

When the Trains Don't Come: Suing the Railroad

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Use of Rail Service

- Coal companies frequently use railroads to ship coal
- Oil companies have increasingly relied on railroads
- Natural gas companies have recently expressed an interest in using rail transport



By Don O'Brien from Piketon, Ohio, United States - NS Coal Train, CC BY 2.0, <https://commons.wikimedia.org/w/index.php?curid=64257147>

History of Railroad Regulation

- Interstate Commerce Act of 1887 →

**Interstate Commerce
Commission ("ICC")**

- Staggers Rail Act of 1980

- ICC Termination Act of 1995 →

**Surface Transportation Board
("STB")**

Common Carrier v. Contract Carrier

Common Carrier	Contract Carrier
STB jurisdiction	No STB jurisdiction
Published tariff	Governed by private contract
Regulations <ul style="list-style-type: none">• Reasonable tariff rates (if the railroad has market dominance), 49 U.S.C. § 10701(d)(1)• "reasonable rules and practices," <i>id.</i> § 11121(a)(1)• "reasonable dispatch," 49 C.F.R. § 1035, App. B, sec. 2(a)	Fewer regulations Contract may incorporate federal regulations

Carmack Amendment

- Originally passed in 1906
- The carrier is liable for the “actual loss or injury” to a shipper’s property, 49 U.S.C. § 11706(a)
- Notice requirements: timing and writing
- Preemption of claims: state and federal

Problems

1. Inadequate rail service
2. Unfair rail pricing
3. Lost or damaged goods
4. Railroad blame game



Claims	
1	Carmack claim
2	STB challenge to service level
3	STB challenge to railroad practice
4	Administrative remedies
5	Contract service
6	Tort claims

Problem 1: Inadequate Rail Service

- Problem: Railroad does not provide trains needed
- Multiple possible causes
- Consequences
 - Customer dissatisfaction or lawsuit
 - Reduction in overall production
 - Demurrage charges for export vessels

Problem 1: Inadequate Rail Service

Claim 1: Carmack Claim

- Delays in service, Carmack Amendment
 - Elements:
 - (1) delivery of a quantity of goods;
 - (2) not shipped with “reasonable dispatch”; and
 - (3) amount of damages
 - Federal court – amount in controversy must exceed \$10,000
 - Notice requirements

Problem 1: Inadequate Rail Service

Claim 1: Carmack Claim (cont'd)

- Potential issues with claim under Carmack Amendment
 - Applicable to challenge the lack of service rather than delayed service?
 - Applicable to business damages from delays as opposed to damage to the goods themselves?
 - Might be difficult to prove fault and specific damages
 - Notice requirements

Problem 1: Inadequate Rail Service

Claim 2: STB Challenge to Service Level

- Possible claim at STB for inadequate and unreasonable rail service under 49 U.S.C. §§ 11101(a), 11121(a)(1)
 - Section 11101 requires carriers to provide transportation or service on “reasonable request”
 - Section 11121 requires carriers to supply an adequate number of locomotives and cars

Problem 1: Inadequate Rail Service

Claim 2: STB Challenge to Service Level (cont'd)

- Broad STB jurisdiction to determine whether particular service is adequate or a particular practice is reasonable
- Precedent
 - *National Grain and Feed Association v. Burlington N. R.R. Co.*, Docket No. 40169 (I.C.C. June 1, 1990) – failing to allot the requested number of cars
 - *Pennsylvania R.R. Co. v. Sonman Shaft Coal Co.*, 242 U.S. 120 (1916) – failing to provide sufficient cars upon request

Problem 1: Inadequate Rail Service

Claim 2: STB Challenge to Service Level (cont'd)

- Potential issues with STB challenge to service level
 - “Reasonableness” standard
 - Potential preemption by the Carmack Amendment
 - Might be difficult to prove fault and specific damages

Problem 1: Inadequate Rail Service

Claim 3: STB Challenge to Railroad Practice

- Possible claim at STB that a particular policy is an “unreasonable practice,” 49 U.S.C. §§ 11101(a), 11121(a)(1), and 10702(2)
- STB will consider many factors (*see* 49 U.S.C. § 10101)
 - Effects on operating efficiency
 - Effects on car supply
 - Effects on rail revenue
 - Effects on competition
 - Undue concentrations of market power
 - Predatory pricing and practices
 - Unlawful discrimination

Problem 1: Inadequate Rail Service

Claim 3: STB Challenge to Railroad Practice (cont'd)

- Decisions for claimants
 - Rejected penalty to coal shippers for coal dust released during transport
 - Rejected denial of private railcars when carrier had no alternatives
 - Sanctioned misrepresentations regarding when cars would be delivered
- Decisions for railroads
 - Rejected challenge to auction system for allocating rail equipment
 - Rejected challenge to set ratio of railroad- and shipper-owned railcars
 - Rejected challenge to empty private car storage program

Problem 1: Inadequate Rail Service

Claim 4: Administrative Remedies

- Temporary substitute railway service, 49 C.F.R. § 1147.1
 - Substantial, measurable service deterioration / service inadequacy
 - Unlikely to restore adequate rail service within reasonable time
 - Commitment from an alternative carrier
- Rail Customer and Public Assistance Program
 - Informal complaint and mediation

Problem 1: Inadequate Rail Service

Claim 5: Contract Service

- Claim under a private carriage contract in state or federal court, 49 U.S.C. § 10709(c)(2)
- Specific language of the contract
 - Duty of reasonable service
 - Federal duties of reasonable service, 49 U.S.C. §§ 11101(a), 11121(a)(1)
 - Carmack Amendment
- Challenges in federal court

Problem 1: Inadequate Rail Service

Claim 6: Tort Claims

- Tortious interference
 - Elements:
 - (1) valid contractual relationship / business expectancy;
 - (2) knowledge of the relationship or expectancy;
 - (3) intentional interference; and
 - (4) resultant damage
 - Affirmative defense: Justified because of “financial interest” or “legitimate business competition”

Problem 1: Inadequate Rail Service

Claim 6: Tort Claims (cont'd)

- Fraud or negligent misrepresentation
 - Elements:
 - (1) false representation;
 - (2) of a material fact;
 - (3) made intentionally and knowingly;
 - (4) with intent to mislead;
 - (5) reliance by the party misled; and
 - (6) resulting damage to the party misled
 - Requires affirmative representation

Problem 1: Inadequate Rail Service

Claim 6: Tort Claims (cont'd)

- Unfair and Deceptive Trade Practices Act
 - *E.g.*, N.C. Gen. Stat. § 75-1.1; Fla. Stat. § 501.204
 - Elements:
 - (1) an unfair or deceptive act or practice;
 - (2) in or affecting commerce; and
 - (3) which proximately caused actual injury to the plaintiff or to his business
 - Treble damages and attorneys' fees

Problem 2: Unfair Rail Pricing

- Challenge in the STB to unreasonable tariff rates, 49 U.S.C. § 10701(d)(1)
- Must show market dominance:
 - (1) quantitative analysis and
 - (2) qualitative analysis
- Must show unreasonable rates
 - Requires expert review and analysis
 - If the rate is unreasonable, then STB sets the maximum rate
 - Maximum rate:
Cover costs + “reasonable and economic profit or return”

Problem 2: Unfair Rail Pricing (cont'd)

- Antitrust claim in U.S. District Court of the District of Columbia
 - Defendants: BNSF, Union Pacific, CSX, and Norfolk Southern
 - Identical fuel surcharges in violation of § 1 of the Sherman Act
 - Anticompetitive acts beginning 2003
 - Complaint filed in May 2007
 - Class certification denial appealed to the D.C. Circuit

Problem 3: Lost or Damaged Goods

- The carrier is liable for the “actual loss or injury” to a shipper’s property, 49 U.S.C. § 11706 (Carmack Amendment)
- Elements:
 - (1) delivery of a quantity of goods to the carrier;
 - (2) arrival at destination of a lesser quantity/quality; and
 - (3) the amount of damages

Problem 4: Railroad Blame Game

- Defamation elements:
 - (1) publication about the plaintiff;
 - (2) an actionable statement; and
 - (3) the requisite intent
- "A corporation may be defamed by statements which cast aspersions on its honesty, credit, efficiency, or its prestige or standing in its field of business." *General Prod. Co. v. Meredith Corp.*, 526 F. Supp. 546, 549-50 (E.D. Va. 1981)
- Punitive damages available

Questions

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