Dependable's request for additional briefing is that 'plaintiff does have something to say and would like an opportunity to respond.' This Court will not condone conduct which both prolongs the resolution of this case and unnecessarily increases the attorneys' fees which all parties must bear. Dependable's motion for leave to file a surreply brief, therefore, is denied.

N.D.Ill. 1985.

Dependable Cartage and Transp. Co., Inc. v. Sovereign Oil Co.
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END OF DOCUMENT

Exhibit 2

rights were indisputably established "in connection with" a case "commenced" under the 1898 Act, the 1978 Reform Act provisions cannot be made applicable to affect those rights. If we were to sustain the debtor's view here, "we would be forced to ignore the ordinary meaning of plain language."⁵⁶ This we decline to do.⁵⁷

C

Conclusion

In our view, the plain meaning of § 403(a), in the intervening 1978 Reform Act, evidences the intent of the Congress, under the facts present here, to bar the instant Chapter 11 case following dismissal of the prior Chapter XII under the 1898 Act. Accordingly, Jamaica's motion to dismiss this Chapter 11 case is, in all respects granted. The parties are directed to settle an order on five (5) days notice in conformity with the foregoing.



Act proceeded though the Congress, provided, with variant, but insubstantial differences, that "[t]he substantive rights of the parties in connection with any bankruptcy case or proceeding pending . . . on the effective date of this title shall continue to be governed by prior law . . ." See H.R.Rep.No. 31 (Jan. 14, 1975) at 261; H.R.Rep.No. 32 (Jan. 14, 1975) at 283; S.Rep.No. 236 (Jan. 17, 1975) at 257; and H.R.No. 6 (Jan. 4, 1977) at 264-5. (emphasis supplied). The only proposed bill employing the term "commenced", in place of "pending", in the Savings Clause, prior to the final enactment of the Reform Act, was H.R.Rep.No. 7330 (May 23, 1977) at 288-289. None of the available recorded debates prior to the introduction of that bill reveal why the earlier used term, "pending" was changed to "commenced". The legislative history of the Savings Clause, H.R. Rep.No. 595, 95th Cong. 2d Sess. 287-88, 459, reported in [1978] U.S.Code Cong. & Admin. News, pp. 5963, 6244, 6415; S.Rep.No. 989, 95th Cong. 2d Sess. 20, 166-67, reported in [1978] U.S.Code Cong. & Admin. News, pp. 5787, 5806, 5852-53; 1 Collier on Bankruptcy ' 7.03[1] (15th ed. 1979), appears not to be directed to the issue at bar and is similarly not helpful to our inquiry here. However, the in-

In re PENN-DIXIE STEEL CORPORATION, Debtor.

THUNDERBIRD MOTOR FREIGHT LINES, INC., Plaintiff,

v.

PENN-DIXIE STEEL CORPORATION, Defendant.

Bankruptcy No. 8010472.

Adv. No. 805159A.

United States Bankruptcy Court,
S. D. New York.

Oct. 24, 1980.

Freight carrier brought action against manufacturer, which was undergoing reorganization under the Bankruptcy Code, seeking to secure full payment of freight charges incurred by manufacturer prior to filing of petition. The Bankruptcy Court, Burton R. Lifland, J., held that: (1) the Interstate Commerce Act did not mandate payment in full to carrier of its freight charges, and carrier had no recourse against manufacturer's customers/consignees; (2) no express trust was created to reserve a

portion by the Congress of the term "a case commenced" in the face of earlier versions of the bill providing for the saving of cases "pending", provides "at least implicit support" for our conclusion here. Compare *Bradley v. Richmond School Board*, 416 U.S. 696, 716, 94 S.Ct. 2006, 2018, 40 L.Ed.2d 476 (1974). Since resort to legislative history is only justified where the legislation, on its face is "inescapably ambiguous", *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395, 71 S.Ct. 745, 751, 95 L.Ed. 1035 (1951) (Jackson, J., concurring), which is not the case here, we must rely upon the ordinary meaning of the plain language of § 403(a).

56. *T. V. A. v. Hill*, 437 U.S. 153, 173, 98 S.Ct. 2279, 2291, 57 L.Ed.2d 117 (1978).

57. Our interpretation of § 403(a) renders it unnecessary to determine the applicability, if any, to the instant motion, of the General Savings Clause set out in 1 U.S.C. § 109. See *Professional & Business Men's Life Insurance Co. v. Bankers Life Co.*, 163 F.Supp. 274, 294-295 (D.Mont.1958).



portion of manufacturer's customers' receipts to pay the freight charges; (3) manufacturer's mere nonpayment of its debt was insufficient for court to impress a constructive trust upon customers' receipts; and (4) carrier had no statutory lien under the Interstate Commerce Act on freight delivered to manufacturer as consignee.

Judgment for defendant.

1. Carriers ⇐194

Carrier, whose arrangement with debtor or manufacturer contemplated that only manufacturer would be held liable for freight charges, had no recourse against manufacturer's customers/consignees under the Interstate Commerce Act for payment of freight charges, but its sole recourse was against manufacturer; fact that manufacturer was in reorganization under the Bankruptcy Code changed nothing. Bankr. Code, 11 U.S.C.A. § 1101 et seq.; Revised Interstate Commerce Act, 49 U.S.C.A. § 10101 et seq.

2. Carriers ⇐32(2)

Subject to prohibitions against unlawful discrimination, parties may decide among themselves who shall pay freight charges and, where payment of full freight charges may be demanded from one party, antidiscriminatory policy of the Interstate Commerce Act is satisfied. Revised Interstate Commerce Act, 49 U.S.C.A. § 10101 et seq.

3. Carriers ⇐194

A consignee is not liable to carrier for payment of freight charges where shipment was accompanied by a bill of lading marked "prepaid" and consignee has already paid consignor.

4. Trusts ⇐1

In general, when circumstances are such that recipient of funds is entitled to use them as his own and can commingle them with his own monies, a debtor-creditor relationship exists, not a trust.

5. Trusts ⇐30½(1)

No express trust was created whereby creditor carrier was entitled to payment of

freight charges collected by debtor manufacturer from manufacturer's customers/consignees where there was no evidence of an agreement to reserve a portion of customers' receipts to pay freight charges and where carrier never requested such an arrangement.

6. Trusts ⇐91

Manufacturer's nonpayment of freight charges owed to carrier was insufficient for court to impress a constructive trust on manufacturer's customer receipts; there was no equitable or other ground upon which carrier could increase its status beyond that of an ordinary, general, unsecured creditor.

7. Carriers ⇐197(1)

Carrier had no statutory lien for payment of freight charges on goods delivered to manufacturer as consignee where each bill of lading stated that the goods were "consigned to" manufacturer and not marked "to the order of" manufacturer. Bill of Lading Act, § 25, 49 U.S.C.A. § 105.

8. Bankruptcy ⇐670.1

Monies collected from various customers of debtor manufacturer that were attributable to accounts receivable owing to manufacturer were "proceeds" from property of the estate and, thus, along with manufacturer's account receivables, were property of the estate.

Fried, Frank, Harris, Shriver & Jacobson, New York City, for debtor; Ilene P. Karpf, New York City, of counsel.

Gerstein, Queler & Churchill, New York City, for Thunderbird Motor Freight Lines; Robert Churchill, New York City, of counsel.

MEMORANDUM OPINION

BURTON R. LIFLAND, Bankruptcy Judge.

Defendant in this action, Penn-Dixie Steel Corporation ("Penn-Dixie") is engaged in the production of a diversified line

of fabricated steel products. On April 7, 1980, it filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code.¹ The plaintiff, Thunderbird Motor Freight Lines, Inc. ("Thunderbird"), is in the business of moving freight by truck, and is a duly licensed class one common carrier whose operations are subject to the provisions of the Interstate Commerce Act ("ICA"), 49 U.S.C. § 10101 *et seq.*, which, among other things, establishes procedures for fixing shipping rates. Prior to the filing of its petition, Penn-Dixie utilized Thunderbird to transport substantial quantities of raw materials to its plant at Kokomo, Indiana, which were shipped on a "collect" basis, and to transport finished steel products from its plant to third party consignee/customers, which were shipped on a "prepaid" basis.

Thunderbird has not been paid freight charges for its services rendered during the pre-petition period, February 28, 1980 through April 3, 1980, and in an effort to secure full payment, instituted this adversary proceeding, [Bankruptcy Rules of Procedure, 701 *et seq.*], requesting a variety of declaratory, monetary, and injunctive relief. The total unpaid freight charges are in excess of \$100,000.00, of which approximately sixty percent represents freight charges owed on goods shipped from Penn-Dixie as consignor to third party consignees and forty percent represents freight charges owed on goods shipped to Penn-Dixie as consignee. Simultaneously, with its summons and complaint, Thunderbird also sought by order to show cause a preliminary injunction and temporary restraining order for the purpose of maintaining the status quo. Pending a full trial on the merits, a modified temporary restraining order acceptable to both parties was granted.

A combined hearing and trial was held and the issues extensively briefed, both pre and post trial.

1. Title I of the Bankruptcy Reform Act of 1978, Pub.L. 95-958, 92 Stat. 2683, enacted and codified as Title 11 of the United States Code, the

Essentially, Thunderbird makes three arguments. As its primary argument, Thunderbird claims that the ICA mandates payment in full to Thunderbird of its statutorily approved freight charges, regardless of the intercession of Penn-Dixie's filing of a Chapter 11 petition. Second, Thunderbird argues that under common law principles, any freight charges collected by Penn-Dixie are held in trust for Thunderbird's benefit. Lastly, Thunderbird contends that under the ICA, it has a statutory lien on freight it delivered to Penn-Dixie as consignee on which freight charges have not been paid. Penn-Dixie, of course, vigorously contests each of these points and seeks restoration of \$2,977.16 in freight charges collected by Thunderbird from the Penn-Dixie customer/consignees. Further facts are developed as pertinent.

I

Interstate Commerce Act

[1] Thunderbird contends that the ICA commands "that every common carrier must bill and receive the exact amount of freight charges, no more and no less, due to it under its statutorily approved freight rates regardless of any and all extenuating circumstances. . . ." It further takes the position that "the Interstate Commerce Act imposes liability on both consignor and consignee for the full amount of its freight charges and absolutely prohibits Penn-Dixie, after receipt of payment of such freight charges from third party consignees, from including such freight charges in its debtor's estate."

Thunderbird's postulates exaggerate the dogma of the case law. First, in creating the regulatory scheme of the ICA, Congress did not undertake to settle every collection problem, nor did it intend to fashion a sword to insure collection in every instance. *Consolidated Freightways Corp. v. Admiral Corp.*, 442 F.2d 56, 62 (7th Cir. 1971). Thunderbird misinterprets the purpose and policy of this important transportation legislation.

"Bankruptcy Code", and all section references may be found therein unless otherwise indicated.

As stated in 1 *Collier on Bankruptcy* (15th Ed.) ¶ 5.37 at 5-158:

The legislative history of the Interstate Commerce Act, and indeed Congress' concerns with the content of what the Interstate Commerce Act purported to achieve, show plainly that correcting the evil of *discriminatory* transportation practices was the principal objective of the Act. Accordingly, the Interstate Commerce Act embodied a wide-reaching and sweeping scheme to prohibit unjust *discrimination* in the rendition of like services under similar circumstances or unreasonable advantages to those involved in the business of interstate commerce. (Emphasis added)

In other words, the purpose of the ICA is to secure equality of rates to all and to destroy favoritism. The ICA is not necessarily frustrated, as Thunderbird contends, if through the intervention of bankruptcy, a carrier is prevented from collecting full freight charges. As will be demonstrated, this is such a case.

Second, it would be incorrect to state that a consignee/beneficial owner of shipped goods will always be jointly and severally liable for a carrier's freight charges. Though this may appear to be the general rule, see e. g. *Illinois Steel Co. v. Baltimore & Ohio Railroad Co.*, 320 U.S. 508, 64 S.Ct. 322, 88 L.Ed. 259 (1944); *Louisville & Nashville Railroad Co. v. United States*, 267 U.S. 395, 45 S.Ct. 233, 69 L.Ed. 678 (1925); *Pittsburg, Cincinnati, Chicago & St. Louis Railway Co. v. Fink*, 250 U.S. 577, 40 S.Ct. 27, 68 L.Ed. 1151 (1919); and 49 U.S.C. § 10744, it is not without exception. Nothing in the ICA suggests that Congress intended to impose absolute liability upon a consignee for freight charges. See, *Consolidated Freightways Corp. v. Admiral Corp.*, *supra*. In fact, the trend of the cases of the last decade, and especially the latest cases in both the federal and state courts, has been to hold that a carrier will be barred from recovering from a consignee when the ICA's policy against discrimination is not violated, and further, these holdings are not limited to preventing double payment by

the consignee. See, *Checker Van Lines v. Siltek International*, 169 N.J.Super., 102, 404 A.2d 333, 335 (1979) (and see cases cited therein).

The case law further reveals that, when, as here, there is no question as to the amount of the freight charges, and the question is only who is to be responsible for payment, *discrimination is not involved*, and the purpose of the ICA is therefore not frustrated by barring or estopping a carrier from collecting its freight charges from the consignee and making him look solely to the shipper. *Consolidated Freightways Corp. v. Eddy*, 266 Or. 385, 513 P.2d 1161, 1165 (1978). Indeed, Penn-Dixie freely admits its full liability to Thunderbird for the freight charges, and the amount is not in dispute. However (and this is the heart of the dispute), Penn-Dixie asserts that Thunderbird must look solely to it, the shipper, for its compensation and that Thunderbird's attempt to collect directly from the third-party consignees is improper. In determining whether the consignees have liability, expressly or impliedly, the facts of each particular case must be examined. *Lyon Van Lines v. Cole*, 9 Wash.App. 382, 512 P.2d 1108, 1112 (1973).

In the instant case, I have determined that Thunderbird has no recourse against the Penn-Dixie Customers/Consignees. Thunderbird's sole recourse is against Penn-Dixie.

[2] The tariffs filed with the Interstate Commerce Commission do not ordinarily prescribe which party to the carriage contract is to pay freight charges. *Illinois Steel Co. v. Baltimore & Ohio Railroad Co.*, *supra*. "Congress left the initial determination of a party's liability for freight charges to express contractual agreement or implication of law." *Consolidated Freightways Corp. v. Admiral Corp.*, *supra* at 62; *Illinois Steel Co.*, *supra*. Subject to the prohibitions against unlawful discrimination, the parties may decide among themselves who shall pay the freight charges, *Illinois Steel Co.*, *id.*, and where the payment of full freight charges may be demanded from one party, the antidiscriminatory policy of the

Cite as 6 B.R. 817 (1980)

ICA is satisfied. *Consolidated Freightways Corp. v. Admiral Corp.*, supra; See also *Lyon Van Lines v. Cole*, supra, *Checker Van Lines v. Siltek International*, supra.

The entire record makes it abundantly clear that Thunderbird looked solely to Penn-Dixie for freight charges. This was the understanding of the parties and this understanding is evident in every facet of their business relationship. Penn-Dixie alone contracted with Thunderbird for its carrier services. Thunderbird billed Penn-Dixie directly for freight charges, after the goods were delivered. Penn-Dixie paid these charges from its general funds. Penn-Dixie billed its customers on a unitary basis (one net amount) and the customers paid this single amount directly to Penn-Dixie, which amount was then deposited into its general accounts. There was no agreement or any request by Thunderbird for segregation of any portion of the funds received from customers, and none took place. Nor were the two billing processes (Thunderbird/Penn-Dixie, Penn-Dixie/Customers) synchronized so as to give Penn-Dixie the appearance of being a mere conduit between carrier and consignee for freight charges. Further, both the bills of lading (which though prepared by Penn-Dixie, were signed by Thunderbird's agents without objection during their entire course of dealing), and Thunderbird's own delivery tickets that accompany each shipment were marked "prepaid", indicating that Penn-Dixie had paid freight charges or was at least responsible for them in Thunderbird's eyes. See, *Southern Pacific Transportation Co. v. Campbell Soup Co.*, 455 F.2d 1219, 1220 (8th Cir. 1972) (defining "prepaid").

In fact, by every indicia, there was a complete absence of any conduct on the part of Thunderbird at any time that would indicate that Thunderbird was looking to the consignees for payment. Indeed, if there was any such intention, the consign-

2. Thunderbird claims that Penn-Dixie is violating Sections 11901-11904 of the ICA, 49 U.S.C. 11901-11904, by its freight absorption policy (i. e.: charging its customers less for freight charges than Penn-Dixie itself must incur as an

ees would probably not have agreed to an arrangement that would have the potential of liability for charges in excess of the invoice price. Penn-Dixie's pricing practices absorbed part of the freight costs in order to make its products price competitive with those of competing sellers situated closer to the purchasers.² Further, this sales relationship was fostered by Thunderbird's misleading use of documentation marked "prepaid", the "prepaid" imprimatur on the documentation being a necessary element to Penn-Dixie's and its customer's course of dealing.

The short and the long of the matter is that Thunderbird's arrangement with Penn-Dixie contemplated that only Penn-Dixie would be held liable for freight charges. This accommodation, under the ICA, the parties were free to choose and decide among themselves. No antidiscriminatory policy of the ICA was violated since Penn-Dixie was charged at the full legal rate and since payment for the full freight charges may be demanded from Penn-Dixie. Thunderbird's lack of recourse against the consignees is but a function of its own course of conduct in dealing with Penn-Dixie.

The fact that Penn-Dixie is now in a Chapter 11 reorganization changes nothing. As pointed out earlier, the ICA does not insure collection in every instance. The possibility that under the scheme of bankruptcy reorganization, Penn-Dixie may be able to satisfy its indebtedness to Thunderbird by paying a lesser amount is simply not violative of the ICA's policy and purpose. Surely, any deficiency incurred by Thunderbird because of the bankruptcy law's important and cornerstone policy of equality of distribution, *Sampsel v. Imperial Paper Corp.*, 318 U.S. 215, 61 S.Ct. 904, 85 L.Ed. 1293 (1941), is not discriminatory in any sense of the word as used in, and comprehended by, the ICA. "The rights and duties

expense). Penn-Dixie denies that this practice violates the ICA. Either way it would not affect the relationship between the parties here. Thunderbird is not an aggrieved competitor of Penn-Dixie.

created by the Interstate Commerce Act are for the protection of the public against secret rebates and discriminations rather than for the enrichment of the carrier." 13 C.J.S. Carriers § 393.

[3] Even under a set of facts where Thunderbird would have recourse against the consignees, its relief would be quite limited. At the time Thunderbird filed its complaint, Penn-Dixie had already received payment from the bulk of its customers for invoices corresponding to Thunderbird's unpaid freight bills. Under the majority rule today, a consignee is not liable to the carrier for payment of freight charges where the shipment was accompanied by a bill of lading marked "prepaid" and the consignee has already paid the consignor. See, *Interstate Motor Freight System, Inc. v. Wright Brokerage Company*, 539 S.W.2d 764 (Mo. App.1976) (and cases cited therein), whose analysis this Court views as controlling on this point.³ See also, *Farrell Lines Inc. v.*

Titan Industrial Corp., 306 F.Supp. 1348 (S.D.N.Y.1969), *aff'd per curiam*, 419 F.2d 835 (2d Cir. 1969), *cert. denied*, 397 U.S. 1042, 90 S.Ct. 1365, 25 L.Ed.2d 653 (1970) (where this circuit applies the same rationale as in *Interstate Motor Freight, Inc.*, albeit in a different context under the ICA).⁴

II

Trust

On the basis of "common law trust principles", Thunderbird argues that it is entitled to payment of all freight charges collected by Penn-Dixie. I suppose that by the designation "common law", Thunderbird intended to shotgun the entire trust field, which includes both express and implied trusts.⁵ At an initial stage in the proceedings, Thunderbird in its pre-trial brief diffidently stated that the debtor held the freight charges received from its customers

3. Moreover, under the analysis in the *Interstate Motor Freight System* case, Penn-Dixie's freight absorption policy, see Note 2, *supra*, would not have any affect on this rule. *Id.* at 768. Further, both at trial and in Thunderbird's post-trial memorandum of law, Thunderbird argued that Penn-Dixie's receipt of its unitary billings must be deemed to include full freight charges (Plaintiff's post-trial memorandum at 27-28), in which case, the consignees fully discharged their obligation.

4. Thunderbird in its post-trial memorandum misconstrued Penn-Dixie's argument on this point. It is not argued that Thunderbird is not entitled to payment of its freight charges in full measure because it is estopped from collecting freight charges from third party consignees where the bills of lading were marked "prepaid". Conversely, the argument is validly advanced that estoppel takes place where a shipment is delivered under a bill of lading marked "prepaid" and the third party consignee has paid the consignor. This latter argument goes to the protection of consignees who in reliance upon the carrier's documentation has already paid once to their detriment, and in good conscience cannot be made to pay again. (These are the so-called "double payment" branch of cases.) Accordingly, and for the reasons explained in *Interstate Motor Freight System, supra*, Thunderbird's line of cases dealing with undercharge situations, or applying those cases by analogy, is inapposite, and do not control here.

5. Express and implied trusts are the two major categories of trusts. Express trusts are also denominated as voluntary, direct, declared or conventional trusts. Implied trusts are also called trusts arising by operation of law or involuntary trusts. There are two classes of implied trusts—resulting and constructive trusts. Resulting trusts are also called presumptive trusts. Constructive trusts are also called trusts ex maleficio, trusts ex delicto, or trusts in invitum.

This list is not all inclusive and there are further subclassifications. See, 89 C.J.S. Trusts §§ 10-15 at 722-729.

Briefly, an express trust arises from a manifestation of intention to deal with the trust property ("res") in the capacity of a trust. The duty of the court is to enforce that intention. On the other hand, an implied trust, whether resulting or constructive, arises because a court of equity compels one person to deal with the property for the benefit of the other. For instance, a constructive trust is imposed to redress a wrong or prevent unjust enrichment, not upon the intention of the parties. A resulting trust arises in favor of a person who transfers property under circumstances that infer that the transferor did not intend to transfer more than bare legal title and not the beneficial interest. See, 1 *Scott on Trusts* § 2.1 and V *Scott on Trusts* §§ 404.2, 462.1.

Here it is clear that Thunderbird does not claim a resulting trust. It did not part with property.

on its behalf or "in some form of trust" capacity.

If a trust were shown, Penn-Dixie's right to moneys in question is susceptible of defeasance. See, 4 *Collier on Bankruptcy* (15th Ed.) ¶ 541.18, N.1 at 541-66. However, the grounds in this case for the invocation of any trust relationship are completely lacking. As was observed by Judge Gourly in a bankruptcy case where a trust relationship was similarly claimed:

Ordinarily every claimant to the assets in the hands of the trustee [or debtor in possession] of the bankrupt estate desires priority and for that reason seeks to establish that his property was acquired under circumstances giving rise to a relationship other than that of an unsecured creditor.

In re Tate-Jones & Co., 85 F.Supp. 971 (W.D.Pa.1949).

Preliminarily, before turning to the substance of the trust issue, a small excursus is necessary. Penn-Dixie raised an irrelevant nondeterminative conflict of law question.

Thunderbird grounds much of its requested relief upon "common law" principles and cites authorities from both the state of Indiana (the state where Penn-Dixie's main steel plant is located and from which Thunderbird carried freight in and out) and New York (the forum state). Penn-Dixie insists that the Court must look to local law, citing *Elliott v. Bumb*, 356 F.2d 749 (9th Cir. 1966), cert. denied 385 U.S. 829, 87 S.Ct. 87, 17 L.Ed.2d 66 (1967) and *Malone v. Gimpel*, 151 F.Supp. 549 (N.D.N.Y.1956), aff'd 244 F.2d 954 (2d Cir. 1957), and seems to equate this with the internal law of the forum (i. e., the law of the forum excluding its own conflict of law rules), New York, citing, *In re Faber's Inc.*, 360 F.Supp. 946 (D.Ct.1973); *In re Dexter Buick-GMC Truck Co.*, 2 B.R. 251 (Bkrcty.D.R.I.1980); and *Jaffke v. Dunham*, 352 U.S. 280, 77 S.Ct. 307, 1 L.Ed.2d 314 (1957) as dispositive.

Why Penn-Dixie chose to ignore the forum state's conflict of law rules, or if it did actually apply them and concluded that the forum, New York, would use its own trust law, is not explained. Further though

Penn-Dixie proposed the rule of the case, to play it safe, it supports its argument under Indiana as well as New York law.

In resolving this byway issue, the authorities indicate that one must first determine the form of trust under consideration. If an express trust is to be construed, 1A (pt. 2) *Moore's Federal Practice* ¶ 310 at §141 N. 41, and 4A *Collier on Bankruptcy* (14th Ed.) ¶ 70.07 N. 8 at 88 are helpful guides. If the case concerns an implied trust, *Collier*, id. at ¶ 70.04, N. 31 at 60, and at ¶ 70.70[2], and *In re Tate-Jones*, supra (for constructive trusts) should be consulted. See also generally, *Moore's*, supra at ¶ 311, 319, and 325.

Fortunately, this often complex and labyrinthine issue does not need to be resolved in this proceeding. Certain elements are so basic to the establishment of trusts that "[w]hether the common law or state law is applied, the same result will be obtained since there does not appear to be any difference in the rules which will govern" *In re Tate-Jones & Co.*, supra at 980 (Federal District Court sitting in Pennsylvania comparing state and federal law on constructive trusts). To put it another way, giving Thunderbird the benefit of the jurisdiction with the most liberal trust formation rules, no trust in their favor would arise in this case.

Often transactions that at first blush appear to establish a trust relationship, on closer view, do not attain that status. One such distinction exists between the concepts of debt and trust. A debt arises when one incurs a mere personal obligation to make payment of a sum of money. This is quite different from a trust, where one takes on a duty to deal as a fiduciary with specific property for the benefit of another.

[4] At times, whether a debt or trust arose may not be too clear. In these cases the intention of the parties must be sought and is determinative. If the formative language, written or oral, provides no clue, resort to circumstances surrounding the transaction in question must be had. In general, when the circumstances are such that the recipient of the funds is entitled to

use them as his own and can commingle them with his own moneys, a debtor-creditor relationship exists, not a trust. *In re Penn Central Transportation Co.*, 328 F.Supp. 1278 (E.D.Pa.1971); 4A *Collier on Bankruptcy* (15th Ed.) ¶541.13 at 541-67.

[5] Here, by virtue of the foregoing, no express trust was created. There is no evidence of an agreement to reserve a portion of the customers' receipts to pay freight charges, nor did Thunderbird even request such an arrangement. There is also no evidence that Penn-Dixie held the moneys in a separate account, notwithstanding the above. Thunderbird failed to establish the existence of any limitation against Penn-Dixie, with respect to either the receipt of funds from customers or their subsequent disbursement. To be sure, the evidence reveals that Penn-Dixie's general corporate accounts were used at all times for the Thunderbird transactions. This conduct is consistent with that of a debtor-creditor relationship and not with that of a trust relationship. See generally, 1 *Scott on Trusts* § 12 at 108-139.

Whether there are grounds to impress a constructive trust (a form of implied trust), must be examined separately.

A comprehensive definition of a constructive trust is difficult, but basically and briefly:

A constructive trust arises where a person clothed with some fiduciary character, by fraud or other action upon his part, gains something for himself which, except for his act, he would not have procured and which it is inequitable for him to retain. If one obtains property by such arts, acts, or circumstances of circumvention, imposition, or fraud or by virtue of a confidential relationship and influence, under such circumstances that he ought not, according to the rules of equity and good conscience, hold and enjoy the beneficial interest, the court, in order to achieve complete equity, will declare a trust by construction and convert the offending party into a trustee and order him to hold the same subject to a lien or direct him to execute the trust so

as to protect fully the rights of the defrauded or deceived party. (Citations omitted) Courts of equity declare trusts of this character and recognize equitable liens because of what they deem fraud, either actual or constructive, including acts or omissions in violation of fiduciary obligations. The constructive trust may be one in which the existence of confidential relation and subsequent abuse of the confidence reposed produce a result abhorrent to equity. The burden of proof was upon appellant to prove that its claim is of this character.

Continental Illinois Nat. Bank & Trust Co. v. Continental Illinois Nat. Bank, 87 F.2d 934, 936 (7th Cir. 1937). Compare, V *Scott on Trusts* § 462; 89 *C.J.S. Trusts* § 139; 76 *Am.Jur.2d Trusts* § 121; 61 *N.Y. Jur. Trusts* § 140; 28 *I.L.E. Trusts* § 71.

[6] *A fortiori*, a constructive trust is an equitable remedy and not a trust in the true sense. This Court, as a court of equity, 28 U.S.C. § 1481, *Local Loan Co. v. Hunt*, 292 U.S. 234, 240, 54 S.Ct. 695, 697, 78 L.Ed. 1230, is free to invoke this remedial device to meet the needs of justice; however, under the facts and circumstances of this case, there is no basis on which to impress a constructive trust. A holding of the United States Supreme Court, dealing with a claimed constructive trust, is instructive and embraces the controlling principle.

The bankrupt was a debtor which had failed to pay its debt. We know of no principle upon which that failure can be treated as a conversion of property held in trust.

* * * * *

It would be impossible to state all the circumstances in which equity will fasten a constructive trust upon property in order to frustrate a violation of a fiduciary duty. See 3 *Pomeroy, Equity Jurisprudence*, § 1044 *et seq.* But mere failure to pay a debt does not belong in that category.

McKey v. Paradise, 299 U.S. 119, 122-123, 57 S.Ct. 124, 125, 81 L.Ed. 75; See also, *Continental Illinois Nat. Bank & Trust Co.*,

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supra at 986; *Mahon v. Stowers*, 416 U.S. 100, 105, 94 S.Ct. 1626, 1628, 40 L.Ed.2d 79; *Cherno v. Dutch American Mercantile Corporation*, 353 F.2d 147, 154 (2d Cir. 1965).

In the instant case, as in *McKey*, the debtor's sole wrong was the mere failure to pay a debt due. No fraud or unconscionable conduct is involved. Paring the transactions to essentials, Penn-Dixie simply assumed a simple contractual obligation to pay Thunderbird the full posted I.C.C. tariff rates for shipping steel. At the inception of this agreement, Thunderbird opted to extend credit to Penn-Dixie and did not demand prepayment or payment before releasing the shipped goods, both protections permitted under the ICA. Applying hindsight, the largess of credit to Penn-Dixie proved a poor choice given the unanticipated intervening insolvency proceeding. There is now no equitable or other ground upon which Thunderbird can increase its status beyond that of an ordinary, general, unsecured creditor. To impress a constructive trust, there must be at least a wrongdoing greater than the nonpayment of a debt. The highest court of the land has so indicated.

In sum—this Court concludes that there is no basis on which to recognize any trust concept. Thunderbird's cited cases arguing in favor of a trust are inapposite. These cases are discussed briefly.

In *United States National Bank v. Blauner's Affiliated Stores, Inc.*, 75 F.2d 826 (3d Cir. 1935), unlike the instant case, the bankrupt had an agreement to keep, and did keep, a separate account.

6. Using general principles akin to those found in the *Restatement of Trusts* and *Restatement of Restitution* (section on constructive trusts), the court stated two axioms.

1. The technique to the solution of this question seems to be this: When A [the porter] turns over to B [the Hotel] some of his property to be sold or evidence of debts owed to him which he wishes to have collected, the presumed intention of both parties is that B is to keep the funds which are proceeds of the sale or of the collection intact and turn them over in due course to A, and not that B may use them for his own purposes and later pay other moneys over to A.

In both *In re Woodman*, 186 F. 533 (D.Mass.1910) and *In re John H. Parker Co.*, 268 F. 868 (D.Ohio 1920), the courts clearly proceeded on a resulting trust theory.

Brown v. Brown, 185 N.E.2d 614, 235 Ind. 563 (1956), did hold that constructive fraud is a ground for constructive trust and that acts which "secure an unconscionable advantage" or which "injure the public interest" may constitute constructive fraud; however, neither of these two wrongs is present. This Court concluded that the ICA's protective policy purpose was not violated thus there is no injury to the public at large. Further, it is no more an unconscionable advantage for Penn-Dixie to retain its full customer billings, then it was for the bankrupt employer in *McKey v. Paradise, supra* (where no constructive trust was found by the Supreme Court) to retain portions of earned, but withheld, wages which were supposed to be placed in a welfare association (a life, health and accident insurance fund) that the bankrupt maintained for his employees. As the Supreme Court stated, "The fact that the failure to pay . . . was an acute disappointment and was especially regrettable . . . cannot avail to change the debtor into a trustee . . ." *Id.* 299 U.S. at 123, 57 S.Ct. at 125.

The "inference" drawn in *Harvey Brokerage Company v. Ambassador Hotel Corp.*, 57 F.2d 727 (S.D.N.Y.1932), a case where a trust and not a debtor-creditor was found, cannot be applied under the facts of the instant case.⁸

Thunderbird did not turn over to Penn-Dixie property to be sold. It rendered a

2. . . . [If] by a long established course of dealing between them, or by the custom of the particular business in which they are jointly participating, B has the right to commingle A's money, when collected, with his own, and use it for his own purposes as would a bank in which A was a depositor and which had collected notes for him, the relation is that of debtor and creditor.

Id. at 729.

Whereas the application of the first principle may have been appropriate under the facts in *Harvey*; the second principle is more susceptible to application in the instant case, though neither is exactly on point.

service for which it expected compensation. Nor did Thunderbird request Penn-Dixie, expressly or impliedly, to collect money from the consignees. Thunderbird looked to Penn-Dixie from start to end and had no relationship with the consignees other than to deliver freight as designated. Further, if the consignees for any reason did not pay Penn-Dixie, Thunderbird still viewed Penn-Dixie as fully liable.

Lastly, Thunderbird argues for a trust based upon a comment made in the legislative history accompanying Section 541 of the Bankruptcy Code (property of the estate), which states:

Situations occasionally arise where property ostensibly belonging to the debtor will actually not be property of the debtor, but will be held in trust for another. For example, if the debtor has incurred medical bills that were covered by insurance, and the insurance company had sent the payment of the bills to the debtor before the debtor had paid the bill for which the payment was reimbursement, the payment would actually be held in a constructive trust for the person to whom the bill was owed. This section and proposed 11 U.S.C. 545 also will not affect various statutory provisions that give a creditor of the debtor a lien that is valid outside as well as inside bankruptcy or that creates a trust fund for the benefit of a creditor of the debtor. See, *Packers and Stockyards Act* § 206, 7 U.S.C. 196.

H.R.Rep.No. 595, 95th Cong., 1st Sess. 367-8 (1977); S.Rep.No. 989, 95th Cong., 2d Sess. 82-83 (1978), U.S.Code Cong. & Admin.News 1978, p. 5787. Any application of the example therein by analogy to the instant case is misplaced.

It would be unreasonable to believe that by way of one example, Congress intended to restate the law of constructive trusts. Every case must be judged on its own particular facts. Second, insurance is special. By definition, "Insurance is an arrangement for transferring and distributing risk" R. Keeton, *Insurance Law* § 1.2(a) at 2 (West 1971). An ordinary contractual obligation, consisting of a debt, such as here, does not

contemplate this arrangement. Third, the linchpin for constructive trust in the example may very well be mistake, which in equity can give rise to a constructive trust. It seems to me that in the ordinary course, health/medical insurance agreements provide that payments, for expenses that are covered, will be made directly to the "healer", and that direct payment to the insured is only made in those instances where the insured presents proof of prior payment by himself. In sum, the legislative history comment is inappropriate to the applicable facts and principles involved in this case. (The commentary in the legislative history concerning statutory liens will be dealt with in the next section of this opinion.)

A discussion of trusts can almost never be exhaustive and although both parties have well developed arguments on tracing, this Court need not go further. "[I]f it cannot first be shown that a trust has been created, there is no necessity for inquiry as to whether the property can be identified or traced." 4 *Collier on Bankruptcy* ¶ 541.13 at 541-67.

III

Carrier's Lien Under the ICA

Thunderbird claims to have a statutory lien on freight delivered to Penn-Dixie as consignee by virtue of Section 25 of the Federal Uniform Bills of Lading Act, 49 U.S.C. § 105. This provision, in pertinent part, provides:

If an order bill is issued the carrier shall have a lien on the goods therein mentioned for all charges on these goods for freight . . .

An "order bill" is defined as:

A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill . . .

49 U.S.C. § 83.

The bills of lading at issue are not designated "to the order of" Penn-Dixie. In fact, they are "straight bills". A straight bill is defined as:

A bill in which is stated that the goods are consigned or destined to a specified person . . .
49 U.S.C. § 82.

[7] Each bill of lading clearly states that the goods are "consigned to Penn-Dixie Steel Corp." and are not marked "to the order of Penn-Dixie Steel Corp." Thus, Thunderbird has no statutory lien under 49 U.S.C. § 105 and none is provided for straight bills of lading.

It should be further noted that even if Thunderbird had a valid carrier's lien, it would still have been faced with Section 362 of the Bankruptcy Code (automatic stay); an insurmountable tracing problem, and finally, the possibility of a possessory requirement (see 13 *Am.Jur.2d Carriers* § 503).

IV

Property of the Estate—Epilogue

The entering of an order for relief under the Bankruptcy Code creates an estate consisting of "all legal or equitable interests of the debtor in property as of the commencement of the case. Section 541(a)(1). More specifically, "[t]he property accruing to the estate under Section 541(a)(1) includes all rights of action the debtor may have arising from contract [including] . . . a right of action . . . for compensation due on a contract . . ." 4 *Collier on Bankruptcy* (15th Ed.) ¶ 541.10(5) at 541-62.

[8] Penn-Dixie and its customers entered into contracts for the sale of steel products by the former to the latter. Upon performance by Penn-Dixie of its contractual obligation to its customers (receipt by Penn-Dixie customers of the steel products they ordered) the customers incurred an obligation to pay Penn-Dixie, and as a result, an account receivable in favor of Penn-Dixie arose. The definition of property of the estate encompasses this debt. If a customer did not pay their account payable in accordance with the contractual arrangement, Penn-Dixie would have the right to bring an action for the compensation due under the contract. Further, monies collected from various customers of

Penn-Dixie that were attributable to the accounts receivable owing to Penn-Dixie are "proceeds" from property of the estate, and, thus, are likewise property of the estate.

Earlier, it was demonstrated that no superior right or claim, either under the ICA or trust law, to this property of the estate exists in favor of Thunderbird. Therefore the \$2,977.16 collected from Penn-Dixie's customers by Thunderbird in mistake of its legal rights shall be accounted for and returned to Penn-Dixie, or on consent of the parties be credited against any future distribution on Thunderbird's claim pursuant to a plan of reorganization. This Court has concluded that Thunderbird is an ordinary, general, unsecured creditor of Penn-Dixie, and as such, its claim must be pursued in the normal course of the bankruptcy proceeding.

Without prejudice to the rights of Thunderbird to file a claim in these proceedings for the unpaid freight charges, Thunderbird is enjoined from further collecting, seeking to collect, receiving, depositing, or otherwise taking possession of or control over funds from Penn-Dixie's customers representing freight charges attributable to the unpaid bills of lading in this proceeding.

So Ordered.



In re Carole Jean MARTIN, aka
Carole Martin, Debtor.

Bankruptcy No. LA 80-02029-RM.

United States Bankruptcy Court,
C. D. California.

Oct. 27, 1980.

In a voluntary proceeding under Chapter 7, the Bankruptcy Court, Richard Med-

Westlaw

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Court of Appeals of Washington, Division 1.
 LYON VAN LINES, INC., Appellant,

v.

Alonzo P. COLE and Jane Doe Cole, his wife, and
 their marital community, Respondents.
 Northwest Data Systems, Inc., Defendant.
 No. 1753-L.

July 23, 1973.

Rehearing Denied Sept. 24, 1973.

Carrier brought suit to recover from consignees, owners of household goods, for carrier's transportation charges after a consignee's prospective employer, which had agreed to pay the charges, found itself unable to pay. The Superior Court, King County, Stanley C. Soderland, J., after entering default judgment against prospective employer, dismissed complaint against consignees with prejudice, and carrier appealed. The Court of Appeals, Swanson, C.J., held that Interstate Commerce Act did not place absolute liability for payment of transportation charges upon consignee-owners, and that where consignees never had any intention to enter into shipping contract with carrier and the carrier so understood, there was no contractual liability on part of consignees to pay the shipping charges.

Judgment affirmed.

West Headnotes

[1] Carriers 70 ⇨194

70 Carriers

70II Carriage of Goods

70II(J) Charges

70k194 k. Persons Liable for Charges.

Most Cited Cases

The Interstate Commerce Act does not place absolute liability for payment of a carrier's transportation charges upon the consignee-owner of goods, and any contractual liability of consignee, express

or implied, must be determined on facts of each particular case. Interstate Commerce Act, § 223, 49 U.S.C.A. § 323.

[2] Carriers 70 ⇨196

70 Carriers

70II Carriage of Goods

70II(J) Charges

70k196 k. Actions for Charges. Most

Cited Cases

Evidence, in carrier's suit to collect transportation charges from consignees, owners of goods, after third party, which had agreed to pay the charges, was unable to pay the bill, supported finding that carrier, which failed to give notice that charges had not been paid to consignees until more than four months after move, by which time third party was unable to meet any of its obligations and consignees were unable to protect their own interests, affirmatively contributed to its failure to collect charges due.

[3] Appeal and Error 30 ⇨1010.1(6)

30 Appeal and Error

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and Findings

30XVI(I)3 Findings of Court

30k1010 Sufficiency of Evidence in

Support

30k1010.1 In General

30k1010.1(6) k. Substantial

Evidence. Most Cited Cases

A finding of facts supported by substantial evidence is binding upon Court of Appeals.

[4] Carriers 70 ⇨32(2.3)

70 Carriers

70I Control and Regulation of Common Carriers

70I(B) Interstate and International Transport-

ation

70k32 Preferences and Discriminations

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EXHIBIT

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70k32(2) What Constitutes Preference
 or Discrimination

70k32(2.3) k. Charges in General.
 Most Cited Cases
 (Formerly 70k32(21/4))

Carriers 70 ⇐194

70 Carriers

70II Carriage of Goods

70II(J) Charges

70k194 k. Persons Liable for Charges.

Most Cited Cases

Where a consignee's prospective employer had agreed to be responsible for payment of shipping costs for consignees' household goods, and default judgment was entered against prospective employer after it was unable to pay the bill, a party existed from whom full payment of charges could be demanded and antidiscriminatory purposes of Interstate Commerce Act were satisfied without imposing liability for the charges upon consignees. Interstate Commerce Act, § 223, 49 U.S.C.A. § 323.

[5] Carriers 70 ⇐196

70 Carriers

70II Carriage of Goods

70II(J) Charges

70k196 k. Actions for Charges. Most

Cited Cases

Evidence, in carrier's suit to collect transportation charges for shipment of household goods from consignees, owners of the goods, after a consignee's prospective employer, which had agreed to pay the charges, was unable to pay the bill, supported finding that consignees, one of whom signed a bill of lading that indicated all charges were to be made to prospective employer, never agreed to pay charges made by carrier, although bill of lading further designated a consignee as shipper and contained provision that shipper would be liable for any and all charges applicable.

[6] Carriers 70 ⇐194

70 Carriers

70II Carriage of Goods

70II(J) Charges

70k194 k. Persons Liable for Charges.

Most Cited Cases

Where consignees, owners of household goods, carrier and a consignee's prospective employer understood at all times that prospective employer would be fully responsible for shipping costs of household goods and there was never any intention on part of consignees to enter into a shipping contract with carrier and carrier so understood, there was no contractual liability on part of consignees to pay shipping charges after prospective employer was unable to pay the bill.

*382 **1109 Steinberg & Steinberg, Quentin Steinberg, Seattle, for appellant.

Robert W. Kitto, Kent, for respondent.

SWANSON, Chief Judge.

Does the Interstate Commerce Act, 49 U.S.C. s 323, place absolute liability for payment of a carrier's transportation charges upon the consignee-owner of the goods shipped notwithstanding an agreement by a third party to pay such charges? The trial judge determined that it does not. We affirm.

The undisputed findings of fact by the trial judge indicate that the operative facts **1110 on this appeal are as follows: During the first part of August, 1970, the respondent Alonzo Cole, who at the time made his home in San Jose, California, commenced employment with Northwest Data Systems, Inc. (Northwest Data), in Everett, Washington. Prior to accepting such employment, Cole had secured the agreement of Northwest Data to pay all expenses involved *383 in moving his household goods from San Jose to Everett. At Northwest Data's request, Mrs. Cole secured the estimates of two moving companies, one of which was the appellant, Lyons Van Lines, Inc. (Lyon). Lyon presented the lowest estimate, and Mrs. Cole advised Lyon's representative that Northwest Data would be responsible for

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the moving costs.

Lyon made arrangements with Northwest Data with respect to the moving of respondents' goods, and the actual move took place between August 24 and August 28, 1970. On August 24, after the goods had been packaged but prior to moving them, Lyon's representative presented a 'Uniform Household Goods Bill of Lading and Freight Bill' (bill of lading) to Mrs. Cole for her signature. Upon delivery of the goods in Everett, the same bill of lading was again presented to Mrs. Cole for her signature. On both occasions, she signed as requested, but at no time did she read the terms of the document which reflected the total charges made by Lyon for the move and indicated that the charges were to be billed to Northwest Data. Mr. Cole continued his employment with Northwest Data until November, 1970, although he learned in the latter part of October that the company was in financial difficulty.

In January, 1971, Lyon notified the respondents Code that Northwest Data was unable to pay the bill for the shipment of the Coles' household goods and that it therefore sought payment from the Coles. When the Coles refused to pay, Lyon brought the lawsuit which is the subject of this appeal. Default judgment was entered against Northwest Data, but the complaint against the respondents Cole was dismissed with prejudice. This appeal followed.

Appellant Lyon advances two basic arguments in support of its contention that the respondents Cole are liable to it for the freight charges incurred in the shipment of the Coles' household goods in August, 1970, notwithstanding the fact that Northwest Data had agreed to pay such charges: first, that the Coles are absolutely liable as consignees accepting goods shipped in interstate commerce under the provisions of the Interstate Commerce Act, *38449 U.S.C. s 323, and, second, that the Coles are contractually liable for such charges by virtue of Mrs. Cole's signature on Lyon's bill of lading.

With respect to the first argument, appellant directs

us to substantial authority in support of the proposition that the Interstate Commerce Act, including the section relating to motor carriers, codified as 49 U.S.C. s 323 [FN1] as well as earlier and related **1111 legislation concerning railroad carriers, imposes *385 absolute liability upon the consignee for all charges arising out of the shipment of goods notwithstanding the fact that the consignee may have relied upon a third party to pay such charges. *Central Warehouse Co. v. Chicago R.I. & P. Ry. Co.*, 20 F.2d 828 (8th Cir. 1927); *Great Nor. Ry. Co. v. Hyder*, 279 F. 783 (W.D.Wash.1922); *National Van Lines v. Herbert*, 81 S.D. 633, 140 N.W.2d 36 (1966); *Aero Mayflower Transit Co. v. Hankey*, La.App., 148 So.2d 465 (1963); *Aero Mayflower Transit Co. v. Rae*, 203 Misc. 801, 118 N.Y.S.2d 895 (1952). See generally, 13 Am.Jur.2d Carriers, s 473 (1964); 13 C.J.S. Carriers ss 316, 393 (1939).

FN1. 'No common carrier by motor vehicle shall deliver or relinquish possession at destination of any freight transported by it in interstate or foreign commerce until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges, including rules and regulations for weekly or monthly settlement, and to prevent unjust discrimination or undue preference or prejudice: Provided, That the provisions of this paragraph shall not be construed to prohibit any such carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory, or political subdivision thereof, or for the District of Columbia. Where any common carrier by motor vehicle is instructed by a shipper or consignor to deliver property transported by such carrier to a consignee other than the shipper or consignor,

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such consignee shall not be legally liable for transportation charges in respect of the transportation of such property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and had no beneficial title in the property, and (b) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of the property. In such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner shall be liable for such additional charges, irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made. If the consignee has given to the carrier erroneous information as to who is the beneficial owner, such consignee shall himself be liable for such additional charges, notwithstanding the foregoing provisions of this paragraph. On shipments reconsigned or diverted by an agent who has furnished the carrier with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith.' 49 U.S.C. s 323.

The holdings in the cases relied upon by appellant are generally linked to a Congressional purpose in enacting legislation regulating interstate commerce 'to eliminate rebates, concessions or discriminations from the handling of commerce, to the end that persons and places might carry on their activit-

ies on an equal basis.' *Union Pac. R. Co. v. United States*, 313 U.S. 450, 461, 61 S.Ct. 1064, 1071, 85 L.Ed. 1453 (1941); See also *United States v. Koenig Coal Co.*, 270 U.S. 512, 46 S.Ct. 392, 70 L.Ed. 709 (1925); *Aero Mayflower Transit Co. v. Rae*, *Supra*. Moreover, the rule imposing what amounts to absolute liability for shipping costs upon the consignee may be traced to early federal cases holding, under the factual circumstances therein presented, that the antidiscriminatory purpose of the interstate commerce legislation requires a presumption that the consignee knows the law, including that setting uniform shipping rates so that he may be held liable to pay the full legal charge in the event of an undercharge through contract or mistake. *Pittsburgh, C.C. & St. L. Ry. Co. v. Fink*, 250 U.S. 577, 40 S.Ct. 27, 63 L.Ed. 1151 (1919); *New York Central R.R. v. York & Whitney Co.*, 256 U.S. 406, 41 S.Ct. 509, 65 L.Ed. 1016 (1921); *Louisville & Nash. R.R. Co. v. Central Iron & Coal Co.*, 265 U.S. 59, 44 S.Ct. 441, 68 L.Ed. 900 (1924). In the cases cited, the Supreme Court rejected the argument of the consignee that the carrier was estopped from collecting the legal rate, stating in *Fink*, 250 U.S. at 583, 40 S.Ct. at 28, 'Estoppel could not become the means of successfully*386 avoiding the requirement of the Act as to equal rates, in violation of the provisions of the statute.'

[1] In the case at bar, the respondents Cole argue that Lyon is essentially estopped from looking to them for the freight charges because of the understanding of the parties that Northwest Data would be responsible for such charges. Respondents urge that the holdings in *Southern Pac. Transp. Co. v. Campbell Soup Co.*, 455 F.2d 1219 (8th Cir. 1972) and *Consolidated Freightways Corp. v. Admiral Corp.*, 442 F.2d 56 (7th Cir. 1971), suggest the rule properly applicable to the circumstances of this appeal. Specifically, respondents contend that the trial court correctly relied upon *Consolidated Freightways* in determining that the Interstate **1112 Commerce Act does not place absolute liability upon a consignee of goods, and any contractual liability of the consignee, express or implied, must

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be determined on the facts of each particular case. We agree.

In *Consolidated Freightways*, the court offered a distinction between the imposition of liability for freight charges and the furtherance of the anti-discriminatory purposes of 49 U.S.C. s 323. The court noted that in *Fink* and its progeny, the Supreme Court ascertained which party was liable for the freight charges independently of its consideration of whether the statutory requirements that the full tariff rate be charged were met. In other words, the concern manifested in *Fink* was to insure that Equal rates at the full legal level were charged by all common carriers, rather than to determine Who was to pay such charges in every case. As the court, in *Consolidated Freightways*, referring to Section 223 of the Motor Carrier Act (49 U.S.C. s 323), stated at 442 F.2d at 62:

*Congress left the initial determination of a party's liability for freight charges to express contractual agreement or implication of law. (Citation omitted.) So long as payment of the full tariff charges may be demanded from some party, the anti-discrimination policy of the Section is satisfied. Congress did not undertake to settle all issues of collection with the enactment of Section 223. Nor did Congress intend to fashion a sword to insure collection in *387 every instance and a shield to insulate the carrier from the legal consequences of otherwise negligent or inequitable conduct.*

. . . The crucial question is not whether estoppel is urged as a bar to collection of the tariff rate as such, but whether the use of estoppel to prevent recovery on the facts of the particular case contradicts the statutory policy of Section 223 to curb discriminatory treatment of shippers.

See also *Southern Pac. Transp. Co. v. Campbell Soup Co.*, *Supra*.

[2][3][4] Appellant seeks to distinguish *Consolidated Freightways* on its facts, pointing out that in that case the consignee had already reimbursed the

consignor for the shipping costs on the carrier's representation that the shipment was prepaid and hence a double payment would be involved if the consignee were held to be absolutely liable to the carrier. Appellant further distinguishes *Consolidated Freightways* on the ground that the carrier, without notice to the consignee, had illegally extended credit to the consignor and thus increased the risk of loss. We note that the *Campbell Soup* case also involved a potential double payment. Assuming arguendo such factual distinctions exist [FN2], the **1113 overriding *388 issue in *Consolidated Freightways*, *Campbell Soup*, and the instant case is whether a determination that the consignee should not be held absolutely liable for the shipping costs will contravene the antidiscriminatory purpose of 49 U.S.C. s 323. It is undisputed that *Northwest Data* agreed to be responsible for payment of the shipping costs, and default judgment has been entered against it. Thus a party exists from whom full payment of the charges may be demanded and this fact alone is sufficient to satisfy the requirements of 49 U.S.C. s 323. Under such circumstances, we hold that it would be improper to impose absolute liability upon the consignee respondents *Cole*. To the extent authority exists to the contrary, we decline to follow it because we have concluded, based upon the reasoning in *Consolidated Freightways* and *Campbell Soup*, that such authority misconstrues the holdings of the Supreme Court in *Fink* and similar cases.

FN2. In the case at bar, it is undisputed that respondent *Cole* secured the agreement of *Northwest Data* to pay the freight costs here in question as one of the terms of his employment contract; consequently, the shipping costs could be considered to be partial compensation to *Cole* for the work he performed for *Northwest Data* and *Cole* would effectively be making a double payment if he were held liable for shipping costs which he had already earned. Moreover, there is substantial evidence in the record to support the trial court's con-

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clusion of law No. 4, disputed by appellant, to the effect that appellant Lyon contributed to the risk of loss. See 49 C.F.R. s 1322.1 (1972). Conclusion of law No. 4 states:

Under the facts of this case, the plaintiff affirmatively contributed to its failure to collect the charges due by failing to notify the defendants Cole until early January, 1971 that the charges had not been paid by Northwest Data Systems, Inc. By that time Northwest Data Systems was unable to meet any of its obligations, and the defendants Cole were unable to protect their own interest.

Conclusion of law No. 4 may be deemed a finding of fact and being supported by substantial evidence, it is binding upon this court. See *Ferree v. Doric Co.*, 62 Wash.2d 561, 383 P.2d 900 (1963).

[5][6] Having thus determined that the trial court's judgment does not contravene the Congressional purpose expressed in 49 U.S.C. s 323, we turn to appellant Lyon's second basic argument which is that the respondents Cole are nevertheless contractually liable to it for payment of the shipping costs here in question because of Mrs. Cole's signature on Lyon's bill of lading. In this regard, the trial court's finding of fact No. 7, to which the appellant assigns error, is dispositive of the issue and reads as follows: 'At no time did either of the defendants Cole agree to pay any of the charges made by the plaintiff.' We have carefully reviewed the record and have concluded that this finding is supported by substantial evidence, and therefore it is a verity for purposes of this appeal.

The record is such that no lengthy analysis is required to reach the conclusion that the parties understood at all times that Northwest Data was to be fully responsible for the shipping costs, and that there was never any intention on the part of the respondents Cole to enter into a contract with Lyon,

and Lyon so understood. The bill of lading indicates on its face that all charges were to be made to *389 Northwest Data, and Mrs. Cole's signatures reflect little more than acknowledgments initially releasing and subsequently receiving the goods. Although, as appellant points out, Mr. Cole is listed on the bill of lading as 'shipper' and a provision on the reverse side of the document recites that the shipper shall be 'liable for any and all charges applicable . . .' there is substantial evidence to support the trial judge's findings, which in turn support his conclusion of law No. 3 stating in relevant part:

Under the facts of this case there is no contract between the plaintiff and the defendants Cole for the payment of subject charges. There was a definite understanding to the contrary, . . .

We conclude that the trial judge correctly held that there is no contractual liability on the part of the respondents Cole to pay the shipping charges here in question. Under such circumstances, and in view of our holding on the issue of absolute liability, we do not reach the merits of the respondents' contention that the appellant is otherwise estopped from looking to them for payment of such charges.

The judgment is affirmed.

WILLIAMS and JAMES, JJ., concur.

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END OF DOCUMENT

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Court of Common Pleas of Pennsylvania, Phil-
adelphia County.
Philadelphia Belt Line Railroad Company
v.
Holt Hauling & Warehouse Systems, Inc.
No. 03025E.

March term, 1967.
May 24, 1972.

**1 *700 Plaintiff's exceptions to findings of trial judge.

West Headnotes

Carriers 70 ⇨ 100(1)

70 Carriers

70II Carriage of Goods

70II(E) Delay in Transportation or Delivery

70k100 Demurrage, and Liability of Con-
signee or Owner for Delay

70k100(1) k. Right of Carrier to

Charge Demurrage, and Persons Liable. Most Cited
Cases

A public warehouseman, named as consignee in the bill of lading for purposes of notification only, and not a party to the contract of carriage, was not responsible to the carrier for demurrage, where the delay in unloading was occasioned by the carrier's withholding delivery of the cars to the warehouse pending payment of the freight charges.

Anthony B. Agnew, Jr., for plaintiff.

Robert H. Malis, for defendant.

BOLGER, J.

This matter was tried by the court, without a jury, on November 2 and 3, 1970, and a finding entered for defendant November 18, 1970. Plaintiff's exceptions to the finding of the court were briefed and argued to the court, and dismissed on July 28, 1971.

The action was brought by the Philadelphia Belt Line Railroad, a corporation engaged in the administration of local rail freight deliveries in the City of Philadelphia for the benefit of interstate carriers *701 such as the Reading Company and the Penn Central Railroad, against Holt Hauling and Warehouse Systems, Inc., a general public warehouse. Plaintiff complains that defendant ("warehouse") incurred demurrage obligations for detention of 18 flatcars consigned to its warehouse at Port Richmond. The facts are not in dispute.

Upon the arrival of a vessel carrying steel coils from Japan in the Port of Philadelphia, a local customs broker, John H. Faunce Co., Inc., an agent of the consignor, prepared a bill of lading directing the Reading Railroad ("Reading") to move the steel to defendant's public warehouse at Bristol and Bath Streets in Philadelphia for unloading and storage.

Plaintiff acknowledged that the bill of lading was prepared without the knowledge, joinder or signature of the warehouse company which was named "Consignee for purposes of notification only." The bill of lading also indicated that the shipment was "freight collect." All of these arrangements having been made between the railroad and the consignor in Japan, none of the documents in question were sent to defendant warehouse. Upon loading of the cars at dockside, the half cargo was shipped in nine cars, on or about August 2nd, not to the warehouse company, but to a marshalling yard in Port Richmond belonging to the Reading Railroad where the railroad retained possession of the freight cars. Upon arrival of the cars at the marshalling yard, an employe of both Reading and Belt Line, acting for both lines, called the warehouse, orally advised it of the arrival of the shipment and demanded payment of the freight from the pier to the warehouse as a condition precedent to the release of the cars for unloading. Warehouse orally advised him that it was not the owner of the goods, that they were the property of Luria Brothers, a *702 customer of warehouse, and furnished customer's full name and



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address to plaintiff in writing.

****2** These nine cars were not released to Holt until the afternoon of August 4th, when the freight was paid, and not physically "spotted" on the Holt premises until August 5th at 1 p.m. Holt did not receive the benefit of the two days of free time normally allowed, but Belt Line charged demurrage for the ensuing six days, including Saturday and Sunday, until the cars were emptied.

Another nine carloads of steel arrived at the dockside on August 4th, under identical circumstances and were detained by plaintiff in the Reading yards until the freight bill was paid on August 15th, and finally "placed" on warehouse property on the 16th at 2 p.m. These cars were unloaded on the 17th, 18th and 19th.

Belt Line's tariff allowed the first two days as "free days," charged \$7.50 per car for the next four days, and \$15 per car for each day thereafter until the cars were unloaded, including all the time the cars were impounded for the collection of the freight bill. In five cases the car was physically placed on the 18th and released on the same day or the next day, but demurrage of \$90 for each car was charged the warehouse, calculated from August 4th.

Plaintiff seeks damages for delay in unloading the cars—"demurrage"—from the warehouse for the period from their arrival at Port Richmond ("constructively placed") until their release empty, allowing two days "free time," irrespective of the fact that the cars were not made available to the warehouse for more than a day or two at the most. Defendant contends that it is not liable, since the delay was occasioned entirely by the desire of the Belt Line and Reading Railroads to retain a lien for freight *703 charges upon the goods until the same was paid to the railroad, and furthermore, since it is a public warehouse, it is not liable for demurrage charges in any event.

It is conceded that the warehouse had no general contract with either the Belt Line or Reading Rail-

road obligating itself to pay demurrage charges for its customers, nor was it privy to any of the bills of lading or other railroad documentation.

Upon oral demand for payment of its freight bill the railroad admitted that it received oral notification by the warehouse that the goods in question were the property of Luria Brothers, Inc., and further that it knew Holt to be a general public warehouse storing commodities for others.

Accordingly the court makes the following:

FINDINGS OF FACT

1. Plaintiff, Philadelphia Belt Line Railroad Company, acted as agent for the Reading Railroad in the movement of the freight from the dockside to the Holt warehouse property.

2. The cars were placed in the custody of the Reading Railroad in its storage yard at Port Richmond under its lien for freight charges until the freight was paid.

3. The Holt Warehouse Company had no contract with plaintiff, Philadelphia Belt Line Railroad, or its principal, the Reading Company, and was a notification consignee only.

****3** 4. Defendant warehouse company unloaded the cars promptly and with due dispatch and during the free time allowed it, once the cars were released to the warehouse company for unloading.

*704 DISCUSSION

Interstate Commerce Commission regulations control the problem at bar and the opinion of the commission in volume 318 of its reports, at page 593, is dispositive of the problem. In this report it is revealed that the commission had instituted an investigation on its own motion into the question of demurrage charges by motor vehicle carriers and undertook extensive hearings regarding publishing tariffs of the Middle Atlantic Conference, a tariff

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publishing agent for 1,300 motor carriers. The conference had proposed to include in its tariffs establishing demurrage charges, any public warehouse receiving goods by motor freight. The word "consignee" as used in its tariff meant, inter alia, a warehouseman, thus imposing liability upon the warehouse for freight and demurrage.

To this proposed tariff, protests and briefs were filed and the result of the commission hearings may be found on page 607 of the report which reads, in pertinent part, as follows:

"Notes B and C define consignor and consignee as parties from (to) whom the carrier receives (delivers) the shipment 'whether he be the original consignor (ultimate consignee), or warehouseman ...' The situation appears to be the same with respect to carriers of other modes, and of pier operators as well as warehousemen engaged in a public service. Their status cannot be changed by publishing tariff provisions which purport to make them consignors-consignees for the purposes of assessing charges in connection with the transportation of a particular shipment."

On page 608 thereof, the commission followed the opinion in *Smokeless Fuel Co. v. Norfolk & W. Ry.* *705 Co., 85 I.C.C. 395, 401, in which it cited with approval the observation:

"The law seems to be well settled that the party to whom a shipment is consigned is the legal consignee and not the party in whose care the goods are shipped.' We conclude that notes B and C of the proposed rule should be eliminated."

A 1969 decision of the commission is reported in 1969 Federal Carriers Cases (CCH) (335 I.C.C. 537), appearing on page 44,393, paragraph 36,350. In that report the commission dealt with the question of liability of a warehouse, agent, broker or steamship agency for the detention charges required by a given tariff provision. The commission decided (headnote in CCH):

"... Where a tariff provision provides that the 'charges due the carrier under the provisions of this rule shall be paid either by the consignor or of the consignee, which ever causes the delay, irrespective of the responsibility for payment of freight or other charges' and where the terms 'consignor' and 'consignee' are defined in the tariff to include agents, brokers, steamship agencies and customs brokers acting in their behalf then such provisions are unlawful because they attempt to place liability for detention charges upon a person not a party to the contract of transportation...."

**4 The commission cited its prior decision regarding detention of motor vehicles, 15 Federal Carriers Cases (CCH), paragraph 35,539, 318 I.C.C. 593, which found unlawful tariff provisions similar to those under consideration in the above case defining the term "consignor" and "consignee" to include warehousemen and others not maintaining joint rates with the motor carriers because such parties are not parties of the contract of transportation. The commission*706 found that the beneficial owner or owners of the shipment would assume ultimate responsibility for the payment of detention charges not otherwise collected by the carrier from other parties voluntarily acting as agents for the principal. The commission affirmed and followed the decision of the Middle Atlantic and New England Case, supra, and concluded:

"... such provisions are unlawful to the extent that they attempt to place liability for detention charges upon a person not a party to the contract of transportation."

Thus, the Interstate Commerce Commission (one commissioner only dissenting) held that a warehouse is not liable to a claim for transportation or for detention charges.

It is quite clear that defendant here, (a) neither a party to the contract of transportation, (b) nor a signer of any agreement with the railroad, is not liable for the basic freight detention charges: 13 C.J.S. 809, note 17; *Southern Pacific Co. v.*

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Granger's Business Association, 1 Pac. 2d 477, 115 Cal. App. 256.

Furthermore, the person liable for demurrage charges is the one through whose default or breach of duty the detention or delay in unloading occurred: 13 C.J.S. 808; Emmons Coal Mining Co. v. Norfolk & W. Ry. Co. (CCA 3d), 3 F. 2d 525, affirmed 47 Supreme Ct. Rep. 254, 272 U.S. 709, 71 L. Ed. 485; Baltimore & Ohio R.R. Co. v. L. B. Foster Co., 81 Pa. Superior Ct. 304.

In *Southwestern Railway Co. v. Mays*, 117 F. Supp. 182 (1959), the court defined demurrage in the following language:

"Demurrage' is a charge exacted by a carrier from a shipper or consignee on account of a failure on the latter's part to load or unload cars within the free time *707 prescribed by the applicable tariffs ... The purpose of the charge is to expedite the loading and the unloading of cars, thus, facilitating the flow of commerce, which is in the public interest ... The subject of demurrage is, in general, governed by the 'Uniform Demurrage Code,' which was adopted in 1909 by the National Convention of Railway Commissioners, and was approved by the Interstate Commerce Commission and ordered by that body to be put into effect throughout the country." (citing cases)

**5 "In order for a liability for demurrage to exist, however, the failure to load or unload the cars within the free time must be the fault of the shipper or consignee; and, conversely demurrage cannot be charged where such failure was due to the fault of the carrier." (citing cases)

As is stated in the annotation, 46 A.L.R. at page 1156:

"No demurrage can be exacted by a carrier unless the delay in unloading is clearly attributable to the fault of the consignee."

The evidence adduced at trial made it abundantly clear that the railroad saw fit to move the freight in

question as a part of "collect shipment" and further elected to assert its lien for the freight charges due the Reading Railroad. Thus, the delay was occasioned for the convenience and at the request of the Reading Company, not defendant.

Accordingly the court makes the following

CONCLUSIONS OF LAW

1. Defendant Holt Hauling and Warehouse Systems, Inc., had no contract with plaintiff, Philadelphia Belt Line Railroad Company.
2. Holt Hauling and Warehouse Systems, Inc., was not the "consignee" within the meaning of the *708 Interstate Commerce Commission tariffs, but was a "notification consignee only."
3. The Holt Hauling and Warehouse Systems, Inc., being a general public warehouse, is not liable for demurrage charges of plaintiff railroad in the absence of an express contract to the contrary.
4. Plaintiff is legally responsible for the delay in unloading the cars and the same can not be assessed against the defendant.

For the foregoing reasons plaintiff's exceptions must be dismissed.

Philadelphia Belt Line R. Co. v. Holt Hauling & Warehouse Systems, Inc.
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Exhibit 3

353 F.Supp. 1109
(Cite as: 353 F.Supp. 1109)

P

United States District Court,
District of Columbia.
MIDDLE ATLANTIC CONFERENCE et al.,
Plaintiffs,
v.
UNITED STATES of America and Interstate
Commerce Commission, Defendants.
Civ. A. No. 1166-70.

Dec. 21, 1972.

Action by motor carrier associations to set aside order of Interstate Commerce Commission prohibiting common carriers from specifying in their tariffs that certain warehousemen, pier operators, brokers, steamship agencies, and others similarly situated, who were neither consignors nor consignees, are to be liable under certain circumstances for charges for undue detention of trucks being loaded or unloaded at their premises. A three-judge Federal District Court, MacKinnon, Circuit Judge, held that proposed tariff of motor common carriers, insofar as it attempted to impose liability for demurrage charges upon an agent who was not a party to contract of transportation, was unlawful.

Order affirmed.

West Headnotes

[1] Shipping 354 ↪ 39(1)

354 Shipping

354III Charters

354k39 Construction and Operation in General

354k39(1) k. In General. Most Cited Cases

A "charter party" is a contract of affreightment whereby owner of a ship lets the whole, or part of her, to a shipper for conveyance of goods in consideration of payment of freight.

[2] Carriers 70 ↪ 194

70 Carriers

70II Carriage of Goods

70II(J) Charges

70k194 k. Persons Liable for Charges. Most

Cited Cases

To make shippers and others liable to carrier in connection with transportation of goods requires a stronger direct contractual base between the parties than in maritime contracts, and land carriers in United States must rely upon liabilities created according to common law principles.

[3] Carriers 70 ↪ 100(1)

70 Carriers

70II Carriage of Goods

70II(E) Delay in Transportation or Delivery

70k100 Demurrage, and Liability of Consignee or Owner for Delay

70k100(1) k. Right of Carrier to Charge

Demurrage, and Persons Liable. Most Cited Cases
Proposed tariff of motor common carriers, insofar as it attempted to impose liability for demurrage charges upon an agent who was not a party to contract of transportation, was unlawful. 28 U.S.C.A. §§ 1336(a), 2325; Interstate Commerce Act, §§ 3(2), 216(g), 217(a), 49 U.S.C.A. §§ 3(2), 316(g), 317(a); Bill of Lading Act, § 25, 49 U.S.C.A. § 105.

[4] Carriers 70 ↪ 100(1)

70 Carriers

70II Carriage of Goods

70II(E) Delay in Transportation or Delivery

70k100 Demurrage, and Liability of Consignee or Owner for Delay

70k100(1) k. Right of Carrier to Charge

Demurrage, and Persons Liable. Most Cited Cases
Before such transportation-related assessments as detention charges can be imposed on a party on a prescribed basis there must be some legal foundation for such liability outside mere fact of handling the goods shipped. 28 U.S.C.A. §§ 1336(a), 2325; Interstate Commerce Act, §§ 3(2), 216(g), 217(a), 49 U.S.C.A. §§ 3(2), 316(g), 317(a); Bill of Lading Act, § 25, 49 U.S.C.A. § 105.

[5] Carriers 70 ↪ 100(1)



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70 Carriers

70II Carriage of Goods

70II(E) Delay in Transportation or Delivery

70k100 Demurrage, and Liability of Consignee or Owner for Delay

70k100(1) k. Right of Carrier to Charge Demurrage, and Persons Liable. Most Cited Cases
Since persons liable for demurrage charges are to be determined by ordinary rules of common law, parties to a contract of carriage are perfectly free among themselves to contract with respect to payment of demurrage, as they are with respect to line-haul charges; but where they have not become contractually obligated to pay demurrage because common-law principles exonerate them from liability, and they are not made liable by statute or custom, liability cannot then be imposed upon them legislatively through device of a tariff.

6 Carriers 70 ↪194

70 Carriers

70II Carriage of Goods

70II(J) Charges

70k194 k. Persons Liable for Charges. Most Cited Cases

Statute relating to collection of rates and charges and liability of agent of beneficial owner speaks only to the "nonliability" in certain narrow situations of warehousemen, and others similarly situated, who appear as consignees on bill of lading, and does not impose liability on an agent not a party to the contract. Interstate Commerce Act, § 223, 49 U.S.C.A. § 323.

7 Principal and Agent 308 ↪136(1)

308 Principal and Agent

308III Rights and Liabilities as to Third Persons

308III(A) Powers of Agent

308k130 Liabilities Incurred

308k136 Liabilities of Agent

308k136(1) k. In General. Most Cited

Cases

An agent for a disclosed principal is not liable to a third person for acts within scope of the agency.

8 Carriers 70 ↪100(1)

70 Carriers

70II Carriage of Goods

70II(E) Delay in Transportation or Delivery

70k100 Demurrage, and Liability of Consignee or Owner for Delay

70k100(1) k. Right of Carrier to Charge Demurrage, and Persons Liable. Most Cited Cases
Although warehousemen are free to assume liability for detention charges by contractual undertaking, absent any custom, statutory or contractual basis, it would be unlawful to attempt unilaterally to impose such liability on a party outside contract of transportation by means of a tariff approved by the ICC. 28 U.S.C.A. §§ 1336(a), 2325; Interstate Commerce Act, §§ 3(2), 216(g), 217(a), 49 U.S.C.A. §§ 3(2), 316(g), 317(a); Bill of Lading Act, § 25, 49 U.S.C.A. § 105.

9 Carriers 70 ↪189

70 Carriers

70II Carriage of Goods

70II(J) Charges

70k189 k. Rates of Freight. Most Cited Cases

A tariff is an inappropriate instrument to legislate liability with respect to a nonconsenting party. 28 U.S.C.A. §§ 1336(a), 2325; Interstate Commerce Act, §§ 3(2), 216(g), 217(a), 49 U.S.C.A. §§ 3(2), 316(g), 317(a); Bill of Lading Act, § 25, 49 U.S.C.A. § 105.

10 Commerce 83 ↪85.33

83 Commerce

83III Interstate Commerce Commission

83III(A) Organization and Authority

83k85.24 Motor Carriers, Regulation

83k85.33 k. Rates and Charges. Most Cited Cases

ICC acted properly in prohibiting motor common carriers from specifying in their tariffs that certain warehousemen, pier operators, brokers, steamship agencies and others similarly situated, who were neither consignors nor consignees, were to be liable under certain circumstances for charges for undue detention of trucks being loaded or unloaded at their premises. 28 U.S.C.A. §§ 1336(a), 2325; Interstate Commerce Act, §§ 3(2), 216(g), 217(a), 49 U.S.C.A. §§ 3(2), 316(g), 317(a); Bill of Lading Act, § 25, 49 U.S.C.A. § 105.

11 Commerce 83 ↪85.25

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83 Commerce

83III Interstate Commerce Commission

83III(A) Organization and Authority

83k85.24 Motor Carriers, Regulation

83k85.25 k. In General. Most Cited

Cases

(Formerly 83k85.24)

Statute, which vests in ICC the regulation of transportation of passengers or property by common carriers engaged in interstate or foreign commerce and of procurement thereof and provision of facilities therefor, was not intended to extend plenary jurisdiction of the ICC to regulation of terminal facilities owned and operated by third parties who are not motor carriers under the Act. Interstate Commerce Act, §§ 202(a), 203, 203(a)(19), 49 U.S.C.A. §§ 302(a), 303, 303(a)(19).

[12] Commerce 83 ↔ 85.3

83 Commerce

83III Interstate Commerce Commission

83III(A) Organization and Authority

83k85.1 Regulation of Carriers in General; Railroads and Pipe Lines

83k85.3 k. Preferences and Discriminations. Most Cited Cases

Under its duty to prevent unlawful discrimination, power of ICC would extend to any person used by any common carrier, subject to ICC jurisdiction, to implement a pattern of unlawful discrimination prohibited by the Interstate Commerce Act, but such authority would not extend to authorizing the ICC to regulate persons or transactions which are not shown to involve unlawful discrimination. 28 U.S.C.A. §§ 1336, 1398, 2284, 2321, 2325.

[13] Carriers 70 ↔ 100(1)

70 Carriers

70II Carriage of Goods

70II(E) Delay in Transportation or Delivery

70k100 Demurrage, and Liability of Consignee or Owner for Delay

70k100(1) k. Right of Carrier to Charge Demurrage, and Persons Liable. Most Cited Cases
Proposed tariff, by which motor common carriers were attempting to impose liability for demurrage charges on warehousemen and others similarly situated who were not named in bills of lading as consignees or consignors, was not lawful on theory that a

contractual relationship existed between carrier and warehousemen in form of a quasi contract. 28 U.S.C.A. §§ 1336(a), 2325; Interstate Commerce Act, §§ 3(2), 216(g), 217(a), 49 U.S.C.A. §§ 3(2), 316(g), 317(a); Bill of Lading Act, § 25, 49 U.S.C.A. § 105.
*1110 Bryce Rea, Jr., John R. Bagileo, Washington, D. C., for plaintiffs Middle Atlantic Conference, Eastern Central Motor Carriers Assn., Inc., and The New England Motor Rate Bureau, Inc. (intervenor).

John Womack, Louisville, Ky., for plaintiff Central & Southern Motor Freight Tariff Association, Inc.

Guy H. Postell, Atlanta, Ga., for plaintiff Southern Motor Carriers Rate Conference.

Harold A. Titus, Jr., Washington, D. C., for defendants United States and United States District Court.

John H. D. Wigger, Washington, D. C., for defendant Dept. of Justice.

Raymond Zimmet, I. C. C., Washington, D. C., for defendant I. C. C.

*1111 Arthur L. Shipe, Burlington, Mass., for intervening plaintiff The New England Motor Rate Bureau, Inc.

John F. Donelan, John M. Cleary and John H. Caldwell, Washington, D. C., for intervening plaintiff The National Industrial Traffic League.

William P. Sullivan, Washington, D. C., for intervening defendants National Assn. of Refrigerated Warehouses, Inc. and American Warehousemen's Assn.

Charles B. Myers, Chicago, Ill., for intervening defendant American Warehousemen's Assn.

Robert G. Seaks, Washington, D. C., Harry N. Babcock, Cleveland, Ohio, Rene J. Gunning, Baltimore, Md., for intervening defendants The Chesapeake and Ohio Railway Company and Western Maryland Railway.

OPINION

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Before TAMM^{FN2} and MacKINNON,* Circuit Judges,
and PARKER, District Judge.

FN* Serving with Judge Parker as members of the District Court of three judges designated by the Chief Circuit Judge by order herein of November 9, 1970.

MacKINNON, Circuit Judge:

This is an action seeking to set aside and enjoin a report and order of the Interstate Commerce Commission (Commission). Our jurisdiction is invoked under 28 U.S.C. §§ 1336, 1398, 2284, 2321 and 2325. Briefly stated, the Commission order prohibits motor common carriers from specifying in their tariffs that certain warehousemen, pier operators, brokers, steamship agencies, and others similarly situated (generally referred to hereinafter as warehousemen), *who are neither consignors nor consignees*, are to be liable under certain circumstances for charges for the undue detention (demurrage) of trucks being loaded or unloaded at their premises.

Various motor carrier associations^{FN1} filed proposed tariffs with the Commission, seeking to establish charges for the detention of carrier's vehicle beyond the so-called free time for loading and unloading cargo.^{FN2} The material provisions of the tariff schedules which the complaint seeks to uphold are substantially as follows:

FN1. The plaintiffs in this case are the Middle Atlantic Conference, the Central & Southern Motor Freight Tariff Association, Inc., the Eastern Central Motor Carriers Association, Inc. and the Southern Motor Carriers Rate Conference. The New England Motor Rate Bureau, Inc. and the National Industrial Traffic League have intervened on plaintiffs' behalf before the Commission and as intervening plaintiffs before this court. The National Association of Refrigerated Warehouses, Inc., the American Warehousemen's Association, the Chesapeake & Ohio Railway Co. and the Western Maryland Railway have intervened before the Commission on the defendants' behalf and as intervening defendants before this court.

FN2. The purpose of detention charges is to

facilitate transportation by providing an incentive to avoid tying up a carrier's vehicles for unnecessary periods of time. Detention of Motor Vehicles-Middle Atlantic and New England Territory, 325 I.C.C. 336, 340 (1965).

The plaintiffs have maintained that the tariff provisions they seek are desirable because they place "the responsibility upon the only person who can eliminate the undue detention-the person who actually causes the undue detention." Opening Statement of Facts and Argument of National Industrial Traffic League, filed March 6, 1967, p. 4.

Except as otherwise specifically provided, when due to no disability, fault or negligence on the part of the carrier, the loading or unloading of freight ... is delayed beyond the free time authorized ... charges in Sec. 4 will be assessed against the consignor (Notes B and C) if the delay occurs at his premises, and against the consignee (Notes B and D) if the delay occurs at his premises . . .

NOTE B: *Under this rule, the agent or representative of consignor or consignee, forwarding or receiving *1112 a shipment for account of consignor or consignee will be treated as a consignor or consignee.*

NOTE C: "Consignor" as used in this item means the party from whom the carrier receives the shipment or any part thereof, for transportation at point of origin or any stop-off point, whether he be original consignor, or warehouseman, or connecting air, motor, rail or water carrier with which the carrier does not maintain joint through rates, or other person to whom the bill of lading is issued.

NOTE D: "Consignee" as used in this rule means *the party to whom the carrier is required by the bill of lading or other instruction, to deliver the shipment, or any part thereof, at destination or any stop-off point, whether he be ultimate consignee, or warehouseman, or connecting air, motor, rail or water carrier with whom the carrier does not maintain joint through rates, or other person designated in the bill of lading.* [Emphasis added.]

In short, the scheme of the tariff proposal is to make warehousemen, agents, etc., liable for detention

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charges by a unilateral redefinition of consignors and consignees to include persons who are neither consignors nor consignees.

Under this plan of the motor carriers to use the device of a tariff which has the force of law^{FN3} to impose liability for detention charges, the charges would accrue only where the overlong detention was not "due" to any "disability, fault or negligence ... of the carrier" and if that requirement were satisfied, then under the tariff, with respect to shipments delivered to a warehouseman, agent, etc., the warehouseman would become automatically liable even though the delay was occasioned by factors outside his control.^{FN4} There is no present controversy over the actual amounts of the charges. However, the proposed tariffs seek to provide not only for the amounts of the detention charges, but also for the imposition of liability for the charges *against particular parties*.

FN3, Crancer v. Lowden, 315 U.S. 631, 635, 62 S.Ct. 763, 86 L.Ed. 1077 (1942); Lowden v. Simonds-Shields-Lonsdale Grain Co., 306 U.S. 516, 520, 59 S.Ct. 612, 83 L.Ed. 953 (1939); Swift & Co. v. Hocking Valley Ry., 243 U.S. 281, 285, 37 S.Ct. 287, 61 L.Ed. 722 (1917); Pennsylvania R.R. v. International Coal Co., 230 U.S. 184, 197, 33 S.Ct. 893, 57 L.Ed. 1446 (1913); Pennsylvania R.R. v. Moore-McCormack Lines, Inc., 246 F.Supp. 143, 147 (S.D.N.Y.1965); Central R.R. of New Jersey v. Anchor Line, 219 F. 716, 717 (2d Cir. 1914).

FN4. We do not discuss the mischief such a detention rule would create in practical application.

In general, the charges are to be imposed by virtue of the tariff provision directly on the party at whose premises the delay occurs even if that party were an agent of the consignor or consignee, such as a warehouseman, pier operator, or other agent or bailee for hire and *not an actual party to the contract of transportation, i. e., a person not named in the bills of lading as consignor or consignee.*^{FN5} This last feature of the proposed tariffs is the one which creates the present controversy. Hereafter we will refer to warehousemen only, they *1113 being representative of the class of third parties, agents and representatives of consignors and consignees upon whom the carriers

seek to impress liability for detention charges.

FN5. Previous to the instant tariff filings, the Commission had required that detention charges be assessed "against the shipment." Detention of Motor Vehicles-Middle Atlantic and New England Territory, 325 I.C.C. 336, 366 (1965). This places the liability for the charges on that party liable for the basic freight charges.

The Commission summarized the substance of the instant tariff filings as follows:

Representative of such publications are the provisions proposed by Central & Southern which provide that detention charges "shall be paid either by the consignor or consignee, whichever causes the delay, irrespective of the responsibility for payment of freight or other charges." ... [T]he tariff defines the terms "consignor" and "consignee" to include agents, brokers, steamship agencies, and custom brokers acting in their [consignors and consignees] behalf . . .

335 I.C.C. at 538.

The Commission has rejected the proposed tariffs as being "unlawful,"^{FN6} and the motor carrier associations now bring this action to set aside, annul and enjoin the report and order of the Commission. 28 U.S.C. § 1336(a) (1964).^{FN7} A three-judge District Court has been convened to hear and decide the case pursuant to 28 U.S.C. § 2325 (1964).^{FN8}

FN6. Docket No. 34767, Responsibility for Payment of Detention Charges, Eastern Central States, 335 I.C.C. 537, (1969), aff'g 332 I.C.C. 585 (1968). The Commission's report and order also embraces Docket No. 34767 (Sub-No. 1), Responsibility for Payment of Detention Charges, Central & Southern States; Docket No. 34767 (Sub-No. 2), Responsibility for Payment of Detention Charges in Various Motor Carrier Regions; and Docket No. 34767 (Sub-No. 3), Responsibility for Payment of Detention Charges in Central States.

FN7. 28 U.S.C. § 1336(a) provides:

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(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

FN8. 28 U.S.C. § 2325 provides:

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 970.

Plaintiffs frame the issue to be:

[O]nly a question of law, i. e., whether the Interstate Commerce Act and the body of case law developed before and since that Act was passed permit the imposition [by means of a tariff] of liability for detention charges on others than persons named in bills of lading as consignors or consignees of shipments.

Plaintiffs' br. p. 5 (emphasis added). To state the issue completely it is necessary to add that the carrier seeks to create this new rule of liability "by means of a tariff." This formulation of the issue by plaintiffs is a clear admission that the carriers are attempting through the tariff to impose liability upon parties who are not named in the bills of lading as consignors or consignees. In the absence of this tariff provision the warehousemen would not be liable for detention charges under such circumstances and thus what is attempted is in effect a "legislative" change in the current law determining their liability.

I

[1][2] The right to assess detention or demurrage charges against parties to a contract of transportation because of delay in releasing transportation equipment is presently well established.^{FN9} Motor carriers term such delay as detention. Railroads refer to it as demurrage. Prior to the coming of the railroad, liability for demurrage of ships was recognized in maritime

law as the amount to be paid for delay in loading, unloading or sailing beyond the time specified.^{FN10} In maritime transactions the time schedule for such acts was frequently fixed in the charter party^{FN11} or *1114 bill of lading^{FN12} but if not so agreed upon there was an implied promise by the shipper or consignee to perform such activities within a reasonable time, or, in default thereof, to become liable for demurrage.^{FN13} If a specific demurrage rate was not fixed in the charter party or bill of lading a reasonable rate would be required^{FN14} and the law recognized that the ship owner or master had a lien on the cargo for such demurrage even though the bill of lading did not contain a demurrage clause.^{FN15} This is an outgrowth of a legal concept, peculiar to contracts of shipment at maritime law, which has been stated as follows:

FN9. 49 U.S.C. §§ 3(2), 105; 13 Am.Jur. Carriers §§ 480-92; 13 C.J.S. Carriers §§ 334-347.

FN10. Hartman, Law and Theory of Railway Demurrage Charges 1-5 (1928).

FN11. A charter party is a *contract* of affreightment whereby the owner of a ship lets the whole, or a part of her, to a shipper for the conveyance of goods in consideration of the payment of freight. The term is derived from the words "charta-partita" which in England and Aquitaine were written on the cards containing the provisions of the contract. Such cards were afterwards divided into two parts, each party taking one, and then placed together when the parties desired to know the terms of their contract. Bouvier's Law Dictionary.

FN12. Hutchinson, Carriers § 842 (3d ed. 1906); The Hyperion's Cargo, 12 Fed.Cas. p. 1138, 2 Low. 93, 7 Am.Law.Rev. 457 (D.C.Mass.1871). See also, The Arizpa, 63 F.2d 42 (4th Cir. 1933); Hawgood v. 1,310 Tons of Coal, 21 F. 681 (D.C.Wis.1884); The Corfe Castle, 221 F. 98, 105 (D.C.E.D.N.Y.1915); Sprague v. West, 22 Fed.Cas. p. 970, 3 Am.Law J. 202 (1849).

FN13. "Reasonable promptitude in delivering a cargo at its point of shipment, and in receiving it at its destination, is a duty im-

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plied in such contracts, and for a violation of it damages in the nature of demurrage are recoverable. *This is too well settled, both in England and in this country, to need discussion or authority.*" (Emphasis added) The M.S. Bacon v. Erie & Western Transp. Co., 3 F. 344 (W.D.Pa.1880). 275 Tons of Mineral Phosphate, 9 F. 209 (D.C.E.D.N.Y.1881); 2 Hutchinson, Carriers § 842 (3d ed. 1906) and cases cited therein at n. 15; Sprague v. West, 22 Fed.Cas. pp. 970, 971, 3 Am.Law J. 202 (1849); The William Marshall, 29 F. 328 (D.C.D.Md.1886). See also, Irzo v. Perkins, 10 F. 779 (D.C.S.D.N.Y.1881).

FN14. 2 Hutchinson, Carriers § 832 (3d ed. 1906); see also, 275 Tons of Mineral Phosphate, 9 F. 209 (D.C.E.D.N.Y.1881); Hawgood v. 1,310 Tons of Coal, 21 F. 681 (D.C.Wis.1884); cf. The Apollon, 9 Wheat 361, 6 L.Ed. 111 (1824).

FN15. 2 Hutchinson, Carriers § 856 (3d ed. 1906); Hawgood v. 1,310 Tons of Coal, supra note 14; 275 Tons of Mineral Phosphate, 9 F. 209 (D.C.E.D.N.Y.1881); The Hyperion's Cargo, supra note 12.

And as, in the eye of the law, maritime, upon commercial reasons, the master of the ship is deemed to contract, in respect to the freight, rather with the merchandise than with the shipper, and his rights are, therefore, not made to depend upon any doctrine of agency.

275 Tons of Mineral Phosphates, 9 F. 209, 211 (D.C.E.D.N.Y.1881).^{FN16} While demurrage originated in maritime law, the legal principles applicable to ship demurrage are not completely applicable to demurrage charges by land carriers in this country.^{FN17} As Judge Prettyman observed, such charges by railroads "are sui generis,"^{FN18} and the same is true of detention charges by motor carriers. This makes it necessary, in applying maritime decisions to issues such as we have here, to give full consideration to the different settings in which maritime demurrage cases arise. Where the master of a ship was deemed to contract with the freight, in the transportation contracts of our rail and motor carriers the carrier is considered to contract directly with the shipper.^{FN19} Thus, to *1115 make shippers and others liable to the carrier in connection with the transportation of goods requires a

stronger direct contractual base between the parties than in maritime contracts which historically left more rights to be determined according to the reciprocal privileges between the master and the cargo. Land carriers in the United States must rely upon liabilities created according to common law principles.^{FN20}

FN16. To the same effect: "It is a maxim of the general law-merchant that the ship is bound [to the merchandise, and the merchandise [is bound] to the ship." The Hyperion's Cargo, supra note 12, 12 Fed.Cas. at p. 1138. See also, Hawgood v. 1,310 Tons of Coal, supra note 14; Stafford v. Watson, 22 Fed.Cas. p. 1031, 1 Biss. 437 (1864).

FN17. Hartman, supra note 10, at 1-2; 1 Michie, Carriers § 980 (1915); Miller v. Georgia R. & Banking Co., 88 Ga. 563, 15 S.E. 316 (1891).

FN18. Iversen v. United States, 63 F.Supp. 1001, 1005 (D.D.C.), aff'd 327 U.S. 767, 66 S.Ct. 825, 90 L.Ed. 998 (1946).

FN19. Brown Transport Corp. v. United Merchants & Mfrs., 21 A.D.2d 303, 250 N.Y.S.2d 440 (1964); Dohrmann Hotel Supply Co. v. Owl Transfer & S. Co., 19 Wash.2d 522, 143 P.2d 441, 446, 149 A.L.R. 1108 (1943); Chicago, B. & O. R.R. v. Evans, 221 Mo.App. 757, 288 S.W. 73, 75 (1926); Thomas Canning Co. v. Southern Pac. Co., 219 Mich. 388, 189 N.W. 210, 213 (1922).

FN20. In re Tidewater Coal Exch., 292 F. 225, 235 (D.C.S.D.N.Y.1923), aff'd 296 F. 701 (2d Cir.), cert. denied, 264 U.S. 596, 44 S.Ct. 454, 68 L.Ed. 868 (1924). See also Missouri-Kansas-Texas R.R. v. Standard Industries, 192 Kan. 381, 388 P.2d 632 (1964); Pennsylvania R.R. v. Susquehanna Collieries Co., 23 F.2d 499 (D.C.E.D.Ohio 1927) as to the basic *ex contractu* nature of an action for demurrage charges.

II

Under section 217(a) of Part II of the Interstate

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Commerce Act, 49 U.S.C. § 317(a) (1964),^{FN21} every motor common carrier subject to the Act must file with the Commission its "tariffs" showing all "rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property" Truckers file their detention charges and the rules, regulations, or practices affecting those charges in conformance with this requirement. The Commission is then vested with statutory power to pass on the *lawfulness* of the charges, as well as the rules, regulations, or practices affecting them. Section 216(g) of Part II of the Act, 49 U.S.C. § 316(g) (1964).^{FN22}

FN21. Section 217(a) provides as follows:

(a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be *unlawful*. (Emphasis added.)

FN22. Section 216(g) provides as follows:

(g) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle, or by any such carrier or carriers in conjunction with a common carrier or carriers by railroad and/or express,

and/or water in interstate or foreign commerce, or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Commission is authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a *hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice*, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, or charge, or classification, rule, regulation, or practice, shall go into effect at the end of such period: *Provided*, That this subsection shall not apply to any initial schedule or schedules filed on or before July 31, 1938, by any such carrier in bona fide operation on October 1, 1935. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, *the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable*. (Emphasis added.)

*1116 The Commission stated that "the lawfulness of the provisions in question is governed by [the] decision of the entire Commission in the first *Detention* case [Detention of Motor Vehicles-Middle Atlantic and New England Territory, 318 I.C.C. 593 (1962)] and that such [tariff] provisions are unlawful to the

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extent that they attempt to place liability for detention charges upon a person not a party to the contract of transportation." 335 I.C.C. at 542. In the first *Detention* case, where the Commission denied the motor carriers' initial attempt to accomplish the same essential result as they seek here, the holding was that the "status [of warehousemen, pier operators and others not a party to the contract of transportation] cannot be changed by publishing tariff provisions which purport to make them consignors-consignees for the purpose of assessing [detention] charges" (318 I.C.C. at 607) and it cited for authority *New York Board of Trade and Transportation v. Director General*, 59 I.C.C. 205 (1920); *Central R. R. of New Jersey v. Anchor Line*, 219 F. 716 (2d Cir. 1914); and *Smokeless Fuel Co. v. Norfolk & Western Ry.*, 85 I.C.C. 395 (1923).^{FN23} In the instant Commission proceedings, the Division 2 findings rejecting the tariffs were upheld in the following language:

FN23. See discussion infra and note 28, infra.

In view of the foregoing, we adopt division 2's finding in the prior report that the *lawfulness* of the provisions in question is governed by decision of the entire Commission in the first *Detention* case and that such [tariff] provisions are *unlawful* to the extent that they attempt to place liability for detention charges upon a person not a party to the contract of transportation. 335 I.C.C. at 542 (emphasis added). The Commission took pains to emphasize the precise grounds of its decision.^{FN24}

FN24. The Commission also mentioned and approved an alternative ground for its holding, *i. e.*, that the phrase "party causing the delay" in the proposed tariff was "indefinite and unclear in violation of section 217 of the act." 335 I.C.C. at 542. However, because of our decision upholding the Commission on its principal ground, we do not reach the propriety of this determination by the Commission that the tariff provisions were unlawfully vague.

Division 2 found the provisions involved unlawful not because they purport to place liability on the party causing the delay, but on a more generic ground, to wit: "because they attempt to place liability for detention charges upon a person *not a party to the con-*

tract of transportation."
Id. at 543 (emphasis in the original).

[3] We agree with the Commission's determination that the proposed tariff was unlawful insofar as it attempted to impose liability for demurrage charges upon an agent who was not a party to the contract of transportation. This finding of unlawfulness was adequately supported by the history of demurrage, the common law and ICC precedent. *New York Board of Trade and Transportation v. Director General*, 59 I.C.C. 205, 209 (1920); *Central R.R. of New Jersey v. Anchor Line*, 219 F. 716 (2d Cir. 1914); *Missouri K. & T. Ry. of Texas v. Capital Compress Co.*, 50 *Tex.Civ.App.* 572, 110 S.W. 1014 (1908); *Stafford v. Watson*, 22 *Fed.Cas.* p. 1031, 1 *Biss.* 437 (1864). The dearth of precise precedent is attributable to the rarity of attempts by carriers to hold persons liable for demurrage who were not parties to the contract.

*1117 In *New York Board of Trade*, the Commission dealt with a challenge to certain demurrage rules brought by consignees who were regularly being held responsible for detention charges. The Commission found that where shipments moved by rail to dockside, thence by lighters and barges to the steamships that would ultimately deliver them to their consignees, the steamship companies acted as agents of the consignees in dealing with the railroads.

The real source of complaint seems to be the difficulty which consignees experience in enforcing their rights against their agents, the steamship companies. As already indicated, the steamship companies are usually responsible for the delays which result in demurrage, and the rail carriers attempt to collect the charges from them. But if the steamship company refuses to pay, *the rail carrier has no recourse other than resort to the consignee, for the courts have decided that the steamship company is not a party to the contract of transportation over the rail lines and can not be held liable by the rail carrier for demurrage.* See *Central R. Co. of New Jersey v. Anchor Line*, 219 F. 716.

59 I.C.C. at 209 (emphasis added). In *Central R.R. of New Jersey v. Anchor Line*, *supra*, cited by the Commission in *New York Board of Trade*, the Second Circuit noted that a steamship, which was not a party to the contract, but which received cargo for foreign shipment from a railroad, could not be held liable for

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demurrage charges merely "by naming them in the tariff." 219 F. at 718.

In Missouri K. & T. Ry. of Texas v. Capital Compress Co., 50 Tex.Civ.App. 572, 110 S.W. 1014 (1908), a company which compressed cotton in transit and then returned the bales to the freight cars for further transportation, was held not be liable for demurrage since it did not authorize the shippers to designate it as consignee, did not appear in any of the bills of lading as consignees and never accepted any of the shipments as consignee. Under such circumstances the court decided that the compress company was acting as agent for the owners, that there was no contractual relation between it and the railroad, and "for that reason ... was not liable for the demurrage . . ."

The findings of fact fail to show any contractual relation between them in reference to the shipment of the cotton, and, for that reason, appellee was not liable for the demurrage sought to be recovered. Appellee was engaged in the business of compressing cotton. The cotton in question did not belong, and was not consigned to it, but to other persons. Appellee compressed the cotton, and, acting as agent for the owners, delivered it to appellant for transportation, and collected from it the charges for compression. We think the trial court ruled correctly when it held, on the facts referred to, that appellee was not liable for demurrage, if any had accrued.

110 S.W. at 1016 (emphasis added). Stafford v. Watson, 22 Fed.Cas. p. 1031, 1 Biss. 437 (1864) also held that an agent for a maritime shipper, whose agency was disclosed to the carrier, was not liable for a ship's demurrage charges.

In re Tidewater Coal Exch., 292 F. 225 (D.C.S.D.N.Y.1923), aff'd 296 F. 701 (2d Cir.), cert. denied, 264 U.S. 596, 44 S.Ct. 454, 68 L.Ed. 868 (1924), also denied a railroad's claim for demurrage against an exchange acting for consignees on the ground that the fact of agency was known to the railroad and hence there was no contract with the exchange (an agent for a disclosed principal) upon which liability could be imposed.

The person liable ... is to be ascertained by the ordinary rules of common law 292 F. at 235.

[I]n case it had appeared that [a factor] was only an

agent, the ordinary rules of liability would apply and ... the principal alone would have been liable. 292 F. at 234.

*1118 [4] Before such transportation-related assessments as detention charges can be imposed on a party on a prescribed basis there must be some legal foundation for such liability outside the mere fact of handling the goods shipped.^{FN25} What the carriers here attempt is not to collect demurrage on claims arising *ex delicto* out of the wrongful conduct of warehousemen^{FN26} but instead to establish throughout a large part of the nation a regular system of demurrage charges that will make warehousemen liable for such charges as a more or less normal incidence of their everyday commercial transactions. Under such circumstances the liability, as for freight charges, must be founded either on contract, statute or prevailing custom.^{FN27} Southern Ry. System v. Leyden Shipping Corp., 290 F.Supp. 742, 745 (D.C.S.D.N.Y.1968)^{FN28}; Brown Transport Corp. v. United Merchants & Manufacturers, Inc., 250 N.Y.S.2d 440 (1964). See also American Ry. Express Co. v. Mohawk Dairy Co., 250 Mass. 1, 144 N.E. 721, 35 A.L.R. 14 (1924).^{FN29} The adjudicated cases do not require that there be a specific contract to pay demurrage but it must arise out of contract^{FN30} and in practically every instance the obligation is only enforced upon persons who are parties to the contract of carriage.

FN25. See, e. g., Smokeless Fuel Co. v. Norfolk & Western Ry., 85 I.C.C. 395, 401 (1923), where the Commission observed that for purposes of fixing demurrage charges, "the law seems to be well settled that the party to whom a shipment is consigned is the legal consignee and not the party in whose care the goods are shipped." There is no claim here that the warehouseman appears as a consignee on the bill of lading.

FN26. When Justice Story in The Apollon, 9 Wheat. 361, 376, 6 L.Ed. 111 (1824) said that demurrage was "often a matter of contract, but not necessarily so" and then went on to affirm the imposition of liability for detention of a vessel in an action *ex delicto* for a marine tort, he was referring to and awarding damages in the nature of demurrage and not imposing demurrage as an incident of a valid

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commercial transaction. In that case, where the Apollon was improperly seized and damages were to be assessed, it was obvious that the civil demurrage rate would be part of any fair measure of damages for her unlawful seizure and detention. The fact that carriers by land have adopted the term demurrage (detention) from the maritime law does not require that matters relating thereto be determined by maritime law. *Michie, Carriers* § 980 (1915). Actually, there are a number of situations where maritime law does not apply to demurrage charges of other carriers.

FN27. See discussion *infra* and note 32, *infra*.

FN28. “[Liability] for the freight charges or demurrage ... may be created only by contract or statute ...” *Southern Ry. System v. Leyden Shipping Corporation*, 290 F.Supp. 742 (1968).

FN29. Justice Brandeis remarked in *Louisville & N. R.R. v. Central Iron Co.*, 265 U.S. 59, 67, 44 S.Ct. 441, 443, 68 L.Ed. 900 (1924) that the determination of who is liable for freight charges depends on “what promise, if any, to pay freight charges was, in fact, made”

[In] the absence of a contract that the consignee shall pay the freight charges [even] he is not legally bound to do so. *Chicago, B. & O. R.R. v. Evans*, 221 Mo.App. 757, 288 S.W. 73, 76 (1926). *American Ry. Express Co. v. Mohawk Dairy Co.*, 250 Mass. 1, 144 N.E. 721, 724 (1924) is to the same effect. In fact, a motor carrier cannot even collect freight charges from the owner of goods transported in the absence of contract or dealings between the owner and carrier where the owner was neither consignor nor consignee and goods were not diverted or signed. *Brown Transport Corp. v. United Merchants & Mfgs.*, 250 N.Y.S.2d 440 (1964). While demurrage charges are not the same as line-haul charges there is nothing about them that is sufficiently different so that liability for their payment could be

created by something less than ordinary common law principles.

FN30. *Missouri-Kansas-Texas R.R. v. Standard Industries*, 192 Kan. 381, 388 P.2d 632 (1964); *Pennsylvania R.R. v. Susquehanna Collieries Co.*, 23 F.2d 499 (D.C.E.D.Ohio 1927).

The National Industrial Traffic League, an intervening plaintiff, in its reply brief, p. 7, cites *Michie, Carriers* § 976 in support of its assertion that “the right to demurrage ... exists independent*1119 of contract or statute.” The entire quotation relied upon states:

Demurrage is often a matter of contract, but not necessarily so. Independent of any express or implied contract of plaintiffs to be bound by the rules, the modern doctrine in this country is that the right to demurrage, in such circumstances, exists independent of contract or statute.

However, that reference does not reach the issue under consideration here. *Michie* states only that demurrage may be assessed *against the parties to the transportation contract* (or against the merchandise) without the necessity of there being any specific independent contract to pay demurrage. The statement cannot be interpreted, as the plaintiff-intervenor contends, to mean that demurrage charges may be assessed in the absence of contract against persons other than those named in bills of lading as consignors or consignees of shipments. The cases cited by *Michie* in its supporting footnote involved shippers, consignors, consignees, the carriers' lien rights against the shipment, and some involved the validity of demurrage rules and provisions therefor. None of the cited cases decide that a warehouseman or agent who is *not* named in a bill of lading as consignor or consignee may be held liable for the payment of detention charges.^{FN31}

FN31. *Hawgood v. 1,310 Tons of Coal*, 21 F. 681 (D.C.Wis.1884) held that in maritime law a ship owner had a valid lien against the cargo for demurrage even though the bill of lading contained no demurrage clause. *Miller v. Georgia R. & Banking Co.*, 88 Ga. 563, 15 S.E. 316 (1891) upheld a railroad demurrage regulation applicable to “customers” who have contracted with knowledge thereof. *Dixon v. Central of*

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Georgia R.R., 110 Ga. 173, 35 S.E. 369 (1900) determined that a carrier could have a lien against a *shipper* under Georgia law. Kentucky Wagon Mfg. Co. v. Ohio & M. R.R., et al., 98 Ky. 152, 32 S.W. 595 (1895) involved the validity of demurrage rules where applicable notice was given to *shippers* and *consignees*. Miller v. Mansfield, 112 Mass. 260 (1873) held that for delay in unloading the railroad had a lien as warehouseman upon the goods for storage as against a *consignee* with notice under an implied promise to pay. Owen v. St. Louis & S.F. R.R., 83 Mo. 454 (1884) allowed a railroad to assess demurrage against a *shipper* where the way bills included provisions therefor. In McGee v. Chicago, R.I. & Pac. R.R., 71 Mo.App. 310 (1897), the bill of lading contained an express stipulation with respect to demurrage but the jury found the *shipper* was not guilty of unreasonable delay. Darlington v. Missouri Pac. R.R., 99 Mo.App. 1, 72 S.W. 122 (1902) involved only *consignees* as did Huntley v. Dows, 55 Barb. 310 (N.Y.1864). In Erie R. Co. v. Waite, 62 Misc. 372, 114 N.Y.S. 1115 (1909) it was held that demurrage may be imposed upon *consignees* independent of statute or express contract. Norfolk & W. R.R. v. Adams, 90 Va. 393, 18 S.E. 673 (1894) allowed recovery of demurrage against a *consignee*. Gage v. Morse, 12 Allen 410, 90 Am.Dec. 155 (Mass.1866) held that a *consignee* of a vessel was not liable for demurrage where the bill of lading contained no provision for payment thereof and especially not since the cargo was shipped to consignee or his assigns and the cargo was sold to a third person on the day the ship arrived in port. In the course of the decision the court stated:

The defendant is not liable, unless upon some contract, express or implied, by which he has agreed to pay the plaintiff demurrage. No express contract is shown; and we are unable to perceive that any can be implied from the facts agreed.

The direct contract of the plaintiff under the bill of lading was with the shipper of

the coal: Blanchard v. Page, 8 Gray. 281, 290-295....

If the consignee will take the goods, he adopts the contract... But as the consignee and his assigns are not parties to the contract in the bill of lading, and are only liable upon the contract which may be implied upon the actual delivery of the cargo and waiver of his lien by the master, they are not bound to accept the cargo at any particular time, and incur no responsibility by a refusal or delay in accepting it.

[5] It would have been more to the point to quote further from Michie on the question whether an *agent* of a party to the transportation contract is liable for demurrage. Actually, in the same paragraph that is quoted partially by the intervenors, Michie refers to a *1120 case which directly involved the question we are here considering:

A corporation was organized to compress cotton and operate a compress. It did not authorize shippers to consign cotton to it, and did not accept any cotton as consignee. As *agent* of the owners, it delivered cotton to a railroad for transportation and collected from the railroad the charges for compensation. The corporation was not liable to the railroad company for demurrage, *there being no contractual relation between the corporation and the railroad with reference to the shipment of cotton.* [Emphasis added.]

That case is Missouri K. & T. Ry. of Texas v. Capital Compress Co., discussed *supra*, and, rather than tending to support plaintiffs' position supports that of the Commission. With respect to the liability of a shipper's agent for demurrage Michie further states at page 712:

Agent.-An *agent* who buys produce and ships it for another, having no concern with it afterwards, is not responsible for damages growing out of a failure of the owner to cause delivery within a reasonable time, *in the absence of an express stipulation to that effect.* [Stafford v. Watson, 22 Fed.Cas.No.13,276, 1 Biss. 437, 2 Chi.Leg.News 385] ... The owner of a vessel, having abandoned his lien on the cargo for demurrage, can not maintain an action for damages against the shippers, who were merely *agents*. [Stafford v. Watson, 22 Fed.Cas.No.13,276, 1 Biss. 437, 2 Chi.Leg.News 385; Irzo v. Perkins, 10 Fed. 779; The William Marshall, 29 Fed. 328] [Emphasis added;

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footnotes supplied in text.]

Since persons liable for demurrage charges are to be determined by the ordinary rules of the common law (In re Tidewater Coal Exch., *supra*), the parties to a contract of carriage are perfectly free among themselves to contract with respect to the payment of demurrage, as they are with respect to line-haul charges; but where they have not become contractually obligated to pay demurrage because common law principles exonerate them from liability, and they are not made liable by statute or custom,^{FN32} liability cannot then be imposed upon them legislatively through the device of a tariff.

FN32. American Ry. Express Co. v. Mohawk Dairy Co., 250 Mass. 1, 144 N.E. 721, 724 (1924); The Corfe Castle, 221 F. 98 (D.C.E.D.N.Y.1915); Irzo v. Perkins, 10 F. 779 (1881).

III

[6][7] There is no claim here that any custom is applicable and the only statute that could conceivably be said to deal with these matters is section 223 of the Interstate Commerce Act (49 U.S.C. § 323). However, we agree with the Commission^{FN33} that a careful reading of that section requires a conclusion that it speaks only to the "nonliability" in certain narrow situations of warehousemen, and others similarly situated, who appear as *consignees* on the bill of lading, but in no way can be read to impose liability on an agent not a party to the contract.^{FN34} The law is well settled that *1121 an agent for a disclosed principal is not liable to a third person for acts within the scope of the agency.^{FN35}

FN33. Payment for Detention Charges, Eastern Central States, 35 I.C.C. 537, 539 (1969).

FN34. See also Brown Transport Corp. v. United Merchants & Mfgs., 250 N.Y.S.2d 440 (1964), where the Appellate Division came to the same conclusion with respect to 49 U.S.C. § 3(2), an earlier provision to the same effect as section 223 which applies to railroads. Section 223 provides as follows:

No common carrier by motor vehicle shall deliver or relinquish possession at destination of any freight transported by it in interstate or foreign commerce until all tariff rates and charges thereon have been paid, under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges, including rules and regulations for weekly or monthly settlement, and to prevent unjust discrimination or undue preference or prejudice: *Provided*, That the provisions of this section shall not be construed to prohibit any such carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory, or political subdivision thereof, or for the District of Columbia. Where any common carrier by motor vehicle is instructed by a shipper or consignor to deliver property transported by such carrier to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of such property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and had no beneficial title in the property, and (b) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of the property. In such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner shall be liable for such additional charges, irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made. If the consignee has given to the carrier erroneous information as to who is the beneficial owner, such consignee shall himself be liable for such additional charges, notwithstanding the foregoing provisions of this section. On shipments reconsigned or

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diverted by an agent who has furnished the carrier with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith.

That portion of section 223 which might be considered to deal with matters relevant to this case begins at the second full sentence with the words "Where any common carrier" This is addressed essentially at the problem of the warehouseman, carrier, etc., who, while acting as agent for an undisclosed principal, appears as consignee on the bill of lading. As such, he may become liable on acceptance of the goods (subject to the arrangement of the parties and other circumstances outside the scope of this section) for transportation charges for the transportation of property (line-haul charges) to the extent they are billed to him at the time of delivery for which he is otherwise liable, but with respect to "transportation charges ... found to be due after the property has been delivered to him" (which may include detention charges), the statute provides that a consignee might escape that obligation if certain conditions of notice are satisfied. The fact that the agent for an undisclosed principal appears on the bill of lading as consignee may be due either to the drafting of the original bill or to the reconsignment or diversion of the shipment to a point other than that specified in the original bill of lading. In the former case, he may escape liability and the shipper or consignor will become liable (1) if he is in fact an agent; and (2) if "prior to delivery of the property" he has "notified the delivering carrier in writing of the fact of such agency and the absence of beneficial title." In the situation where there has been a reconsignment or diversion of the shipment, he may escape liability and the "beneficial owner" of the property will become liable if the agent satisfies the above two conditions and additionally (3) if he has also "notified the delivery carrier in writing of the name and address of the beneficial owner of the property."

In no case does section 223 operate to place liability on an agent for a disclosed principal where goods are billed to a consignee in care of a warehouseman, carrier or other agent. It only provides certain methods of avoiding liability where an agent of an undisclosed principal appears on the bill of lading as a consignee without indication of his agency status and who thereby might become liable for detention charges in addition to line-haul charges.

FN35. Whitney v. Wyman, 101 U.S. 392, 396, 25 L.Ed. 1050 (1879); Valkenburg, K-G v. The S.S. Henry Denny, 295 F.2d 330, 333 (7th Cir. 1961); United Packinghouse Workers v. Maurer-Neuer, Inc., 272 F.2d 647, 649 (10th Cir. 1959), cert. denied, 362 U.S. 904, 80 S.Ct. 611, 4 L.Ed.2d 555 (1960); New York Board of Trade v. Director General, 59 I.C.C. 205, 208, 211 (1920); Restatement (Second) of Agency § 320 (1957); 3 C.J.S. Agency § 215 (1936); 3 Am.Jur.2d Agency § 294 (1962).

IV

[8][9] Certainly warehousemen are free to assume liability for detention *1122 charges by contractual undertaking^{FN36} and this is sometimes done through average demurrage agreements to promote their own business and in some instances to obtain the benefits of lower detention costs for the benefit of their customers.^{FN37} However, absent any custom, statutory or contractual basis, for reasons heretofore stated, it would be unlawful to attempt unilaterally to impose such liability on a party outside the contract of transportation by means of a tariff approved by the Commission.^{FN38} A tariff is an inappropriate instrument to "legislate" liability with respect to a nonconsenting party and we find that the Commission acted properly in declining to approve a tariff which purported to do so.^{FN39}

FN36. See, e. g., New York Board of Trade & Transportation v. Director General, 59 I.C.C. 205, 209-10 (1920) which notes that certain contractual provisions were contemplated by the parties which would make the steamship company (agent) liable as a consignee for

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demurrage charges. After observing that this could not be done by tariff, the Commission approves the possibility of a contractual undertaking.

FN37. Guandolo, Transportation Law 358 (1965). U. S. Trucking Corp. v. New York, N.H. & H. R.R., 274 I.C.C. 552 (1949), cited by plaintiffs, was such a case.

FN38. Two cases cited by plaintiffs are not to the contrary. U.S. Trucking Co. v. New York, N.H. & H. R.R., 274 I.C.C. 552 (1949) involved an average agreement where a freight handler had voluntarily agreed to pay demurrage and its liability for demurrage as an agent was not in issue. The case merely holds unreasonable a portion of the demurrage charges assessed.

D. C. Andrews Co. v. Reading Co., 279 I.C.C. 299 (1950) held only that the demurrage charges assessed were reasonable and refused to decide which party was responsible therefor.

FN39. In the situation in which the warehouseman appears on the bill of lading as an agent of a disclosed principal, for example in an "in care of" capacity, plaintiffs' proposed tariff would clearly constitute an attempt to change the established law that, "unless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract." Restatement (Second) of Agency § 320 (1957). See also note 35, *supra*.

[10] Even had the Commission adopted this tariff in accordance with plaintiffs' requests, it would not have effectively imposed liability on "others than persons named in the bills of lading as consignors or consignees of shipments."^{EN40} A long line of cases have held under various transportation acts that attempts by carriers to engraft onto a tariff a gratuitous unilateral provision not contemplated or required by the statute authorizing the filing of tariffs is entirely ineffectual.^{EN41} And we are not cited to any provision in the Interstate Commerce Act, or in the regulations promulgated by the Commission, which authorizes or re-

quires a tariff to include any provision creating liability for detention charges upon an agent for *1123 a disclosed principal who is not a party to the contract, either as consignor or consignee. We accordingly conclude that the Commission acted properly in rejecting the tariff.

FN40. It is clear that plaintiffs are attempting to establish "the lawfulness of the use of tariff publication to specify liability for payment of detention charges," *i. e.*, to change the basic law of contracts and agency to make an agent for a disclosed principal liable for the obligation of his principal. Reply br. of National Industrial Traffic League, intervening pl. at 3, and see notes 35, 39, *supra*.

FN41. Bernard v. United States Aircoach, 117 F.Supp. 134, 140-142 (S.D.Cal.1953); Southern Pacific Co. v. United States, 272 U.S. 445, 47 S.Ct. 123, 71 L.Ed. 343 (1926); Thompson v. Chicago, B. & Q. R.R., 157 I.C.C. 775 (1929); Turoff v. Eastern Airlines, 129 F.Supp. 319, 321 (N.D.Ill.1955); Shortley v. Northwestern Airlines, 104 F.Supp. 152 (D.C.1952); Pacific S.S. Co. v. Cackette, 8 F.2d 259 (9th Cir. 1925); Thomas v. American Airlines, 104 F.Supp. 650 (E.D.Ark.1952); Toman v. Mid-Continent Airlines, 107 F.Supp. 345 (W.D.Mo.1952). These cases deal primarily with attempts by carriers to impose shorter time limitations on actions brought by passengers than would otherwise obtain under the usual statute of limitations. These efforts have been consistently struck down by courts finding them to be unauthorized unilateral usages of the tariff mechanism.

V

[11] Plaintiffs suggest that section 202(a) of the Motor Carriers Act, 49 U.S.C. § 302(a), authorizes the Commission to approve the proposed detention rule. This section in its entirety provides:

(a) The provisions of this chapter apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the *regulation of such transporta-*

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tion, and of the procurement thereof, and the provision of facilities therefor, is [hereby] vested in the Interstate Commerce Commission.

49 U.S.C. § 302(a) (emphasis added); 49 Stat. 543, as amended, 54 Stat. 920. The key word here is "transportation" and that word is defined by section 203 of the Act as follows:

(19) The "services" and "transportation" to which this chapter applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all facilities and property operated or controlled by any such carrier or carriers, and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith.

49 U.S.C. § 303(a)(19) (emphasis added). This definition also refers to "facilities," does not define the word, but indicates an intent to include only "facilities and property operated or controlled by any [motor] carrier or carriers" (Emphasis added.) With such a limitation being placed on the words "transportation facilities" in the definitional section, which has general effect throughout the entire Act, we find no reason indicating that Congress intended a more expansive interpretation to be given to the word "facilities" in section 202(a). There is nothing in the context of section 202(a) that indicates Congress intended a different meaning for the word. Sections 202(a) and 203(a)(19) must be read together and it would not be reasonable to conclude that when Congress limited "transportation" facilities in section 203(a)(19) to "facilities ... operated or controlled by any [motor] carrier or carriers" (emphasis added) that it intended to remove the limitation when it referred in section 202(a) to "facilities ... for [transportation]." These provisions are central to the whole Act and it would be more in keeping with the principal purpose Congress stated in the title of the Act, which was to provide for the "regulation of the transportation ... by motor carriers operating in interstate and foreign commerce," P.L. 255, Aug. 9, 1935, c. 498, 49 Stat. 543, to not use these words to extend the jurisdiction of the Commission to facilities not operated or controlled by motor carriers. We are thus unable to find any intent on the part of Congress to extend the plenary jurisdiction of the Commission to the regulation of terminal facilities owned and operated by third parties who are not motor carriers under the Act.^{FN42} More-

over, even if the Commission were vested with plenary authority to the extent that plaintiffs here contend, the Commission has decided that this tariff *1124 is unlawful. It has thus not exercised the questioned authority and it is therefore not necessary for this court on this record to decide the extent of the Commission's jurisdiction over such matters.

^{FN42} It is also inapposite for plaintiffs to rely upon our decision in American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission, 143 U.S.App.D.C. 366, 444 F.2d 824 (1970), since the Federal Maritime Commission in that case was vested by express statutory provision with plenary regulatory authority over marine terminals. The Interstate Commerce Commission is not vested with such jurisdiction over warehouses.

VI

[12] On the basis of several cases^{FN43} plaintiffs contend that the Commission has authority to approve their imposition of liability for detention charges on warehousemen and pier operators even though the latter are not "subject to the regulatory jurisdiction of the Commission [and] are [not parties] ... to contracts of carriage." Plaintiffs' br. p. 11. The cases plaintiff cite all involve decisions upholding Commission jurisdiction in fact situations where there was "unjust discrimination." Such decisions merely decide that common carriers subject to the provisions of the Interstate Commerce Act could be prevented by the Commission from using warehouses as the instrumentality whereby they (carriers) give undue and unreasonable preferences, advantages, rebates and concessions, pay illegal allowances for performing loading and unloading services to some warehousemen and not to others, and are thereby guilty of unlawful discrimination relating to transportation.^{FN44} In those cases the authority of the Commission was extended to acts and transactions between carriers subject to the Act and parties not subject to direct regulatory jurisdiction of the Commission because of its power to prohibit the discriminatory relationship^{FN45} in which the other parties (warehouses) were directly involved. Here, however, there is no showing that motor carriers are unlawfully discriminating with respect to anyone and the cases cited by plaintiffs are therefore distinguishable on that basis. That the

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Commission may prevent warehouses and others from being used as the instrumentality of illegal discrimination *by carriers* under its jurisdiction is not equivalent to holding that it has plenary authority to regulate the rights, duties and obligations of local independent *1125 warehousemen. Under its duty to prevent unlawful discrimination, the power of the Commission would extend to any person used by any common carrier, subject to Commission jurisdiction, to implement a pattern of unlawful discrimination prohibited by the Act, but such authority would clearly not extend to authorizing the Commission to regulate persons or transactions which, as here, are not shown to involve unlawful discrimination.

FN43. Merchants Warehouse Co. v. United States, 283 U.S. 501, 51 S.Ct. 505, 75 L.Ed. 1227 (1931); McCormick Warehouse Company v. Pennsylvania R. R., 148 I.C.C. 299 (1928); aff'd sub nom. Terminal Warehouse Co. v. United States, 31 F.2d 951 (D.C.D.Md.1929); Southern Ry. v. United States, 186 F.Supp. 29 (N.D.Ala.1960); Shaw Warehouse Co. v. Southern Ry., 288 F.2d 759 (5th Cir. 1961).

FN44. At the time Justice Stone wrote the decision in Merchants Warehouse Co. v. United States, 283 U.S. 501, 51 S.Ct. 505, 75 L.Ed. 1227 (1931), the provision prohibiting unlawful discrimination upon which the Commission based its opinion provided:

Sec. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common

carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Feb. 28, 1920, c. 91, § 404, 41 Stat. 479.

FN45. See especially, Merchants Warehouse Co. v. United States, 283 U.S. 501, 51 S.Ct. 505, 75 L.Ed. 1227 (1931), where the Court refers to "the relationship between persons and rail carriers, with which the Commission is authorized to deal" In McCormick Warehouse Co. v. Pennsylvania R.R., 148 I.C.C. 299, 306 (1928), it was clear that the Commission was acting with respect to a "practice ... [resulting] in unjust discrimination." Similarly unlawful discrimination in "services" gave the Commission jurisdiction in Terminal Warehouse Co. v. United States, 31 F.2d 951, 958 (D.Md.1929). In Southern Ry. v. United States, 186 F.Supp. 29, 36 (N.D.Ala.1960) and Shaw Warehouse Co. v. Southern Ry., 288 F.2d 759 (5th Cir. 1961) it was prohibited rental "practices."

VII

[13] Plaintiffs also argue that even if a contractual relationship must exist between a carrier and a warehouseman before demurrage may be assessed against the latter, such a relationship does exist in the form of a quasi contract. In support of this quasi contract theory plaintiffs contend that when the warehouseman causes a detention of the carrier's equipment such warehouseman has received a benefit which gives rise to a quasi contractual relationship. Quasi contracts are created by law for reasons of justice to prevent unjust enrichment of a party, regardless of the expressed intentions of the parties.^{FN46} While quasi contracts have been created in a variety of situations where one party has clearly bestowed a benefit upon another,^{FN47} we decline to create such a contract here where the unjust enrichment of the warehouseman or other agent is so uncertain. We have not been referred to, nor has our own research disclosed, any cases which have held that the benefits which a warehouseman or agent might receive when he detains a carrier's equipment are such that the warehouseman should be required to compensate the carriers by way of demurrage. Indeed we feel that it would be an unprecedented use of the term "demurrage" to characterize it as compensation

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for a benefit bestowed upon a party.^{FN48} In its true sense demurrage is part compensation to the carrier and in part a penalty to secure the release of equipment,^{FN49} and in many situations it may be exacted even though no person was benefited.

FN46. Osborn v. Boeing Airplane Co., 309 F.2d 99, 102 (9th Cir. 1962); Hill v. Waxberg, 237 F.2d 936, 939, 16 Alaska 477 (9th Cir. 1956); Maple Island Farm v. Bitterling, 209 F.2d 867, 876 (8th Cir. 1954). See also 1 Corbin on Contracts § 19 (1963).

FN47. See, e. g., Bayne v. United States, 93 U.S. 642, 23 L.Ed. 997 (1876); Fidelity and Deposit Co. of Md. v. Harris, 360 F.2d 402 (9th Cir. 1966); Matarese v. Moore-McCormack Lines, 158 F.2d 631 (2d Cir. 1946); Schenley Distillers Corp. v. Kinsey Distilling Corp., 136 F.2d 350 (3d Cir. 1943).

FN48. The primary purpose of demurrage charges is to promote car efficiency by penalizing under detention of cars. Pennsylvania R.R. v. Kittanning Iron & Steel Mfg. Co., 253 U.S. 319, 323, 40 S.Ct. 532, 64 L.Ed. 928 (1920). While a secondary purpose of demurrage is to compensate the carrier for the use of his car, Turner Lumber Co. v. Chicago, M. & St. P. Ry., 271 U.S. 259, 262 (1926), we feel this purpose is motivated not by a concern that the party detaining the car has been benefited, but that the carrier has suffered some detriment.

FN49. Turner D. & L. Lumber Co. v. Chicago, M. & St. P. Ry., 271 U.S. 259, 262, 46 S.Ct. 530, 70 L.Ed. 934 (1926); Edward Hines Yellow Pine Trustees v. United States, 263 U.S. 143, 145, 44 S.Ct. 72, 68 L.Ed. 216 (1923); Pennsylvania R.R. v. Kittanning Iron & Steel Co., 253 U.S. 319, 323, 40 S.Ct. 532, 64 L.Ed. 928 (1920); Investigation and Suspension of Advances in Demurrage Charges, 25 I.C.C. 314, 315 (1912). See note 30, *supra*.

Plaintiffs also rely on Indiana Harbor Belt R. R. v. Jacob Stern & Sons, 37 F.Supp. 690 (N.D.Ill. 1941), to support their quasi contract theory, however, we find

this reliance wholly misplaced. In that case a carrier sought to recover demurrage from a consignee for detention of the carrier's railroad cars despite the fact that the cars had been leased to the consignee and were resting on the consignee's own tracks. The court held that in such a situation there was no consideration for a contract to assess demurrage against the consignee. While that court stated that "that contractual status is that which arises under a day-by-day contract for such storage service," it was referring to a liability arising^{FN50} out of a contract of transportation between the shipper and the carrier, and we find nothing therein to support the judicial creation of an obligation to pay demurrage in the situation where, as here, the parties have no contractual relationship with each other.

VIII

Finally, we note it has been unnecessary to reply to plaintiffs' contention that the Commission's brief to this court relied on a *post hoc* rationalization^{FN50} because that portion of our decision set forth in II above is alone dispositive of the case and it relies solely upon the Commission's opinion.^{FN51}

FN50. Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962).

FN51. In view of the disposition we make of the case it is likewise unnecessary to deal with the Commission's finding that the proposed tariff was unclear and indefinite.

It is thus our opinion that plaintiffs were mistaken when they concluded they could use a tariff to impose liability upon warehousemen and others who are not designated as consignors or consignees. Clearly those cases which indicate that demurrage may be imposed by a tariff only authorize the imposition of such liability upon those who by the transportation contract in effect become consignors or consignees in their own name. We do not interpret those cases as changing fundamentals of contract or agency law and we are unwilling to attempt to make such change in the law by this opinion. In so concluding we are not unmindful of the fact that motor carriers have an adequate remedy to collect demurrage charges from consignors and consignees and may require them to guarantee the payment of such charges when delay is caused by their agents.^{FN52}

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FN52. Carriers and shippers are free to contract regarding the payment of carriers' charges. Louisville & N. R.R. v. Central Iron Co., 265 U.S. 59, 66, 44 S.Ct. 441, 68 L.Ed. 900 (1924).

We therefore affirm the order of the Interstate Commerce Commission and dismiss the complaint.^{FN53}

FN53. We do not discuss what plaintiffs alleged to be an "order" of the Interstate Commerce Commission issued on October 20, 1969, since the Commission's action was held to be "unlawful" in A. E. Staley Mfg. Co. v. United States, 310 F.Supp. 485, 489 (D.Minn.1970).

Judgment accordingly.

D.C.D.C., 1972.
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END OF DOCUMENT

No. 38484

DETENTION OF MOTOR VEHICLES—
MIDDLE ATLANTIC AND NEW ENGLAND TERRITORY

Decided December 19, 1962

Proposed rule for determining charges for detention of vehicles of motor common carriers in middle Atlantic territory and between that territory and New England, found unjust and unreasonable. New rule prescribed for 1-year trial period. Appropriate order entered.

Bryce Rea, Jr., J. M. Adelizzi, Nuel D. Belnap, A. M. Bluestine, F. H. Floyd, Burton Fuller, Bernard N. Gingerich, C. F. Hardy, T. F. Kilroy, Alexander Markowitz, Herman Matthei, Ambrose A. Such, C. A. Sutherland, and W. M. Watt for respondents.

P. J. Batt, Hewitt Biatt, R. A. Blocki, E. M. Boyne, G. W. Oaterson, G. Crimm, Dale C. Dillon, C. F. Fisher III, J. J. Flatley, Richard J. Gage, R. G. Gawley, John A. Griffin, J. W. Hanifin, K. R. Hawk, A. W. Jacobs, Louis Karfiol, J. D. Keefe, E. O. Kenlan, R. E. Knudson, J. E. Naile, L. P. Nelson, Arthur Olsen, Warren A. Rawson, Charles R. Seal, P. C. Shannon, R. A. Smith, D. J. Speert, A. W. Todd, Clarence D. Todd, W. L. Travis, E. A. Weathers, and R. E. Werts for other parties.

REPORT OF THE COMMISSION

BY THE COMMISSION:

This is an investigation instituted on our own motion by order of October 25, 1960, "into charges for the detention of vehicles incident to the loading or unloading of truckload shipments, and the rules, regulations, and practices in connection therewith, of all common carriers by motor operating in middle Atlantic territory and between that territory and New England territory, as defined in Ex Parte No. MC-20 and Ex Parte No. MC-22, 24 M.C.C. 501, 631-633 and 8 M.C.C. 287, 330-331, * * *." All common carriers of property by motor vehicle operating in middle Atlantic territory and between that territory and New England territory were made respondents, and they and all other persons interested were given an opportunity to present evidence bearing on the question whether we should prescribe a rule for determining the charges for such detention sought by the petitioner, the Middle Atlantic Conference (hereinafter sometimes called the conference), tariff-publishing agent for approximately 1,300 motor common carriers. Exceptions to the recommended report were filed by the con-
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EXHIBIT

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ference and various parties replied. Our conclusions differ from those recommended. Exceptions and requested findings not specifically discussed herein nor reflected in the findings and conclusions have been considered and found not justified.

In its petition, filed April 29, 1960, the conference stated that "the present rules or lack of uniformity among the carriers with respect to detention charges has created chaos in the area." Notice of the petition, together with the text of the rule proposed by the petitioner which is set forth in appendix A to this report, was published in the Federal Register, and comments were invited on the request for an investigation. Representations or replies were received from 29 motor carriers, 42 shippers, warehousemen, port authorities, et cetera, and 1 rail carrier; and 36 others expressed interest in the proceeding. Upon consideration of those communications, we determined that such an investigation was desirable. Special rules of procedure were promulgated, and evidence was submitted in the form of verified statements. Parties desiring to file briefs were permitted to do so.

This is a rulemaking proceeding governed by section 4(a) of the Administrative Procedure Act, which requires that notice of proposed rulemaking shall include, among other things, "(2) reference to the authority under which the rule is proposed." In the petition of April 29, 1960, before referred to, and our first notice, it was stated that the rule to be prescribed would be "pursuant to its authority under Section 216(e) of the Interstate Commerce Act." That section authorizes the Commission in proceedings involving common carriers by motor vehicle to "determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective."

In its brief, however, the petitioner states that the Commission should prescribe the proposed rule "in performance of its duty under Section 204(a)(1) of the Interstate Commerce Act to 'regulate common carriers by motor vehicle * * * and to that end [to] establish reasonable requirements with respect to continuous and adequate service.'" While the authority referred to in our first notice properly might have included also section 204(a)(1), it seems to us that reference to section 216(e), which provides that in certain circumstances, including investigations on our own initiative, we "shall determine and prescribe the lawful * * * charge * * * or the lawful * * * rule, regulation, or practice thereafter to be made effective * * *," is "sufficiently precise to apprise interested persons of the agency's legal authority to issue the proposed rule."¹

¹ Attorney General's Manual on the Administrative Procedure Act, 1947, in the analysis of section 4(a) of that act, at page 29.

In 1956, in *Class Rates, Middle Atlantic & New England Territories*, 67 M.C.C. 741, concerning among other things the lawfulness of certain arbitraries added to rates to and from steamship piers in New York, N.Y., and Philadelphia, Pa., to compensate for delays in moving vehicles to and from the docks and in loading or unloading vessels, division 3 found that the proposed assessment of fixed charges per hundredweight was not shown to be justified, without prejudice, however, to the establishment of lawful charges for the detention of vehicles beyond reasonable periods of free time. The conference interprets the latter as an admonition to establish such charges, and early in 1957, it published provisions designated as rule 47. However, since adoption of the rule was optional, and numerous members declined concurrence, it was not effective.

When the petition herein was filed, 13 conference members had no detention rule, 20 maintained provisions other than rule 47, and, where published, the latter did not apply from or to 45 rate groups in the Pittsburgh, Pa., area, between points in New Jersey and New York, including Long Island, in the New York City area, from thence to points in middle Atlantic territory, or from thence to points in New Jersey and Pennsylvania in the Philadelphia area, and it was not applicable on specific movements of glassware, iron and steel, liquids in bulk, foodstuffs, groceries, acids and chemicals, boxes, alcoholic liquors, and containers. In addition, the tariffs of 11 other publishing agents contained 16 different rules, and 21 individual carriers published 26 different rules.

The conference and supporting carriers urge that the failure to assess and collect charges for undue detention requires higher rate levels to recover the costs thus incurred, and penalizes consignors and consignees who do not unduly detain equipment. One supporting carrier, operating principally in New Jersey, estimates that a uniformly effective rule would reduce its annual costs by \$50,000. Another, obtaining 90 percent of its traffic in the affected area which, in 1960, approximated 18,000 truckloads averaging 30,000 pounds, estimated that its savings would be nearly \$100,000 annually if 1 hour could be saved in pickup or delivery, based on drivers' wages, including fringe benefits and payroll taxes, averaging over \$3 an hour, and equipment costs of about \$2.50 an hour, for 18,000 hours.

To obtain information concerning the extent of detention, the conference sent a questionnaire to members regarding their operations during the month of October 1960. The 20 carriers which responded showed a total of 210 vehicles with truckload shipments detained beyond free time, involving 23 consignors and 49 consignees, located at 45 points in Virginia, Maryland, Pennsylvania, New Jersey, Dela-

ware, and Massachusetts, and at Washington, D.C. The total elapsed free time and detention was 1,425 hours, averaging 6.8 hours per vehicle.

The rule now proposed, set forth in appendix A to this report, follows the outline of rule 47, some of its provisions being identical. Regarding section I(b), the conference recognizes that disagreement might arise over whether or not detention is caused by consignor-consignee or by the carrier, but it believes that the record required by the rule would provide the basis for decision. The carrier is said to be at fault at times, as when equipment breakdowns or the presentation of improper shipping documents cause delays. Most delays are encountered, it is stated, in waiting to spot vehicles for loading or unloading, and in failure promptly to present shipping papers when loading or unloading is completed.

Concerning the exception to section II(a), dealing with carrier inability to meet prearranged arrival schedules, the conference states that such schedules have become a common practice and that they tend to relieve congestion.

The free time provided in section III is more liberal than that extended by rule 47. Experience has shown, according to the conference, that if free time is less liberal the tendency is for shippers of larger lots to reduce the size of loads to avoid detention charges. To compensate for the liberalization, the proposed detention charges set forth in section IV are higher than those in rule 47 in effect at the time the verified statements were filed. The former range from \$10 per vehicle for 60 minutes or less, to \$30 for delays of 151-180 minutes, compared with \$3.34 for 60 minutes or less and \$21.14 for delays of 166-180 minutes under rule 47. The conference acknowledges that on the basis of "bare costs" the charges could be less, but considering the liberalization of free time and the cumulative loss of opportunity to handle additional business, it regards \$10 an hour as reasonable penalty and compensation. As an indication of the effect of unreasonable detention, it calculates that if 36 minutes could be saved in pickup time and in delivery time, representing 5 percent of 24 hours, the equivalent of 650 vehicles of its members' estimated 13,000 tractor-trailers would be freed. At a tractor price of \$13,000 depreciated in 4 years, and a trailer price of \$3,000 depreciated in 10 years, the annual saving, so computed, would be \$2,632,500.

With respect to the limitation in section V that the rule applies only when the carrier furnishes its employees or power units, and not when trailers are placed without power assistance of the carrier, the conference does not now publish a charge for spotting, but it states that the matter is under consideration.

Tariff-publishing agents in other territories, the Southern Motor Carriers Rate Conference, Inc., New England Motor Rate Bureau, Inc., Niagara Frontier Tariff Bureau, Inc., and Empire State Highway Transport Association, Inc., support the proposed rule, either expressly or inferentially indicating that if it is approved herein, it will be extended. The Southern Conference has no opinion on the specific wording, but emphasizes that any rule which is approved must be applied by all carriers and at all points in the territory, regardless of origin or destination outside that territory. The National Motor Equipment Interchange Committee, organized to improve interchange practices and procedures, has roughly 550 members, of which 40 percent are domiciled, and over half are operating to, from, or within the area here considered. The difficulty encountered in inducing some using carriers to pay per diem on equipment to the owning carriers is due in part to the objection to paying for use while the equipment is idle at a shipper's dock. While the proposed rule does not contemplate charging for detention of trailers, the committee states that it would be helpful to the using carriers.

The Eastern Industrial Traffic League, an organization of shippers and receivers, supports the rule in its recognition that inefficient use of available equipment increases the carriers' cost of doing business, with a consequent effect on the level of rates. It contends that shippers who unreasonably detain equipment without being charged are unduly preferred and those who promptly release vehicles are unduly prejudiced. Also, the league urges, a detention rule must be required of all carriers operating in the territory; otherwise, some individual carriers will flag out, and others, for competitive reasons, will not observe the rule, leading to discrimination. It regards the free time under the proposed rule as sufficient and the charges provided therein as adequate to serve as a deterrent.

The Capitol Steel Corporation, a fabricator of reinforcing steel bars with plants at Baltimore, Md., and Jersey City, N.J., supports the proposed rule. Its consignees either unload by crane or are expected to have a sufficient number of construction workers available for the unloading. Delays are not unusual when the workers are not present, and charges therefor are warranted. This shipper suggests, however, that on overflow shipments where the two (or more) vehicles arrive at the same time, the computation of time on the second vehicle (and any others) should not begin until the first (or preceding) vehicle has been unloaded.

One statement was filed on behalf of 15 carrier-members² of the conference which do not now participate in a detention rule, although each in the past has published such a rule but could not maintain it because of competition and the lack of uniformity. They strongly support the need for a rule and urge that it be required of all carriers operating in the territory, whether conference members or not. However, they suggest changes and additions, as follows: The bill of lading and other shipping documents should state that detention charges are in force. Provision should be made for detention charges also on trailers, and should be applied at all points and by all carriers in the territory. Such a provision should apply when the tariff requires shipper-consignee loading and unloading, and a charge of \$10 should be assessed for each 24-hour period or fraction thereof after 48 hours' free time, beginning with the spotting of the trailer. Another provision should be made for including the elapse of time after "constructive" placement as a part of free time. The exception to section II(a), regarding carrier inability to maintain a prearranged schedule, is vague and indefinite and is subject to manipulation by either shipper or carrier. The statement in section I(b), indicating that the rule will not apply where detention is attributable to the carrier, also is vague and will promote destructive competition and increase policing problems. These latter two provisions should be eliminated.

National Tank Truck Carriers, Inc., an association of regulated tank-truck carriers of traffic in bulk, and Eastern Tank Carrier Conference, Inc., which publishes a tariff containing a detention rule for many of such carriers, oppose the rule solely to the extent that it is not restricted against application to the transportation of commodities in bulk in tank vehicles. They point out that detention rules maintained by carriers of the latter type differ conspicuously from those of general-commodity haulers, especially with respect to the amount of free time allowed and the amount of charges assessed for detention. The manner of loading and unloading bulk goods differs greatly. There is no problem of observance of the established detention rules in connection with such transportation, and it is contended that there is no justification for the prescription of the proposed rule for carriers engaged in such operations.

The Heavy and Specialized Carriers Tariff Bureau, agent for about 100 specialized irregular-route motor common carriers, is opposed to

² B & P Motor Express, Inc.; Kramer Bros. Freight Lines, Inc.; Lightning Express, Inc.; North Braddock Motor Lines, Inc.; Besor Express, Inc.; Keystone Lawrence Transfer and Storage Company; Philadelphia-Pittsburgh Carriers, Inc.; Motor Age Transit Lines, Inc.; Continental Transportation, Inc.; Helm's Express, Inc.; Zeno Freightways, Inc.; Keystone Transfer Company, Inc.; Leonard Bros. Motor Exp. Service, Inc.; Schreiber Trucking Company, Inc.; and Standard Motor Freight, Inc.

the maintenance of the rule by the carriers it represents. In addition to the use of special equipment for over-the-road service, other special equipment is used in loading and unloading. Heavy haulers publish their own provisions for free time and detention charges, drastically different from those proposed, which have been an intrinsic part of their rate structure. The cost of their equipment is much higher than that of general-commodity carriers, and their crews include riggers and erectors who draw wages entirely unrelated to general drivers and helpers.

The Steel Carriers Tariff Association, Inc., representing 32 carriers engaged primarily in hauling iron and steel articles, also opposes the rule from the standpoint of their own operations. It is urged that the basic 300 minutes of free time proposed in the rule is more than is needed on such traffic, that the rule is designed for general-commodity haulers, and that any rule required to be maintained by the steel carriers should consider the peculiarities of their operations.

Six respondents' operating dump trucks oppose application of the rule to their business. They state that loading and unloading of such equipment is extremely fast compared with that of standard vehicles, and the maintenance of the records which the rule would require would cut the number of daily trips and decrease efficiency.

Malone Freight Lines, Inc., opposes the rule because it omits trailers and includes the exception to the computation of time regarding prearranged schedules. It asserts that the proposed rule is virtually the same as that published in the South for most members of the Southern Conference. Another objection made is that "notification" of arrival and "responsible representative" are not adequately defined. Concerning the optional prearranged schedules it asks whether delivery would be restricted to a carrier's normal working hours, and states that records of such schedules should be required. It believes, however, that they are contrary to the terms of the uniform bill of lading which provide that no carrier is obligated to transport goods according to any particular schedule. Also, it criticizes the failure to provide a penalty to consignors-consignees when they do not meet such schedules, and the possibility of undue prejudice to shippers of less-than-truckload and any-quantity lots.

The Transport Corporation, a motor common carrier, objects to any general prescription of the rule. It flagged out of rule 47, not because of competition, but to avoid noncompliance in instances where its drivers did not keep the required records. It urges that,

* Benjamin H. Herr, doing business as Herr's Motor Express; Chester Carriers, Inc.; Kenneth K. and Harry B. Zechman, doing business as Blue Diamond Company; Thomas F. Rugby, doing business as Maryland-Pennsylvania Express; Wilbur H. Johns; and Irvin W. Zechman.

historically, detention charges in the motor carrier industry have been established by independent action when needed. Undue detention is not one of this carrier's problems; it claims that with rigid enforcement it would obtain less than \$100 annually. Failure to provide for a charge for spotting trailers, which it maintains is more costly than detention, is regarded as unfair.

The Chesapeake and Ohio Railway Company opposes the rule to the extent that it would make rail carriers consignors-consignees in the definitions of notes B and C. It points out that railroads are not parties to the respondents' contracts of carriage, and the latter do not explain how the rule can be thus extended. Rail carriers, it is contended, derive no benefit from the use of motor carrier equipment and some train schedules would not permit acceptance of shipments from vehicles within the free time. Rail equipment must be obtained from car-supply points; it is not available at all stations to which truck shipments move. Similarly, switching operations would be affected, it is urged, including those at rail-operated piers. Also, the exception to section II(a) is said to protect the motor carrier but not the railroad, assuming it to be a proper consignee. Comparison is made of the assessment of charges on a per-hour basis by the respondents with the per diem basis maintained by the railroads.

The New York Terminal Conference, an association of steamship companies and stevedores operating piers at the port of New York, opposes any application of the rule at ocean piers. It points out the following: The responsibility for loading and unloading at the piers is that of the owner of the goods, not of the steamship company. The interchange is between two common carriers. The two purposes of demurrage or detention charges, namely, to encourage efficiency and to compensate for idle equipment, would not be accomplished by assessing charges at the piers. The operators have no control over traffic moving over the docks, and they cannot be required to pay such charges. The Federal Maritime Board regulates ocean piers.

To similar effect is the opposition of the Virginia State Ports Authority which alleges that terminal operators are not responsible for detentions, but under notes B and C it appears that they would be billed. It is also urged that it would be unfair to charge the inland shippers or receivers, who have no control over detention at the piers.

Eight⁴ members of the National Association of Refrigerated Warehouses, Inc., representing companies operating such warehouses in

⁴Hudson Refrigerating Company; North East Cold Storage Corporation; Upton Cold Storage Company; Atlantic Company (Merchants Ice & Cold Storage Plant); Quincy Market Cold Storage & Warehouse Company; Merchants Refrigerating Company; Quaker City Cold Storage Company, Inc.; Merchants Terminal Corporation.

the considered area, filed statements opposing the rule as it would apply to them. They urge that they are not shippers-consignees but are like public utilities, holding themselves out to store goods for the general public. A large part of the traffic is exempt from regulation. Shippers and consignees have no control over shipments at the warehouses. In connection with loading or unloading, goods and equipment must be inspected and temperatures taken, and delays sometimes occur because operators have local deliveries to make over the dock in the mornings. The former procedures are directly related to the public health and cannot be avoided.

The National Fisheries Institute, Inc., a nationwide trade association of producers of fresh and frozen fishery products, opposes the rule because it fails to reflect the special transportation characteristics of perishable foods. They must be stored in refrigerated facilities, which are at a premium in the middle Atlantic area, especially in New York and Philadelphia, and are not equipped to accommodate the growing number of motor carriers which are attempting to participate in the traffic. The commercial cold-storage warehouses are the principal delivery points, and the proposed detention charges would be borne by the consignors-consignees, who have no control over detention at those points. The rule is criticized for failing to provide compensation to shippers-receivers when empty vehicles are not furnished or deliveries are not made with dispatch. If the rule is nevertheless to be approved, modification is sought as follows: (1) When a shipment moves in two or more vehicles which arrive simultaneously, free time should not begin to run on the remaining vehicles until the preceding vehicle or vehicles have been unloaded; (2) there should be a provision for a reasonable time within which a carrier's employees must perform the loading-unloading; otherwise, plain inefficiency could cause charges to accrue; (3) there should be some method for recording the fact of prearranged arrival schedules; (4) additional free time should be provided for pre-cooling equipment before loading, and also for the required inspections and sampling of temperatures throughout the lading at origin and destination; and (5) a plan like a railroad average demurrage agreement should be provided to permit the accrual of credits for prompt release prior to the elapse of free time.

The National Biscuit Company opposes the proposed rule on the ground of uncertainty as to who is to decide when the detention is attributable to the carriers; also, it attacks the exception to section II(a) as providing an "out" for the carriers' failure to comply. Concerning the provision for completion of loading-unloading on the next day when it is not accomplished by the end of the shipper-receiver's normal working day, it suggests that the latter should have

an option. The free time allowed in column B of section III, it claims, could result in substantial added time after a stopoff of only a few minutes' duration. It believes that the recordkeeping requirements of section VI should include a "reason for delay, if any," and a showing of the time elapsed between arrival and departure to protect against driver delay in unloading. In addition, it contends that notification of planned delivery time should be required.

Continental Can Company, Inc., is opposed to the sections concerning free time and the amount of the charges. As to the former, it urges that the weight of the lading has no direct relation to the time required to load or unload, that the number of units which must be handled controls, and that consequently the varying free time would be unduly prejudicial and preferential. It suggests a uniform free time of 300 minutes on all truckloads; and under column B, a total of 300 minutes for all stops, each stop to be allowed free time based on the ratio of the weight unloaded to the total weight. Regarding charges, based on its private operations, it states that the New York drivers' wage scale, including all fringe benefits, is \$3.78 an hour, that the average depreciation on a tractor is \$1.20 an hour, and that therefore the hourly detention charge should be \$5 instead of \$10. With respect to the position of certain other parties that the spotting of trailers be included, it stresses that such a matter is beyond the scope of the issues before us here.

The United States Steel Corporation believes that the selection of the "responsible representative" in section II(a) should not be left to the discretion of the driver, and that reference therein to "premise" is too indefinite, especially in a large plant area with more than one dock facility. It contends that time should not begin until the vehicle is available at the actual loading-unloading station, and while recognizing that such was likely the intention of the framers it suggests that the provisions could be clarified by adding "designated by the consignor or consignee" after "responsible representative," and adding "at the location on the premises specified by the consignor or consignee" after "either." With respect to the amount of proposed charges, it asserts that iron and steel articles are generally transported on flat-bed trailers for which rental charges are less than for van-type equipment, and no helpers are needed to load and unload; thus, it urges that detention charges should vary with the type of equipment. Regarding the prearranged-schedule exception to section II(a), it believes it should remain, since it has found that such scheduling avoids undue delays to carriers and shippers.

Swift & Company, a meatpacking firm, suggests a change of wording in the provisions of section V to avoid any confusion, by adding "by carrier" after "Where trailers are spotted," and adding "during the loading or unloading period" after "power unit(s)."

The Olin Mathieson Chemical Corporation opposes the rule as providing no incentive for expedition in loading-unloading since no credits would be allowed for special promptness, as likely to generate arguments concerning which party is at fault for delay, as increasing the clerical costs of all concerned, and as encouraging the extension of private or contract truck carriage and of rail plans III and IV service.

The Kraft Foods Division of National Dairy Products Corporation opposes any general application of the proposed rule, urging the belief that only actual experience can develop the proper factors to be treated. It states that a few large cities appear to be the source of most of the detention problem. The exception with respect to prearrangement schedules is supported. This is a feature under which it has operated, holding dock space for vehicles when notified 1 day in advance.

The Eastern Freezers Association, a trade organization of firms which grow, process, package, and distribute frozen foods, opposes the rule. It contends that lack of advance notice of truck arrival is the principal cause of detention. Since the rule would apply only to common carriers, it foresees the extension of preference to those carriers in loading-unloading matters and prejudice to contract, private, intrastate, and exempt carriers, unless loading-unloading is required in the order of arrival. The charges are regarded as exorbitant, \$5 an hour being considered adequate. Additional free time is held to be necessary on frozen foods to permit precooling, inspection, and temperature recording.

The Coordinating Committee of the Food Industries, an association of 48 trade groups located largely in the Northeast, suggests the following changes or additions to the proposed rule: Consignors-consignees should be permitted to schedule arrival time for all vehicles which are to be loaded-unloaded by the carriers' employees, so that consignors-consignees will not be penalized by the former's inefficiencies. A \$5 charge "for each 12 hour detention period" would be adequate to encourage prompt release.

The Brooklyn (N.Y.) Chamber of Commerce, Inc., states that a provision should be included requiring carriers to specify a time for pickup and delivery because such scheduling would result in more efficient and economic operations.

The Food Distributors Association of Philadelphia Trade Area, an organization of six food firms, opposes the rule as fatally deficient in that its operation depends on carrier employees over whom consignors-consignees have no control. Two of its members which receive merchandise around the clock have found that when little or no receiver supervision (which is not that party's responsibility) is present from midnight to 8 a.m., advantage is taken of that fact. It disagrees that such considerations would be reflected in the records

so that the delay would be attributed to the carrier. If, as indicated, a rule for spotting trailers is under consideration, such a rule would be so related to a rule for detention that the latter should not be decided separately. Regarding specific provisions of the proposed rule, this association comments as follows: Section I(a) should be clarified to show that the rule does not apply on shipments moving at assembling and distribution rates. The problem of determining fault for detention under section I(b) might be solved by separating waiting time and unloading time; on the former, consignors-consignees can exercise some control, while the latter is usually governed by carrier personnel. Haphazard preparation of shipping documents by carriers is another cause of delay, and there should be a requirement that such documents be sufficiently accurate to permit checking the lading while unloading. Concerning section II(a), it believes that the provision for arrival of a vehicle "as close" to the consignor's-consignee's premises "as conditions * * * will permit" is too indefinite, and that the exception to that provision regarding prearranged schedules is meaningless because many carriers refuse to schedule. In (b), normal business hours should be specified on the shipping documents, and the carrier's employees should coordinate their meal period with that of the consignors-consignees. The charges specified in section IV are regarded as too high. The keeping of records in section VI should consider the suggestion of separating, waiting, and loading-unloading time, and the "released for departure" note in (d) should be changed to require the time the loading-unloading was completed; and all such information should be recorded on the copy of the shipping document presented to the consignor-consignee.

The Owens-Illinois Glass Company, with 12 manufacturing plants and 5 warehouses in middle Atlantic territory, objects that the proposed rule would have no application to contract carriers or intrastate common carriers. It assails the charges as exorbitant, claiming that it can rent a vehicle and driver for \$6.50 to \$6.75 an hour.

The Lincoln Electric Company of Cleveland, Ohio, engaged in the manufacture, sale, and distribution of electric-arc welding equipment and supplies, urges that, considering the nature of truck transportation, there is no warrant for vehicle-detention charges merely because the railroads charge demurrage on rail equipment. The following distinctions are made: Rail charges are per diem, while motor charges would be on a per-hour basis, and are much less easily ascertainable; rail units form a common pool and there is merit in regarding the cost of detention as similar, regardless of where it occurs, or on what day; rail-detention records are kept by a car checker who is independent of the train crew and the shipper-receiver, while those of vehicle detention would be kept and verified by two

l, "potentially prejudiced" persons, its driver and the shipping-receiving
d clerk; and the billing for demurrage is monthly, unrelated to regular
e freight bills, and is generally done by one railroad, while vehicle-
d detention charges would be directly related to freight charges, and
e would be processed and rendered by innumerable carriers with the
t possibility of innumerable variations. This company has experienced
g instances where drivers have asked receiving clerks to record falsely an
g arrival time an hour or more before the actual arrival; it is said that
s they have "leverage" to do so by relaxing aid in the loading-unloading
r operation. In general, the company believes that much of the deten-
s tion in the industries most prominently represented in this proceeding
- is due to private, leased, or contract operators who do not operate
t under the same conditions as the drivers for common carriers, and
- that the assessment of the proposed charges is no cure for the problem.
- The amount of free time is admitted to be generous, and for the few
- instances in which charges would accrue, all shippers-receivers would
- be burdened with additional clerical work on each shipment. The
- one area in which the proposal might be workable, according to this
- shipper, is at the piers.

The Boneless Meat Dealers Association, a group of meat processors in the Philadelphia area, contends that effective scheduling is the answer to the detention problem. It complains that members often have employees standing by, waiting for scheduled truck deliveries. If records of detention are kept by drivers, they might charge wasted time to consignors-consignees. It asserts that a uniform rule does not take into account the peculiarities of each type of traffic, citing the tank-truck carriers' request for exclusion as an example.

A group⁵ identified as the Philadelphia Shipper-Receiver Interests concurs in the statements of the Continental Can Company in opposition to the provisions for free time and for charges. They urge, too, that there is no relation between the weight of shipments and the time required to load and unload.

Finally, the Greater Miami Traffic Association, Inc., formed to promote trade in Dade County, Fla., considering that any rule emanating from this proceeding will have far-reaching effect, opposes the proposed rule on the grounds, among others, that under section II(a) thereof free time would begin to run upon notification of arrival, even if the vehicle is parked off the consignor's-consignee's premises in a situation where other vehicles are being unloaded and the consignee cannot accept the vehicle, and that the shipper is not protected against unusually slow carrier loading or unloading. There have been instances in the area in which detention bills have

⁵The Pop Boys; Leonard Wasserman, Inc.; Snyder Manufacturing Company; Marand Distributors, Inc.; All-Aluminum Products, Inc.; and Airport Distributors, Inc.

been issued and declined because the driver was not available when needed. On import and export shipments, there is great difficulty in determining who is responsible for delays and who should be liable for detention charges when the customers of the carrier are not present. Larger shippers and receivers often use pallets, forklifts, and their own employees to load and unload, and it is urged that they should receive credit for the saving in free time thus accomplished. While carriers are not required to transport shipments on any particular schedule, under the rule consignors and consignees are expected to accept vehicles immediately upon arrival, and the association believes that carriers should notify in advance of the anticipated arrival.

The conference originally took the position that the proposed rule should be applied by all common carriers in the affected territory. It now concedes that the rule would be inappropriate in connection with the transportation of commodities in bulk in tank trucks, of articles handled by heavy haulers, and of household goods. Such carriers maintain their own rules, which appear to have been effective. Considering the service performed by dump truck operators, they also should be excluded. On the other hand, it is not established that iron and steel carriers should be exempt. The opposing tariff agent represents only 32 of such carriers. The principal basis for the opposition is that free time is too generous. That might be so in numerous instances, not confined to iron and steel traffic, but the provisions of a rule for general application must apply to all members of the shipping public whose traffic is handled under substantially similar circumstances. If an exception is made on one commodity, as distinguished from the exception of a wholly different type of service, the purpose of the rule would be defeated by a multiplicity of exceptions or claimed exceptions.

The matter of spotting trailers, and also the matter of requiring observance of a detention rule by other than common carriers, are beyond the scope of this proceeding as indicated by the petition, the public notice, and the order of investigation. It is conceded that in many instances the number of pieces constituting a shipment will have more effect on time consumed in loading or unloading than the total weight, but on freight of average density and weight the conference believes that there is a direct relation between weight and time. In any case, where varying free time is to be permitted, the problem is to select the most equitable basis for the variation, and it would appear that generally weight is the proper basis.

Discussion and conclusions.—In view of the background of the proposal; that is, the failure of numerous and different rules to meet the problem of detention in the past, it is apparent that any rule to be

effective must be applied by all common carrier respondents at all points which they serve in middle Atlantic and New England territories. We turn now to the consideration of certain of the individual provisions of the proposed rule, in the light of the criticisms thereof and our own appraisal.

The opening sentence of the rule refers to notes A, B, and C. Note A defines the word "vehicles" as meaning "power units only." That definition is inconsistent with the word "vehicle" as used in section III, concerning free time, because the power unit of a tractor-trailer combination would not contain the shipment. In view thereof, we conclude that note A should provide as follows:

"Vehicles" as used in this rule means straight trucks or tractor-trailer combinations, except this rule will not apply to trailers without power units left by carrier at consignee's or consignor's place of business.

Notes B and C define consignor and consignee as parties from (to) whom the carrier receives (delivers) the shipment "whether he be original consignor (ultimate consignee), or warehouseman, or connecting air, motor, rail, or water carrier with which the carrier does not maintain joint through rates, or other person to whom the bill of lading is issued." The position of the Chesapeake & Ohio, of certain warehousemen, and of pier operators regarding those provisions has previously been stated. The question is whether such persons, who are not parties to the contract of transportation, can be subjected to liability for the payment of detention charges. Referring to the Chesapeake & Ohio's position, in its rebuttal statement the conference agreed that loading-unloading of rail cars should be excluded from the computation of detention time.//The situation appears to be the same with respect to carriers of other modes, and of pier operators, as well as warehousemen who are engaged in a public service. Their status cannot be changed by publishing tariff provisions which purport to make them consignors-consignees for the purpose of assessing charges in connection with the transportation of a particular shipment. In *New York Board of Trade v. Director General*, 59 I.C.C. 205, 209, concerning a similar question, division 3 stated:

The real source of complaint seems to be the difficulty which consignees experience in enforcing their rights against their agents, the steamship companies. As already indicated, the steamship companies are usually responsible for the delays which result in demurrage, and the rail carriers attempt to collect the charges from them. But if the steamship company refuses to pay, the rail carrier has no recourse other than to resort to the consignee, for the courts have decided that the steamship company is not a party to the contract of transportation over the rail lines and can not be held liable by the rail carrier for demurrage. See *Central R. Co. of New Jersey v. Anchor Line*, 219 Fed. 716.

Compare also *Smokeless Fuel Co. v. Norfolk & W. Ry. Co.*, 85 I.C.C. 395, 401, in which it was observed: "the law seems to be well settled 318 I.C.C.

that the party to whom a shipment is consigned is the legal consignee and not the party in whose care the goods are shipped." We conclude that notes B and C of the proposed rule should be eliminated.

Section I(a) states that the rule applies only to shipments subject to truckload rates. This would cause considerable confusion in application because many rates on large quantities in tariffs other than those issued by the conference are not identified as truckload rates. For example, rates are published "subject to volume minimum weight of 25,000 pounds," or merely subject to a specified minimum. As this provision of the rule is phrased, it would only apply where the applicable rate is specifically designated as a "truckload" rate, and application could be avoided by eliminating that word from rate tariffs. The conference's exceptions to the governing classification provide for conversion of truckload or volume minimum weights in the classification to "truckloads." The lowest truckload minimum in that exceptions tariff is 12,000 pounds. We believe that in most instances quantities of 12,000 pounds or more would be intended for handling as truckloads, and we conclude that section I(a) should be supplemented as follows:

If the shipment is moving at a rate subject to a stated minimum weight of 12,000 pounds or more, and such rate is not designated as a truckload rate, it will be considered a truckload rate for the purpose of applying this rule.

Section I(b), excluding application of the rule when detention is "attributable in whole or in part to the carrier," is a potential source of disagreement, and since the rule considers together both delay caused by a shipper in providing for placement of a vehicle for loading-unloading with the time consumed in actual loading-unloading, there is no satisfactory method of clarification. This would be proper where the tariff provides for consignor-consignee loading and unloading, but where, as in most instances, the carrier has the responsibility for loading-unloading, the rule should be limited to delays caused by consignor-consignee (by act or failure to act), excluding time consumed by the carrier in loading and unloading. Such a modification would meet the criticism of several shippers that they have no control over the efficiency of the carrier's employees. The following is an amendment to reflect the view stated:

(b) Where the tariff requires loading and unloading by the consignor and consignee, this rule applies when vehicles are delayed or detained through no fault of the carrier. Where the carrier is responsible for loading and unloading, this rule applies when vehicles are delayed or detained by the consignor or consignee, not including the time consumed by the carrier in actual loading and unloading.

We agree with the considerable criticism of the exception to section II(a), dealing with carrier inability to meet prearranged sched-

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ules, that it would open the door to discrimination. A carrier could prearrange a time for arrival at the premises of preferred patrons, and then arrive late. If the shipper or consignee performs the loading or unloading, free time would not commence until that had actually begun. It is possible that it could be several hours after arrival and placement of the vehicle, especially in a congested plant area, or when customer employees were required to complete other duties first. The exception should be eliminated. Carriers would still be free for their own convenience to inquire of customers concerning the time when least delay should be encountered.

In section III, it is not clear whether the words "Billed Weight" in the columnar headings mean actual or minimum weight. We believe that actual weight should be used. It would overcome any difficulty encountered in determining the free time per vehicle on overflow shipments. Also, in the explanation of column A, addition of the clause "except as provided in Column B" would avoid possible minor conflicts.

In section V, the word "or" connecting "employee(s)" and "power unit(s)" is susceptible of the interpretation that the carrier will furnish either but not both. Since the rule is intended to deal with the detention of vehicles, the reference to employees should be eliminated.

Section VI (c) and (d) require the signatures of consignors-consignees to the records of arrivals and releases. If they refuse, the rule might not be applicable. The requirements of signatures should be eliminated. Carriers could nevertheless make a practice of requesting signatures to discourage disputes. In paragraph (c), and in section II(a), reference is made to the time "that vehicle is available for loading or unloading." This implies that the carrier has completed performance of its service by placement, and that someone else will load or unload. The words "that vehicle is available" should be supplanted by the words "of the arrival of the vehicle." In paragraph (e), the word "billed" should be changed to "actual."

The first sentence of section VII, stating that the proposed rule does not affect the application of other rules or tariffs concerning pickup or delivery, can conceivably conflict with the sought prescription of a rule to be uniformly observed throughout the considered territories. So far as appears, that sentence serves no purpose, and it should be stricken.

Obviously, no rule can be devised which will have the unanimous support of every party affected by it. The record in this proceeding establishes the need for a uniform rule uniformly observed. We have stated and considered the numerous criticisms which the proposed rule has evoked. It is unlikely that all possible infirmities could be

foreseen; however, the experience of actual use over a reasonable period of time should expose weaknesses and demonstrate the value of such a general rule. Therefore, we conclude and find that the proposed rule is unjust and unreasonable, and that the rule set forth in appendix B hereto should be established and maintained by all respondents (with the exceptions previously specified) in connection with transportation within the scope of this investigation; that is, in middle Atlantic territory and between that territory and New England territory, for a test period of 1 year from the date on which the rule becomes effective.

In the recommended report, the examiner found the proposed detention rule unlawful primarily because a shipper has no remedy for recovery of an unreasonable rate or charge under part II of the act. The conference admits that the charges under the proposed rule include a penalty element in addition to compensation. The rule prescribed herein fixes the charges at the levels currently in effect under present rule 47. We are convinced that prescription of charges at the present levels will avoid the possible inequity of a shipper paying an unreasonably high nonrecoverable charge since current levels of the detention charges do not exceed adequate compensation for added costs attributable to undue delays. If the level of the prescribed charges proves to be too low to fully compensate the respondents for undue delays, increases in the charges will be considered upon a proper showing of the costs incurred. At the end of the 1-year test period we will entertain further representations from the parties in the light of the experience gained.

An appropriate order will be entered.

APPENDIX A

Detention rule proposed by Middle Atlantic Conference carriers and by Eastern Industrial Traffic League for application throughout territory covered by Middle Atlantic Conference tariffs

DETENTION OF VEHICLES

This rule applies when carriers' vehicles (Note A) are detained at the premises of consignor (Note B) or consignee (Note C) subject to the following provisions:

Section I—General Provisions

- (a) This rule applies only to vehicles which have been ordered or used to transport shipments subject to truckload rates.
- (b) This rule applies only when vehicles are detained by consignor or consignee and not when detention is attributable in whole or in part to the carrier.
- (c) Free time for each vehicle will be as provided in Section III.
- (d) After the expiration of free time as herein provided, charges as provided in Section IV will be assessed against the consignor if detention occurs at his premises and against the consignee if detention occurs at his premises.

ATTENTION OF MOTOR VEHICLES—MIDDLE ATL. & NEW ENGLAND 611

Section II—Computation of Time

(a) The time per vehicle shall begin to run upon notification by the driver, the responsible representative of the consignor or consignee that the vehicle is available for loading or unloading, as the case may be, either on the premises of the consignor or consignee or as close thereof as conditions on said premises or under the control of the consignor or consignee will permit, and shall end upon completion of loading or unloading and receipt by the driver of a signed bill of lading or receipt for delivery, as the case may be.

Exception—When carrier and consignor or consignee make a prearranged schedule for arrival of the vehicle for loading or unloading and carrier is unable for any reason to maintain such schedule, the time shall begin to run from the commencement of loading or unloading and not from the time of arrival of the vehicle.

(b) Computations of time are subject to, and are to be made within the normal business (shipping or receiving) day of the consignor or consignee. When loading or unloading is not completed at the end of such day, time will be resumed at the beginning of the next such day. When loading or unloading carries through a normal meal period, meal time, not to exceed one hour, will be included from computation of time.

Section III—Free Time

Free time shall be as follows:

Column A		Column B	
Billed weight in pounds per vehicle	Free time in minutes	Billed weight in pounds per vehicle stop	Free time in minutes per vehicle stop
100 or less.....	240	5,000 or less.....	45
100 to 25,999.....	300	5,001 to 9,999.....	90
100 or more.....	360	10,000 to 19,999.....	135
		20,000 to 29,999.....	240
		30,000 to 35,999.....	300
		36,000 or more.....	360

Column A—applies to vehicles containing truckload shipments requiring only one vehicle or to fully loaded vehicles containing truckload shipments requiring more than one vehicle.

Column B—applies to last vehicle used in transporting overflow TL shipments requiring two or more vehicles or to vehicles containing TL shipments stopped for completion of loading or partial unloading.

Section IV—Charges

When the delay per vehicle beyond free time is—	The charge per vehicle will be—
1/4 hour or less.....	\$10.00
or 1 hour but not over 1 1/4 hours.....	15.00
or 1 1/4 hours but not over 2 hours.....	20.00
or 2 hours but not over 2 1/2 hours.....	25.00
or 2 1/2 hours but not over 3 hours.....	30.00
or 3 hours.....	35.00

Plus \$5.00 for each 1/4 hour or fraction thereof.

Section V

This rule applies only when carrier furnishes its employee(s) or power unit(s). Where trailers are spotted for loading or unloading by consignor or consignee and carrier does not furnish its employee(s) or power unit(s), this rule has no application.

Section VI

A record of the following information must be maintained by the carriers and kept available at all times:

- (a) Name and address of consignor or consignee at whose place of business freight is loaded or unloaded.
- (b) Identification of vehicle tendered for loading or unloading.
- (c) Date and time of notification that vehicle is available for loading or unloading and signature of consignor or consignee thereto.
- (d) Date and time vehicle is released for departure by consignor or consignee, after loading or unloading is completed, and signature of consignor or consignee thereto.
- (e) Total billed weight of shipment loaded or unloaded.

Section VII

The provisions of this rule do not change or prevent the application of other rules or other tariffs lawfully on file with the Interstate Commerce Commission covering pick-up or delivery of freight. Nothing in this rule shall require a carrier to pick-up or deliver freight at hours other than such carrier's normal business hours.

Note A—"Vehicles" as used in this rule means power units only.

Note B—"Consignor" as used in this rule means the party from whom the carrier received the shipment, or any part thereof, for transportation at point of origin or any stop-off point, whether he be original consignor, or warehouseman, or connecting air, motor, rail, or water carrier with which the carrier does not maintain joint through rates, or other person to whom the bill of lading is issued.

Note C—"Consignee" as used in this rule means the party to whom the carrier is required by the bill of lading, or other instructions, to deliver the shipment, or any part thereof, at destination or any stop-off point, whether he be ultimate consignee, or warehouseman, or connecting air, motor, rail or water carrier with whom the carrier does not maintain joint through rates, or other person designated in the bill of lading.

APPENDIX B

Amended detention rule prescribed for 1-year test period

DETENTION OF VEHICLES

This rule applies when carriers' vehicles (Note A) are detained at the premises of consignor or consignee subject to the following provisions:

Section I—General Provisions

(a) This rule applies only to vehicles which have been ordered or used to transport shipments subject to truckload rates. If the shipment is moving on a rate subject to a stated minimum weight of 12,000 pounds or more, and such rate is not designated as a truckload rate, it will be considered a truckload rate for the purpose of applying this rule.

(b) Where the tariff requires loading and unloading by the consignor and consignee, this rule applies when vehicles are delayed or detained through no fault of the carrier. Where the carrier is responsible for loading and unloading, this rule applies when vehicles are delayed or detained by the consignor or consignee, not including the time consumed by the carrier in actual loading and unloading.

DETENTION OF MOTOR VEHICLES—MIDDLE ATL. & NEW ENGLAND 613

(c) Free time for each vehicle will be as provided in Section III.

(d) After the expiration of free time as herein provided, charges as provided in Section IV will be assessed against the consignor if detention occurs at his premises and against the consignee if detention occurs at his premises.

Section II—Computation of Time

(a) The time per vehicle shall begin to run upon notification by the driver to the responsible representative of the consignor or consignee of the arrival of the vehicle for loading or unloading, as the case may be, either on the premises of the consignor or consignee or as close thereto as conditions on said premises (or under the control of the consignor or consignee) will permit, and shall end upon completion of loading or unloading and receipt by the driver of a signed bill of lading or receipt for delivery, as the case may be, except as provided in paragraph (b) of this section and paragraph (b) of Section I.

(b) Computations of time are subject to, and are to be made within the normal business (shipping or receiving) day of the consignor or consignee. When loading or unloading is not completed at the end of such day, time will be resumed at the beginning of the next such day. When loading or unloading carries through a normal meal period, meal time, not to exceed one hour, will be excluded from computation of time.

Section III—Free Time

Free time shall be as follows:

Column A		Column B	
Actual weight in pounds per vehicle	Free time in minutes	Actual weight in pounds per vehicle stop	Free time in minutes per vehicle stop
22,999 or less.....	240	5,000 or less.....	45
24,000 to 25,999.....	300	5,001 to 9,999.....	30
26,000 or more.....	360	10,000 to 19,999.....	150
		20,000 to 22,999.....	240
		24,000 to 25,999.....	300
		26,000 or more.....	360

Column A—applies to vehicles containing truckload shipments requiring only one vehicle, or to fully loaded vehicles containing truckload shipments requiring more than one vehicle, except as provided in column B.

Column B—applies to last vehicle used in transporting overflow TL shipments requiring two or more vehicles, or to vehicles containing TL shipments stopped for completion of loading or partial unloading.

Section IV—Charges

When the delay per vehicle beyond free time is—	The charge per vehicle will be—
1 hour or less.....	\$3.70
Over 1 hour but not over 75 minutes.....	6.15
Over 75 minutes but not over 90 minutes.....	8.60
Over 90 minutes but not over 105 minutes.....	11.05
Over 105 minutes but not over 120 minutes.....	13.50
Over 120 minutes but not over 135 minutes.....	15.95
Over 135 minutes but not over 150 minutes.....	18.40
Over 150 minutes but not over 165 minutes.....	20.85
Over 165 minutes but not over 180 minutes.....	23.30
Over 180 minutes but not over 195 minutes.....	25.75
Over 195 minutes but not over 210 minutes.....	28.15
Over 210 minutes but not over 225 minutes.....	30.60
Over 225 minutes but not over 240 minutes.....	33.10
Over 4 hours.....	(1)

¹ \$33.10 plus \$2.50 per each 15 minutes or fraction thereof over 4 hours.

Section V

This rule applies only when carrier furnishes its power unit(s). Where trailers are spotted for loading or unloading by consignor or consignee and carrier does not furnish power unit(s), this rule has no application.

Section VI

A record of the following information must be maintained by the carriers and kept available at all times:

- (a) Name and address of consignor or consignee at whose place of business freight is loaded or unloaded.
- (b) Identification of vehicles tendered for loading or unloading.
- (c) Date and time of notification of the arrival of the vehicle for loading or unloading.
- (d) Date and time vehicle is released for departure by consignor or consignee, after loading or unloading is completed.
- (e) Total actual weight of shipment loaded or unloaded.

Section VII

Nothing in this rule shall require a carrier to pick up or deliver freight at hours other than such carrier's normal business hours.

Note A—"Vehicles" as used in this rule means straight trucks or tractor-trailer combinations, except that this rule will not apply to trailers without power units left by carrier at consignor's or consignee's place of business.