Railroad Limits Liability by Circular and Avoids Higher Carmack Liability

AMLIN CORPORATE INSURANCE N.V., and CG POWER SYSTEMS CANADA, INC., Plaintiffs, v. UNION PACIFIC RAILROAD COMPANY, Defendant

2011 U.S. Dist. LEXIS 70447

June 29, 2011, Decided

This case involved the rail movement of an electrical transformer. Plaintiff CG Power contracted with Canadian National Railroad (CNR) to ship it from Canada to Fort Worth, Texas with BNSF Railway Co. (BNSF). BNSF did just that, and transported the transformer from Noyes, Minnesota to Fort Worth, Texas, pursuant to the CNR contract without a problem.

Plaintiff CG Power entered into a separate contract (the Union Pacific contract) with defendant Union Pacific to transport the transformer from Fort Worth, Texas to McCoy, Texas. On or about January 26, 2009, the train car carrying the transformer derailed at Union Pacific's Davidson Yard in Fort Worth, Texas. Plaintiffs did not sue CNR, and BNSF was dismissed from the lawsuit. Plaintiff AMLIN Corporate Insurance, N.V. (AMLIN) was the insurer of the shipment that is subject of this suit. According to the court, the terms of the Union Pacific contract and the events which took place during Union Pacific's transportation of the transformer were the only relevant facts. The court did not deal with the possible liability of BNSF if the shipment had been transported from Canada to US on a Athrough@ bill of lading.

The Union Pacific shipment was subject to Union Pacific Price Authority which provided in relevant part:

GENERAL APPLICATION RULES FOR ITEM 3002-G

1. Price is subject to Exempt Circular 16 (series), item 695 (series) . . .

2. Price is subject to Exempt Circular UP (series) . . .

3. **Subject to maximum liability of $25,000 per Car.**

Union Pacific's Circular 16-E provided:

On moves that originate in the United States, Shippers may, at their option, select liability provisions set forth in *49 U.S.C. Section 11706* (Carmack) as explained in ITEM 17. If *49 U.S.C. Section 11706* (Carmack) is not selected, the liability provisions of this item will govern.

AUnion Pacific's Circular 16-E, ITEM 17 provided:

49 U.S.C. Section 11706 provides for full-value liability and other liability terms for the carrier and the shipper. To make a shipment pursuant to the terms of *49 U.S.C. Section 11706*, the shipper must comply with all of the following provisions:

1. Shipper must notify carrier no less than 72 hours before the shipment is released for transportation that the shipper chooses Carmack liability protection.

2. Shipper may at this option specify in the Bill of Lading that the shipment shall move under the liability provisions set forth under *49 U.S.C. Section 11706*, in which case the rate shall be 200 percent of the applicable rate subject to this circular.

3. The shipping instructions must note that the shipment is moving under *49 U.S.C. Section 11706* liability terms and that the shipment is subject to a specific pricing authority.

4. Carmack liability coverage is not available for shipments that originate in Mexico.@

While this case involved a motion for reconsideration and a motion to dismiss, the underlying issue involved the question of whether the UP effectively limited its liability to $25,000.00 or whether it was liable for Carmack Afull value@ damages.

Plaintiffs argued that: (1) in order for Union Pacific to limit its liability, Union Pacific needed to have offered an alternative liability rate pursuant to the Carmack Amendment; (2) although defendant

Union Pacific did indeed offer plaintiffs the opportunity to elect an alternative liability rate as outlined above, the UP was not entitled to a limitation of liability of $25,000 per car because the move of the transformer did not "originate in the United States," making the provision of the Union Pacific contract offering an alternative liability rate inapplicable to the move of the transformer; (3) the Court overlooked controlling Supreme Court precedent in determining that the rail movement Aoriginated in the United States@; and (4) if the provisions of the Carmack Amendment, as codified in *49 U.S.C. Section 11706*, applied to the Union Pacific contract then the Court had to decide the meaning of the word Aoriginate@ as found in the Union Pacific contract, in accordance with Supreme Court precedent found in *Kawasaki Kisen Kaisha Ltd. et al v. Regal-Beloit Corp. et al, 130 S.Ct. 2433, 2445, 177 L. Ed. 2d 424 (2010)*. In that case the Supreme Court held:

> A [I]f . . . the bills of lading for [an international] transport ended .... at this country's ports and the cargo owners then contracted with Union Pacific to complete a new journey to an inland destination in the United States[,] [u]nder those circumstances, Union Pacific would have been the receiving rail carrier and would have been required to issue a separate Carmack-compliant bill of lading to the cargo owners.....@

According to the court: under Carmack, the "receiving" rail carrier is considered the "originating" rail carrier. *See Kawasaki, 130 S.Ct. at 2445 (2010); (and citation)* "The test is not where the shipment originated, but where the obligation of the carrier as receiving carrier originated." Therefore, as the contract for the transport of the transformer from Canada to Fort Worth, Texas ended in Fort Worth, and CG Power then contracted with Union Pacific to complete transportation to a new destination within the United States, Union Pacific is considered the@ receiving carrier@ (under Carmack) for the newly issued, separate Union Pacific contract. That makes Union Pacific the Aoriginating carrier@ of the new Union Pacific contract for the new transport. As the various parties dealing with the shipment separated the transportation into distinct portions by their contracts, the Court refused to judicially combine the two contracts into something they were not.

The court further provided that: even if it was later discovered that the provisions of the Carmack Amendment did not apply to this move, "[t]he terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them." *Nebraska*

Public Power Dist. v. MidAmerican Energy Co., 234 F.3d 1032 (8th Cir. 2000) (citations omitted); There were two parties to the contract, the defendant Union Pacific and plaintiff CG Power. The sole purpose of the contract was to govern a move of an electronic transformer from one point in Texas to another point in Texas. Since the shipment took place entirely in one state in the United States, the shipment subject to the contract Aoriginated in the United States@. According to the court, there was explicit language within the contract which provided CG Power with an opportunity to seek an alternative liability rate, and CG Power did not choose the provision when entering into this distinct contract with Union Pacific.

The Court concluded that: It had thoroughly reviewed its previous ruling and found that it was not based upon mistake, inadvertence, or manifest error of law or fact, and that the Union Pacific was entitled to enforce the $25,000 liability limitation per car which plaintiff CG Power agreed to pursuant to the Union Pacific contract.

The learning here is straightforward. Parties to intermodal shipments must pay attention to rail circulars and tariffs which if ignored will limit liability to undesired amounts. The terms of the circulars impose A default@ terms into the agreements of the parties, if there is no other contractual agreement.

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