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Over the past couple decades, the lawyers in Benesch's Transportation & Logistics Practice Group have spoken at countless industry conferences and authored hundreds of substantive articles dealing with a host of business and legal issues important to both the providers of, and the commercial users of, transportation and logistics services. With this new publication, which will be issued every other month, we look back on some of these seminal articles that remain critically relevant to the industry to this day. In advance of each issue, we carefully comb through the archives of our prior published work in the transportation and logistics arena and select a relevant article that we trust will be of continuing interest to our readers. Please let us know how we are doing!

To Delivery….And Beyond!: The Boundaries of Carrier Liability for Unloading (A Clear Answer to Muddled Facts)

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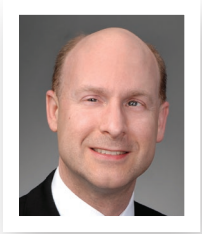

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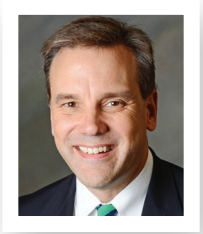

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A. Introduction: Carmack Boundaries and the Blurring of Unloading Functions

Under the Carmack Amendment, a carrier is liable for the actual loss of goods which "arrive" damaged 49 U.S.C. §4706(a)(1). But *when* does that liability for a carrier *end*? Usually, upon arrival at destination, *i.e.* delivery. However, what if the carrier insinuates itself into the actual unloading process? Does liability of the carrier extend, for instance, to the movement of the freight by forklift from a location within its destination terminal to a flatbed trailer owned by the consignee, or to assistance in unloading at the consignee's docks?

Often in these situations, the carrier's employees fully control, *to the exclusion of any others*, the movement of the freight from its location in the destination terminal to the consignee or its trailer. Carriers have workers who are employed at their terminals as forklift drivers, primarily for loading and off-loading. These employees have often taken courses in safe operation and handling of freight. Also, carrier's employees often assist, either physically, or on an instructive and didactic basis, in the unloading process. Consequently, is a carrier liable for freight damage, when off-loading, or assisting in unloading in some fashion?

B. Heavy Loads: A Clear NMFC, Industry Standard, Delineating Unloading Obligations

Item 568, a National Motor Freight Classification ("NMFC") rule, places the responsibility of unloading certain heavy goods upon the consignee. The NMFC is a tool that shippers and carriers may adopt that establishes a variety of standards aimed at making the treatment of transportation of goods more uniform. The NMFC provides proposed shipping prices for various commodities. Significantly, Item 568 of the NMFC provides:

> Unless otherwise provided in carriers' individual tariffs, when freight (per package or piece) in a single container, or secured to pallets, platforms or lift truck skids, or in any other authorized form of shipment:
>
> > *... (c) weighs 500 pounds or more, the consignor will perform the loading and the consignee will perform the unloading. On request of the consignor or consignee, the truck driver will assist the consignor or the consignee in loading or unloading.*

(emphasis added). Clearly then, in an NMFC governed shipment, if the freight weighs more than five hundred pounds, the carrier *does not* have the duty to unload it from its truck after it arrives at the carrier's terminal (of course, the carrier probably does not have the physical capability to do so in any event).

It should be noted, however, that Item 568 of the National Motor Freight Classification is not itself a Federal Regulation. The NMFC system is essentially a reference book or tariff system established by the trucking industry. Moreover, as always, the rules applicable to any shipment may be varied by contract. *Medeiros v. Whitcraft*, 931 F. Supp 68 (D. Mass. 1996); *Intech, Inc. v. Consolidated Freightways, Inc.*, 836 F. 2d 672

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(1 Cir. 1987) (same holding; also, spotting a shipment is not final delivery if anything remains to be done by the carrier to effectuate delivery).

C. A Threshold Issue: Determining "Possession"; No Possession—No Liability

A threshold issue in these situations, is determining who has "possession" of the freight at the time of the damage. For instance, in *Tokio Marine & Fire Ins. Group v. J.J. Phoenix Express Ltd*, 156 F. Supp. 2d 889 (2001 E.D. Ill.) a common carrier attempted to sue a warehouseman for indemnity under 49 U.S.C. §14706 (b), for a loss which occurred while the goods were in the possession of a carrier ostensibly selected by the warehouseman. The Court stated:

> Applying § 14706 (b), the Court concludes that Airco's claim against Nissin fails because in order to recover under this provision, Airco was required to plead and prove that the *loss occurred while in the possession of Nissin*, and it is undisputed that the loss did not occur while in Nissin's possession. (italics in original)

Tokio Marine & Fire Insurance Group v. J.J. Phoenix Express Ltd., et al. 156 F.Supp 2d 889, 897-898. Thus, if the carrier can prove that the loss occurred while the goods *were in* the *consignee's possession*, it will generally have no liability for unloading damages.

D. Consignee Duty and Liability: A Clear Supreme Court Holding and Its Progeny

Unlike many other situations, here, there is very clear case law on this point. The United States Supreme Court has squarely held that the duty to unload goods rests upon the consignee:

> The general rule is that it is the responsibility of the carrier ... to 'deliver' the goods by placing them in such a position as to make them accessible to the consignee. *Normally unloading is not a part of the delivery and is performed by the consignee.*

Secretary of Agriculture of U.S. v. U.S., 74 S.Ct. 826, 828 (1954) (emphasis added); *Medeiros v. Whitcraft*, 931 F.Supp. 68, 74 (D. Mass. 1996) (consignee has the duty to unload). A carrier's interstate carriage is terminated at the very moment that it is instructed to cease transportation and to make the cargo available to the consignee or its agents, because the carrier has no duty to unload, transfer, or reload the cargo. *Secretary of Agriculture of U.S. v. U.S.*, 74 S.Ct. 826, 828 (1954); *Medeiros v. Whitcraft*, 931 F.Supp. 68, 74 (D. Mass. 1996) (consignee has the duty to unload).

Similarly, in *Elder & Johnston Co. v. Commercial Motor Freight, Inc. of Indiana*, 94 Ohio App. 358 (Ohio 1953), a consignee brought an action against a carrier arising out of a shipment of mirrors. The carrier delivered crates full of mirrors to the consignee's location. The consignee's employees assisted in unloading the crates and carried them to an upper floor of the consignee's building. The employees opened up the crates and found many of the mirrors broken. The court of appeals affirmed the trial court's judgment in favor of the carrier, stating that the plaintiff had failed to show that the damage occurred at a point before the carrier had completed its transportation obligation.

In short, the carrier's obligations as an interstate carrier of goods terminate at the moment that the consignee instructs it to stop delivery. In other words, the carrier is not acting as an interstate carrier of goods subject to Carmack Amendment liability at a time that a consignee or its agent arrive to retrieve the cargo made available to it by the carrier. This conclusion follows from well-established case law. For instance, in *Season-All Industries, Inc. v. Merchant Shippers*, 451 F.Supp. 727 (W. D. Pa. 1978), a shipper brought an action under the Carmack Amendment against a number of carriers for damage done to goods in transit. The initial carrier moved for summary judgment, based upon the undisputed fact that the damage occurred at some point after the carrier had completed its portion of the delivery. The court agreed and entered summary judgment in favor of the carrier, stating:

> This result follows not from any explicit authority cited by the parties, but from the general purposes and effects of the Carmack Amendment [The shipper] re-claimed possession and control of the shipment in Seattle. There it re-loaded the shipment into boxcars and had a full opportunity to inspect it. *No useful purpose would be served by extending Breman's liability as an initial carrier beyond this point, regardless of its issuance of a bill of lading with the destination in Fairbanks, Alaska....* Once the shipper regains possession of the shipment and opens it and can see its condition, neither law nor logic requires the carriers to incur further liability for injuries to the shipment occurring beyond that point. Nor would this result be different under the common law.

Id. at 730-31 (emphasis added). In other words, the court found that the carrier's liability terminated when it made the goods available to another entity for further transportation.

The same rationale is illustrated in *Arnold J. Rodin, Inc. v. Atchison, Topeka & Santa Fe Rv. Co.*, 477 F.2d 682 (5th Cir. 1973). In that case, a shipper brought an action against a railroad to recover damages for the loss of a number of carloads of potatoes. A jury found in favor of the carrier and the shipper appealed on the basis that, among other things, the trial court improperly instructed the jury regarding the destination point for the potatoes. The appellate court noted that the shipper's argument was peculiar:

> This contention on the part of appellant presents this court with a rather puzzling issue. If the plaintiff's contention is accepted and the trial court is found to be in error as to its instructions that Amarillo was the final destination, then the appellant, in fact, has no case under the Carmack Amendment, against this defendant railroad.... If Chicago is then considered to be the destination under the Carmack Amendment, then the record

> demonstrates that the railroad received damaged goods and the appellant has no case.

Id. at 687-88 (emphasis added). *See, generally, Industrial Risk Insurance v. United Parcel Service*, 746 A.3d 532 (N.J. 2000) (finding that carrier's liability arose only after the shipper had loaded the goods onto the carrier's truck). Accordingly, a carrier who has no duty to unload, transfer, or reload goods cannot be held liable for any damage to goods incurred during the unloading, transferring, or reloading process under the Carmack Amendment.

E. The Borrowed Servant Rationale

A variety of courts have made this finding based in part upon the "Borrowed Servant Doctrine." For instance, *Nationwide Ins. Co. v. Mayflower Transit, Inc.*, 1992 WL 44290 (D. Md. 1992) involved a claim for damage to certain equipment valued at approximately $265,078.00. The equipment apparently fell from the carrier's truck during the course of unloading the equipment at its final destination. The court granted summary judgment in favor of the carrier, who assisted a consignee in unloading equipment from a truck. Although a factual dispute existed as to the precise circumstances regarding how the equipment fell from the truck, the trial court found that the carrier was not liable for this damage as a matter of law under the Carmack Amendment, because the contract of carriage imposed the obligation to unload onto the consignee. Therefore, the carrier and its employees were merely acting as the consignee's "borrowed servants":

> When [the truck driver] assisted in the unloading, he did so at the request and direction of the Plaintiff's employees. Thus, [the truck driver] was acting on behalf of [the consignee] when he moved the truck. *As a result. Mayflower would not be liable for [the truck driver's] alleged negligence in unloading* .... [A] s the driver was a `special servant' of [the consignee] when he assisted in the unloading, and Mayflower is therefore not liable for his alleged negligence, *the precise circumstances of the unloading are irrelevant to the resolution of this matter*. Thus, there is no genuine issue of material fact and this case is appropriate for summary judgment.

Id. at *3.4 (emphasis added).

A Florida appellate court reached a similar conclusion in *Wajay Bakery, Inc. v. Carolina Freight Carriers Corporation* (Fla. 1965), 177 So.2d 544. In that case, some heavy machinery was damaged while being unloaded by a carrier's driver and the consignee's employees at the consignee's place of business. The plaintiff brought an action for negligence against the carrier. The trial court entered a directed verdict and dismissal as a matter of law in favor of the carrier, because federal law imposed the unloading obligation upon the consignee, in light of the weight of the machinery. The court of appeals affirmed:

> We affirm the dismissal of the defendant carrier. Federal regulations quoted in the margin relating to interstate carriage invaded the contract. Under them, the duty to unload this heavy (1,800 pound) machine *was on the consignee and not on the carrier, and in aiding the employees of the consignee in the unloading the carrier's driver became the servant of [the consignee]*.

Id. at 546 (emphasis added). Consequently, a carrier is not liable for damage incurred in the unloading or reloading of goods when common law, statutes, regulations, or contracts impose that obligation upon someone else. Analogously, the same result probably arises if a carrier is performing the transfer and reloading of goods when the *consignee* or other person has the obligation to do so.[1]

F. Exact Factual Circumstances Not Determinative

As noted, the exact circumstances of the reloading process are irrelevant. The dispositive fact is generally that a carrier cannot be liable, even for its dockman's alleged negligence, in unloading or reloading cargo (and specifically heavy cargo) because the carrier is acting as the borrowed servant of the consignee or its agent in performing this task.

G. A Potentially Evolving Minority View

There is a line of argument, however that propounds that if, as a part of is regular business practice and service to its customers, a carrier undertakes to unload, and provide this services to its customers, it is required, as a general principle of law, to unload the cargo with due care. *See, generally, Power v. Boles* (1996), 110 Ohio App. 3d 29, 34; 673 N.E. 2d 617, 620 (*citing* Restatement 2d of the Law of Torts (1965), 135, §323). The principle is that one who *"undertakes"* the unloading operations, is under a duty to exercise reasonable care to perform the unloading of the switch gears. *See generally, Pantentas v. United States* (1982), 687 F.2d 707 (3rd Cir. 1982). That case, quoting the Restatement of Torts 2d, set forth the exact parameters of such a gratuitous assumption of duty claim. *To wit:*

> Negligent Performance of Undertaking to Render Services.
>
> One who undertakes, gratuitously or for consideration to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability for the other for physical harm resulting from his failure to exercise reasonable care to perform its undertaking, if
>
> (a) his failure to exercise such care increases the risk of harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Id. at 714. *See also*, Restatement 2d, Torts, §323. This author has not located any cases in which this principle has been applied to any unloading situation, to hold a carrier liable.

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H. Conclusion

Generally then, there is ample precedent, both in the case law, federal regulations, and industry practices, such as the NMFC, that once cargo has been delivered by the carrier, even if the carrier undertakes to assist in the unloading process, courts will generally find that the carrier owes no duty to do so, and thus, cannot be held liable for unloading damages. Generally, in these cases, there is a supporting NMFC classification, contractual language or pertinent federal regulation that will support this negation of liability on the part of the carrier. However, gratuitous assumption of duty principles may invade this tenet. Carriers may guard against encroaching gratuitous assumption of duty principles in these situations with appropriately crafted and negotiated contract language.

[1] A determination of who is liable for unloading, and personal injuries from unloading, also often arises in situations in which an employee of the consignee is injured while unloading freight from the carrier's truck. In those situations, the consignee's employee alleges that the carrier, or, even the shipper, negligently loaded the tractor trailer, which caused him or her to sustain injury. Direct claims against the consignee itself are generally barred by the state's applicable workers' compensation statutes. *See, generally, J.B. Hunt Transport, Inc. v. USF Distribution Services, Inc.*, 2002 WL 31045152 (E.D. Pa. 2002), Fed. Carr. Cas. P84000266. These cases generally turn upon applicability of insurance coverages as between the carrier, the consignee, and even the shipper. In these situations of personal injury to consignee employees, traditional negligence principles would apply. Arguably, the Carmack delineation as to possession triggering liability would also apply.

MARC S. BLUBAUGH, a partner in the firm's Litigation Practice Group, also Co-Chairs the firm's Transportation & Logistics Practice Group. Mr. Blubaugh has litigated a wide variety of transportation and logistics-related cases in state and federal courts throughout the United States as well as before administrative bodies. Among other things, he represents international and domestic carriers of all modes, freight forwarders, transportation brokers, warehousemen, other third-party logistics providers, and commercial shippers in a wide variety of surface, air, and ocean disputes including, but not limited to, high-dollar cargo claims, freight charge and pricing controversies, breaches of transportation, logistics, and warehousing agreements, prosecution of subrogation claims, insurance coverage disputes, trade-secrets and unfair competition litigation, and class action defense. He also defends carriers, third-party logistics providers, and shippers in catastrophic injury actions arising out of the transportation of goods. In addition to litigating matters, Mr. Blubaugh also regularly consults with clients regarding contracting practices and operating procedures, helps clients navigate the changing regulatory landscape, and provides strategic and business advice to help clients not only minimize liability but, just as importantly, to grow their businesses. He is Past President of the Transportation Lawyers Association.

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Eric has litigated or arbitrated matters in 29 states, before state and federal trial and appellate courts in various jurisdictions, and before the Surface Transportation Board, the Department of Veterans Affairs and the United States Olympic Committee.

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