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When the Trains Don't Come: Suing the Railroad

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I. Introduction

A. Energy companies often rely on rail service to ship their product to customers.

1. Coal companies, in particular, frequently use railroads to ship coal.

a. For example, railroads ship steam coal to power plants and metallurgical coal to steel plants.

b. Railroads also ship coal to the coast for export overseas.

2. Historically, oil companies did not use railroads very often to ship oil and related products.

a. According to the American Association of Railroads ("AAR"), however, more recently, oil companies have begun using railroads to ship oil.

b. Largely due to the increase in production in the United States, oil production has begun to surpass pipeline capacity.

c. As a result, oil companies have increasingly relied on railroads to ship crude oil to refineries.

3. Similarly, historically, natural gas companies did not use railroads to ship natural gas.

a. According to AAR, however, more recently, natural gas companies have expressed an interest in using rail transport.

b. In October 2015, the Federal Railroad Administration ("FRA") granted a permit to Alaska Railroad to transport liquefied natural gas ("LNG") by rail.

c. In January 2017, the AAR petitioned the Pipeline and Hazardous Materials Safety Administration ("PHMSA") to allow for the transportation of LNG. In May 2018, the PHMSA decided to consider the petition for merit.

[1] The opinions expressed in this article are the authors' alone and should not be attributed to Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C. Nothing in this article should be construed as legal advice.

B. Rail shipment for energy products can be arranged either by the energy producer or by the customer:

1. *First*, the shipper can obtain rail service from the railroad either by direct contract or under an applicable tariff.

2. *Second*, the customer (*e.g.*, a power plant) can obtain rail service from the railroad again either by direct contract or under an applicable tariff.

a. Under these circumstances, the supply contract between the energy company and the customer typically calls for delivery of the product at the railcar.

b. In this situation, the energy company does not have a direct contract with the railroad; the transportation is arranged and paid for by the customer.

C. Legal and regulatory background for railroads

1. History of railroad regulation

a. In 1887, the Congress passed the Interstate Commerce Act ("ICA"), making railroads the first industry regulated by the federal government.

(i) The ICA was passed in response to public outcry regarding the railroads' monopoly power over areas with limited rail service.

(ii) The ICA set guidelines for how the railroads could do business, including requiring that rates be "just and reasonable" and prohibiting rate preferences for any particular locality or shipper.

(iii) The ICA also established an enforcement board, the Interstate Commerce Commission ("ICC").

b. Regulatory reform in the 1970s and 1980s gave the railroads more flexibility in their rate-setting and contracting practices.

(i) The Staggers Rail Act of 1980 permitted railroads to set their own rates except where the ICC determined that there was no competition for rail services.

(ii) The Staggers Act also allowed railroads and shippers to execute private contracts, which would be outside the ICC's jurisdiction.

c. The ICC Termination Act of 1995 abolished the ICC and replaced it with the three-member Surface Transportation Board ("STB").

2. Today, a railroad may provide transportation services either by tariff, where it is acting as a common carrier; or by contract, where it is acting as a contract carrier.

a. If the railroad is acting as a common carrier, then the STB retains jurisdiction over such transportation and a host of federal rules regulate the railroad's rates and service levels.

b. If a railroad is acting as a contract carrier, then the STB lacks jurisdiction and the relationship is governed by private contract. *See* 49 U.S.C. § 10709(c)(2).

3. Common carrier service

a. Common carrier service is service provided by the railroad subject to a published tariff governing its terms. A tariff is a published document setting forth the prices and terms for shipments of a certain type of good to a particular destination.

b. When a railroad is acting as a "common carrier" it is required to take cargo from any customer under the terms of its published tariff.

c. When the railroad provides common carriage service it is subject to the jurisdiction of the STB and federal law imposes duties to:

(i) Charge reasonable tariff rates (if the railroad has market dominance), 49 U.S.C. § 10701(d)(1);

(ii) Provide transportation at "reasonable request," *id.* § 11101(a);

(iii) "[F]urnish safe and adequate car service and establish, observe, and enforce reasonable rules and practices on car service," *id.* § 11121(a)(1);

(iv) "[E]stablish reasonable . . . rules and practices on matters related to that transportation or service," *id.* § 10702; and

(v) Provide service with "reasonable dispatch," 49 C.F.R. § 1035, App. B, sec. 2(a).

4. Contract service

a. When the railroad provides contract carriage service pursuant to a private contract, it is *not* subject to the jurisdiction of the STB and the duties of a common carrier are *not* applicable to it. *See* 49 U.S.C. § 10709(a)-(c).

b. The contract might, however, provide for a standard of service similar to federal law, such as providing rail transportation services with "reasonable dispatch." 49 C.F.R. § 1035, App. B, sec. 2(a).

c. The railroad will sometimes attempt to incorporate the federal regulatory regime, including the Carmack Amendment (discussed below), into the contract.

5. The Carmack Amendment

   a. In 1906, the Congress passed the Carmack Amendment, which addresses damages to goods transported in interstate commerce. *See* 49 U.S.C. § 11706.

      (i) Congress enacted this provision to respond to disparity resulting from the application of many different state laws to damages incurred to goods moving in interstate shipping. *See Coughlin v. United Van Lines, LLC*, 362 F. Supp. 2d 1166, 1167 (C.D. Cal. 2005).

      (ii) The Carmack Amendment relating to rail transportation provides: "A rail carrier providing transportation or service . . . shall issue a receipt or bill of lading for property it receives for transportation under this part. The rail carrier and any other carrier that delivers the property and is providing transportation or service . . . are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed . . . is for the actual loss or injury to the property caused by—(1) the receiving rail carrier; (2) the delivering rail carrier; or (3) another rail carrier over whose line or route the property is transported . . . ." 49 U.S.C. § 11706(a).

      (iii) The Carmack Amendment essentially requires that the railroad must issue a bill of lading for a shipment and is liable for any "actual loss or injury to" the transported property caused by it or any other carrier along the delivery route.

      (iv) The Carmack Amendment eliminated the ability of carriers to excuse their non-performance except on narrow grounds and provides that a carrier is liable for the actual loss or injury it causes to a shipper's property. *See Continental Grain Co. v. Frank Seitzinger Storage, Inc.*, 837 F.2d 836, 839 (8th Cir. 1988).

   b. Carmack Notice Requirements

      (i) As a practical matter, shippers are likely required to provide notice to the railroad of a Carmack claim within nine months and have two years to bring a civil action for damages for any rejected claim. *See* 49 U.S.C. § 11706(e).

      (ii) Federal regulations require that the notice must be in writing and must (1) contain sufficient facts to identify the shipment, (2) assert liability for damages against the carrier, and (3) make a claim for a specified and determinable amount of money. *See* 49 C.F.R. § 1005.2(b).

c. Preemption of claims under the Carmack Amendment

(i) Soon after the Carmack Amendment was passed, the Supreme Court confirmed that Congress intended for it to preempt state-law claims relating to interstate shipments. *See Adams Express Co. v. Croninger*, 226 U.S. 491, 505-06 (1913); *see also Georgia, Fla. & Ala. Ry. Co. v. Blish Milling Co.*, 241 U.S. 190, 196 (1916) (describing the Carmack Amendment as "comprehensive enough to embrace responsibility for all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation").

(ii) The courts use extremely broad language in describing the preemptive reach of the Carmack Amendment.

- *Turner's Farms, Inc. v. Maine Cent. R.R. Co.*, 486 F. Supp. 694, 697 (D. Me. 1980): "Although a literal reading of the statutory language suggests that the Carmack Amendment covers only cases in which the property transported is itself damaged or reduced in value, the Amendment applies to any cause of action arising by virtue of a breach of an interstate contract of carriage."
- *See also Rymes Heating Oils, Inc. v. Springfield Terminal Ry. Co.*, 358 F.3d 82, 89 (1st Cir. 2004) (noting in *dictum* that "where the claim for damages is for actual loss or injury to the property caused by the carrier, it is usually brought under the Carmack Amendment").

(iii) Some courts have also suggested that the Carmack Amendment preempts not only state law claims, but also claims based on *federal* law.

- *See American Rock Salt Co. v. Norfolk Southern Co.*, 387 F. Supp. 2d 197, 202 (W.D.N.Y. 2005) (rejecting claims under 49 U.S.C. §§ 11101(a) and 11121(a)(1) as preempted).
- *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 382 (5th Cir. 1998) (concluding that the Carmack Amendment preempted federal common law claim for punitive damages, but noting some conflict between federal circuits).
- There are arguments that these opinions go too far in Carmack preemption.

II. Problem: Inadequate rail service

A. The railroad sometimes fails to provide adequate service to regular shippers such as energy companies.

1. For example, the railroad might fail to provide enough trains on a sufficiently regular schedule to satisfy the shipping needs of the shipper and its customers.

2. This failure can take many forms:

a. The railroad refuses to issue requested permits for trains;

b. The railroad refuses to assign equipment to permits that it does issue;

c. The railroad fails to send trains requested by the shipper;

d. The railroad provides "short trains" without an adequate number of cars; or

e. The railroad provides exceedingly slow service, increasing shipping times.

3. It is often difficult to determine why the railroad is providing inadequate service. Sometimes it is the railroad's fault, sometimes it is the shipper's fault, sometimes it is the receiver's fault, and sometimes it is attributable to general market conditions.

4. Possible causes attributable to the railroad:

a. Unfair allocation of equipment by the railroad to its various customers, including favoring some customers (especially those paying higher rates) over other customers;

b. Poor execution by the railroad; or

c. A shortage of equipment or crews due to an unfair allocation or poor planning by the railroad.

5. Possible causes attributable to the shipper:

a. Problems at the shipper's loading sites;

b. Poor execution by the shipper; or

c. Uneven or slow production at, for example, a coal mine.

6. Possible causes attributable to the receiver:

a. Problems at the receiver's loading sites;

b. Poor execution by the receiver; or

c. Delays in shipments or usage at the point of transshipment or usage.

7. Possible causes attributable to general market conditions:

a. A shortage of equipment and crews due to increased demand or other market causes;

b. Congestion on certain shipping routes due to changes in traffic or demand; or

c. Problems at terminals where coal is delivered.

8. An important part of determining how to address a problem of poor railroad service is to determine the underlying cause for any inadequate service; this can sometimes be challenging.

B. Consequences of inadequate rail service

1. The shipper's customer might complain or even sue the shipper for failing to supply contracted product.

2. The inability to ship production might reduce overall production; for example, if a coal company cannot ship coal at its production sites it might run out of storage capacity and therefore be required to reduce production.

3. The shipper might be forced to pay demurrage charges for export vessels.

C. Potential claims against the railroad for inadequate rail service: Tariffed service

1. *First*, the shipper might be able to bring a claim for damages against the railroad for delays in service under the Carmack Amendment.

a. The Carmack Amendment by its terms applies to lost or damaged goods (discussed *supra* Point I.C.5.a).

b. But the Carmack Amendment has also been applied to damages caused by delay in delivering goods. *See generally New York, Philadelphia & Norfolk R.R. Co. v. Peninsula Produce Exch.*, 240 U.S. 34 (1916).

(i) *See, e.g.*, *Hargrove v. Universe Exp. Inc. Moving & Storage*, No. 5:13-CV-594-FL, 2013 WL 5218104, at *7 (E.D.N.C. Sept. 17, 2013) ("An action for damages lies under the Carmack Amendment where goods are not transported with reasonable dispatch.");

(ii) *Yakubu v. Atlas Van Lines*, 351 F. Supp. 2d 482, 489 (W.D. Va. 2004) (same);

(iii) *Richter v. North Am. Van Lines, Inc.*, 110 F. Supp. 2d 406, 413 (D. Md. 2000) (same).

c. In an action to recover under the Carmack Amendment for delay, a shipper must show:

(i) "Delivery of a quantity of goods to the carrier;

(ii) Goods were not shipped with reasonable dispatch; and

(iii) The amount of damages. *See Richter*, 110 F. Supp. 2d at 413.

d. Reasonable dispatch means "the performance of transportation on the dates, or during the period, agreed upon by [the carrier] and the individual shipper and shown on the Order For Service/Bill of Lading." 49 C.F.R. § 375.103.

e. What constitutes a reasonable time for delivery of goods depends on the circumstances of the particular case. *See Turner's Farms*, 486 F. Supp. at 698.

f. Venue for Carmack Amendment claims lies in the United States District Courts so long as the amount in controversy exceeds $10,000. 28 U.S.C. § 1337(a).

g. Potential limitations on Carmack Amendment claims

(i) Because the Carmack Amendment focuses on a remedy for goods that were damaged or lost in shipment, it is not readily applicable to cases challenging overall rail service or the lack of trains altogether.

(ii) It might be difficult for the shipper to prove that the railroad was the cause of any delays.

(iii) The Carmack Amendment has strict (and short) notice requirements.

2. *Second*, the supplier might be able to bring a claim for damages against the railroad before the STB for providing inadequate and unreasonable rail service under 49 U.S.C. §§ 11101(a) and 11121(a)(1).

a. The theory of this claim would be that the railroad failed to provide trains – it *missed* trains – rather than delayed service.

b. Section 11101(a) requires railroads to "provide . . . transportation or service on reasonable request."

(i) The standard under § 11101(a) is "whether a particular service is adequate or a particular practice is reasonable." *Granite State Concrete Co. v. STB*, 417 F.3d 85, 92 (1st Cir. 2005) (internal quotation marks omitted).

(ii) "The STB has been given broad discretion to conduct case-by-case fact-specific inquiries to give meaning to these terms, which are not self-defining, in the wide variety of factual circumstances encountered." *Id.*

(iii) Generally, "adequate service" has been summed up in this way: "A carrier is not required to perform the impossible. The law, of course, exacts only what is reasonable from a carrier." *United States v. Sea-Land Serv., Inc.*, 424 F.

Supp. 1008, 1011 (D.N.J. 1977) (internal quotation marks omitted).

(iv) While § 11101(a) requires "rail service upon reasonable request," the "obligation is not absolute, and may be temporarily suspended if the rail carrier is incapable of providing service." *Central Or. & Pac. R.R., Inc. – Coos Bay Rail Line*, STB Finance 35130, 2008 WL 1306626, at *2 (S.T.B. Apr. 11, 2008) (internal citation omitted).

- "Such incapacity may arise from operating restrictions due to congestion." *Id.*
- A rail carrier "is excused from liability for its failure to furnish the type and number of cars requested by a shipper in cases of sudden and great demands which it could not reasonably be expected to meet in full." *Ethan Allen, Inc. v. Maine Cent. R.R. Co.*, 431 F. Supp. 740, 743 (D. Vt. 1977); *see also General Foods Corp. v. Baker*, 451 F. Supp. 873, 876 (D. Md. 1978) (finding that a "lack of equipment" can justify a temporary cessation of service).

(v) The STB gives rail carriers wide latitude in selecting the economically efficient number of cars and locomotives to have in service. "Railroads are not expected to acquire equipment that cannot be economically justified by the traffic available." *Lo Shippers Action Comm. v. Aberdeen & Rockfish Ry. Co.*, 1987 WL 99199, at *9 (I.C.C. 1987).

(vi) That said, "carriers have a duty to provide cars necessary for the transportation they hold themselves out to provide." *Shippers Comm., OT-5 v. Ann Arbor R.R. Co.*, 1989 WL 239462, at *3 (I.C.C. 1989).

c. In addition to § 11101, § 11121(a)(1) requires rail carriers to "furnish safe and adequate car service and establish, observe, and enforce reasonable rules and practices on car service." 49 U.S.C § 11121(a)(1).

d. Read as a whole, the statutes require rail carriers to "supply" adequate numbers of "locomotives" and "cars," and have "reasonable rules and practices" when doing so. 49 U.S.C. §§ 11121(a)(1), 10102(2) (defining "car service").

e. There is some authority for the proposition that a common carrier can be liable in damages if it fails to provide adequate service.

(i) In *National Grain and Feed Association v. Burlington N. R.R. Co.*, 1990 I.C.C. LEXIS 158, at *6-7, *15 (I.C.C. May 23, 1990), the ICC denied a motion to dismiss where

shipper claimed railroad had failed to provide "adequate car supply" by failing to allot the requested number of cars to the shipper.

(ii) In *Pennsylvania R.R. Co. v. Sonman Shaft Coal Co.*, 242 U.S. 120, 126-27 (1916), the Supreme Court affirmed the lower court's judgment that the railroad in that case had failed to provide sufficient cars upon the reasonable request of a coal company.

f. But the STB will give significant leeway to the railroad, especially where demand was high and equipment was therefore short.

(i) In evaluating such a claim, the STB might excuse the railroad based on congestion, a sudden surge in demand, revenue conditions for the railroad, and other economic factors.

(ii) *See*, *e.g.*, *Allied Corp. v. Union Pac. Pac. R.R. Co.*, 1985 WL 56817, at *484 (I.C.C. 1985) (rejecting claim that railroad provided insufficient cars on ground that there was significant increase in demand and railroads cannot be expected to meet peak demand).

(iii) More recently, the STB rejected shippers' claims of unreasonable "service variability" and "erratic service" in part because of the varying demands of the numerous shippers to which the railroad furnished rail service. *N. Am. Freight Car Ass'n v. BNSF Railway Co.*, 2007 WL 201203, at *9 (S.T.B. Jan. 24, 2007).

g. There are challenges to claims against the railroad for inadequate and unreasonable rail service:

(i) The STB might hold that such a claim is really one for "delay," which might be preempted by the Carmack Amendment. As noted above, the Carmack Amendment contains strict nine-month notice requirements which frequently dooms claims.

- There are arguments for limiting the scope of preemption under the Carmack Amendment. In particular, claims that the railroad did not provide any service or sufficient service as opposed to claims that the railroad provided delayed service or damaged the goods, might not be preempted.
- For example, in *Clark v. Messer Industries, Inc.*, 475 S.E.2d 653 (Ga. Ct. App. 1996), the court found claims for breach of contract and conversion

against a motor carrier were not preempted by the Carmack Amendment where the facts suggested that the motor carrier had not intended to deliver the goods.

- Similarly, in *Counter v. United Van Lines, Inc.*, 935 F. Supp. 505 (D. Vt. 1996), homeowners contracted with a moving company, making clear that the sale of their old home and purchase of the new home was contingent upon moving by a set date. The moving company arrived on time, but demanded an additional $3,000 to complete the move. The homeowners could not pay the amount and could not close on the pending transactions. They sued the moving company in state court for fraud, consumer fraud, and other claims. The district court held that Carmack did not apply to the claim because it did not allege lost or damaged goods but claimed that the mover failed to ever take the goods to deliver them.
- Based on these cases, an energy company might be able to make a non-preempted claim for inadequate rail service based on a complete failure to provide trains at all as opposed to merely delayed shipments once the railroad takes possession of the goods.
- There is some support for this view, although no cases directly on point. One case that supports this view is *Rini v. United Van Lines, Inc.*, 104 F.3d 502, 506 (1st Cir. 1997), which held that "liability arising from separate harms – apart from the loss or damage of goods – is not preempted. For example, if an employee of the carrier assaulted and injured the shipper, state law remedies would not be preempted. Similarly, a claim for intentional infliction of emotional distress alleges a harm to the shipper that is independent from the loss or damage to goods and, as such, would not be preempted."
- In addition, the STB has considered claims under 49 U.S.C. §§ 11101(a) and 11121(a)(1) for inadequate train service and not found those claims preempted by the Carmack Amendment. *See*, *e.g.*, *Grain Land COOP v. Canadian Pac. Ltd.*, 1999 WL 1117130 (S.T.B. Dec. 6, 1999) (claim under §§ 11101 and 10702).

(ii) The "reasonableness" standard applied by the STB is sometimes railroad-friendly and might forgive the railroad for operating restrictions due to congestion, high demand for cars, and other factors (depending on the circumstances).

(iii) It might be difficult to prove that the problems are the fault of the railroad. The railroad will try to blame problems on the shipper, the customer, general congestion, and other causes.

(iv) It might be difficult to prove specific damages because the rail tariffs often exclude consequential damages.

3. *Third*, if the railroad has a specific policy that is unfairly harming the supplier – by, for example, reducing its rail service – then the supplier might be able to bring a claim for damages or an injunction against the railroad before the STB challenging an "unreasonable practice" by the railroad under 49 U.S.C. §§ 11101(a), 11121(a)(1), and 10702(2).

a. Those statutes require the railroad to apply reasonable rules in providing rail service to its customers.

b. The statute "does not define what would be reasonable rules and practices." *Granite State Concrete Co. v. STB*, 417 F.3d 85, 92 (1st Cir. 2005).

c. In practice, the STB will take into account the express congressional purposes of regulation set forth in 49 U.S.C. § 10101, including efficiency of the rail system, the prohibition of predatory pricing and practices, the avoidance of undue concentrations of market power and the prohibition of unlawful discrimination (among other factors).

d. In evaluating the reasonableness of a practice, the STB takes into account "(1) the effects of the challenged practices . . . on car supply; (2) effects on operating efficiency . . .; (3) competitive effects; [and] (4) rail revenue effects." *Ann Arbor*, 1989 WL 239462, at *864. In this analysis, the STB "gives rail carriers the freedom to explore new transportation programs and services" when determining whether the practice is "reasonable." *National Grain & Feed Ass'n v. Burlington N. R.R. Co.*, 1992 WL 540494, at *11-12 (I.C.C. 1992), *aff'd in part, rev'd in part*, 5 F.3d 306 (8th Cir. 1993).

e. The STB has rejected some railroad practices and policies as unreasonable:

(i) The STB determined that a change in the tariff to penalize coal shippers for coal dust released during transport "create[d] too much uncertainty to be deemed a reasonable

practice." *Arkansas Elec. Coop. Corp. – Petition for Declaratory Order*, 2011 WL 742698, at *10 (S.T.B. Mar. 2, 2011).

(ii) The ICC held that a practice of denying use of private railcars was unreasonable when the carrier had no available cars to offer in the alternative. *See*, *e.g.*, *Ann Arbor R.R. Co.*, 1989 WL 239462, at *2, *4 n.8, *13.

(iii) The STB found that misrepresentations as to when cars were to be delivered could be an unreasonable practice. *See Grain Land COOP v. Canadian Pac. Ltd.*, 1999 WL 1117130, at *3 (S.T.B. Dec. 8, 1999).

f. The STB has also frequently rejected challenges to a railroad's car supply practices.

(i) For example, the ICC rejected a challenge to a system of allocating rail equipment by auction because it was reasonable and fell within a carrier's "wide latitude" in managing cars. *See*, *e.g.*, *National Grain*, 1992 WL 540494, at *9.

(ii) As another example, in *Allied Corp.*, the ICC found reasonable a railroad policy to require a one-to-one relationship between railroad- owned and shipper-owned railcars used during a period of oversupply of railcars.

(iii) More recently, the STB rejected shippers' claim that BNSF's "empty private car storage program" made "the freight car supply inadequate." *N. Am. Freight Car Ass'n*, 2007 WL 201203, at *8.

g. This claim would suffer from many of the same challenges as the first claim for damages from unreasonable shipping. *See supra* Point II.C.2.g.

4. *Fourth*, the supplier might be able to seek temporary substitute railway service for service inadequacies under 49 C.F.R. § 1147.1.

a. If the incumbent railroad is not providing adequate service and there is another railroad that might be able to provide service on the particular route, then a shipper can petition the STB for temporary substitute railway service.

b. In order to obtain such relief, the shipper's application would need to: "(1) show substantial, measurable service deterioration or service inadequacy; (2) summarize discussions with the incumbent carrier and show why the incumbent is unlikely to restore adequate rail service within a reasonable time; and (3) contain a commitment from an alternative carrier to meet current

transportation needs and show that this service can be performed safely without hurting service to existing customers of the alterative carrier and without unreasonably interfering with the incumbent's service." *Pyco Indus. – Alternative Rail Service – South Plains Switching, Ltd., Co.*, 2006 WL 190014, at *3 (S.T.B. Jan. 25, 2006).

c. This might be a way of getting the railroad's attention short of suing it for damages.

5. *Fifth*, the shipper might be able to file an informal complaint with the STB regarding the railroad's poor service.

a. The STB has established the Rail Customer and Public Assistance Program, which is designed to resolve service problems experienced by shippers.

b. When a complaint is made to the STB, the program staff contact the railroad and attempt to mediate the dispute. The shipper could ask the STB to work with it and the railroad to develop solutions to the service problems.

c. Such pressure from its regulator might encourage the railroad to provide better service.

D. Potential claims against the railroad for inadequate rail service: Contract service

1. Depending on the language of the carriage contract, a shipper might be able to bring a claim in state or federal court against the railroad for a failure to provide reasonable service.

2. Again, this theory should be based on a failure to provide trains and therefore take shipments rather than delays in shipments, which might need to be brought under the Carmack Amendment.

3. Actions for alleged breach of a contract under § 10709 must be resolved in state or federal court, unless the parties agree to some other resolution (such as arbitration). *See* 49 U.S.C. § 10709(c)(2).

4. The viability of this type of claim will depend largely on the specific language of the contract:

a. Does it impose a duty of reasonable service?

b. Does it incorporate federal duties of reasonable service under 49 U.S.C. §§ 11101(a) and 11121(a)(1)?

c. Does it incorporate the Carmack Amendment and the limitations on claims contained therein?

5. Note that rail contracts might incorporate federal statutes and regulations, including the Carmack Amendment.

a. Courts considering contracts containing such provisions have concluded that the Carmack Amendment, for example, would apply and other claims for shipment losses or delays would be preempted.

b. *See*, *e.g.*, *American Rock Salt*, 387 F. Supp. 2d at 200-02 (applying Carmack Amendment to § 10709 contract that incorporated "all . . . government . . . rules, regulations, and provisions . . . covering . . . freight loss and damage claims . . . that would apply if this Contract were not in effect").

6. Contract claims for inadequate rail service have faced difficulty in court, although each of these cases turns on the specific language of the particular contract:

a. For example, in *Wisconsin Electric Power Co. v. Union Pacific Railroad Co.*, 557 F.3d 504 (7th Cir. 2009), Judge Posner rejected a claim that a contract carrier provided inadequate service to a shipper.

(i) The parties' contract required "reasonable efforts" to follow the parties' agreed schedule. Union Pacific was not responsible for providing *any* rail cars; the shipper was supposed to provide private cars. *Id.* at 510.

(ii) The shipper nevertheless argued that Union Pacific violated the obligation of good faith and fair dealing by shipping only 84% of its requirements.

(iii) Judge Posner rejected this claim, holding that that duty did not require the railroad to put one of its customers ahead of the others and that the plaintiff asked "the court to undertake an unmanageable judicial task – that of working out an equitable allocation of Union Pacific's railcars among its various customers." *Id.* at 510.

b. As another example, *American Rock Salt* held that a similar claim was preempted by the Carmack Amendment and dismissed most of the claims for failure to comply with the notice requirements.

(i) In *American Rock Salt*, a shipper brought claims against Norfolk Southern for breach of contract, failure to provide timely service on reasonable request under §§ 11101(a) and 11121(a)(1), and failure to provide service with reasonable dispatch under the Carmack Amendment.

(ii) It appears (although it is not clear) that the claim was based on delay in shipments (rather than missed shipments, which might not be preempted). The parties were signatories to a contract for rail transportation which incorporated the Carmack Amendment. These factors

might distinguish this case from other situations involving overall lack of rail service.

(iii) The court concluded that the incorporation of the Carmack Amendment preempted the claims for breach of contract and unreasonable service under §§ 11101(a) and 11121(a)(1).

(iv) As noted above, there are arguments for limiting the scope of Carmack preemption; this case seems to be somewhat of an outlier on the scope of preemption.

7. This claim suffers from the same potential challenges as the claims under federal law, *see supra* Point II.C.2.g, as well as the additional challenge that, depending on the language of the contract, the court might conclude that the railroad did not have a contractual duty to provide reasonable levels of rail service.

E. Potential claims against the railroad for inadequate rail service: Tort claims

1. Tortious interference: The supplier can try to assert a claim for tortious interference with contract.

a. Non-parties to a contract have a duty to refrain from interfering with the performance of a contract between two other parties. *See*, *e.g.*, *DurretteBradshaw, P.C. v. MRC Consulting, L.C.*, 670 S.E.2d 704, 706-07 (Va. 2009).[2]

b. The elements of a prima facie claim of tortious interference with a contract are: "(i) the existence of a valid contractual relationship or business expectancy; (ii) knowledge of the relationship or expectancy on the part of the interferor; (iii) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (iv) resultant damage to the party whose relationship or expectancy has been disrupted." *DurretteBradshaw*, 670 S.E.2d at 706-07.

c. If these elements are established, then the defendant may escape liability by proving, as an affirmative defense, that the interference was justified because it acted to protect its own "financial interest," or because of "legitimate business competition." *Chaves v. Johnson*, 335 S.E.2d 97, 103 (Va. 1985).

d. However, a problem with bringing this claim is that this claim is might be preempted by either 49 U.S.C. § 10501(b) – which gives the STB "'exclusive' jurisdiction over rail carrier transportation," *San Luis Cent. R.R. Co. v. Springfield Terminal Ry. Co.*, 369 F.

[2] Note that this outline uses Virginia law for the tort claims. The elements of tort claims vary by state and there is some difference of opinion among the various states on the scope of tortious interference and other torts discussed herein.

Supp. 2d 172, 174 (D. Mass. 2005) – or the Carmack Amendment, which "preempts all state law claims that relate to the loss or damage to goods." *See Cleveland v. Beltman N. Am. Co.*, 30 F.3d 373, 378 (2d Cir. 1994).

e. Also, proving causation and overcoming the justification defense might be difficult.

2. Fraud or negligent misrepresentation: The supplier can try to assert a claim for fraudulent or negligent misrepresentation against the railroad, *e.g.*, for misrepresenting that it can handle the supplier's planned shipments in order to enter into a rail freight transportation contract.

   a. The elements of a prima facie claim of fraud are "(1) a 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." *Prospect Dev. Co. v. Bershader*, 515 S.E.2d 291, 297 (Va. 1999) (internal quotation marks omitted).

   b. A claim for negligent misrepresentation requires a showing that a "false representation of a material fact was made innocently or negligently, and the injured party was damaged as a result of his reliance upon the misrepresentation." *Bershader*, 515 S.E.2d at 297 (internal quotation marks omitted).

   c. These claims might be effective if the railroad made an *affirmative* representation that it would be able to handle the supplier's planned shipments.

   d. However, in certain states proving intent to mislead and reasonable reliance might be difficult. *See White v. Potocska*, 589 F. Supp. 2d 631, 650 n.18 (E.D. Va. 2008) ("Virginia is one of the minority of states that requires the higher standard of reasonable reliance to establish fraud.").

3. Promissory estoppel: The supplier can try to assert a claim for promissory estoppel, *e.g.*, for promising that the railroad can handle the supplier's planned shipments and inducing a rail freight transportation contract.

   a. The elements of a prima facie claim of promissory estoppel are "(1) the promisor should [have] reasonably expect[ed] his promise to induce action or forbearance by the promise, (2) the promise did induce such action or forbearance, and (3) enforcement of the promise is necessary to avoid injustice to the promisee." *Southern Gen. Constr., Inc. v. Cathedral Stoneworks*, 32 Va. Cir. 277, 278 (1993).

b. However, it might be difficult to prove that the railroad's actions constituted a "promise" and that the supplier's reliance on the promise was reasonable.

4. Unfair trade practices

a. Some states have law prohibiting "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. § 75-1.1 (codifying North Carolina's the Unfair and Deceptive Trade Practices Act); *see also* Fla. Stat. § 501.204 (codifying Florida's Unfair and Deceptive Trade Practices Act).

b. These unfair trade practices can allow treble damages and attorney's fees. *See, e.g.*, N.C. Gen. Stat. §§ 75-16, 75-16.1.

c. The elements of a prima facie claim of unfair trade practices are "(1) an unfair or deceptive act or practice (2) in or affecting commerce (3) which proximately caused actual injury to the plaintiff or to his business." *Kelly v. Georgia-Pac. LLC*, 671 F. Supp. 2d 785, 798 (E.D.N.C. 2009).

d. This claim requires more than a breach of contract, even if the breach was intentional. *See Georgia-Pac. LLC*, 671 F. Supp. 2d at 799 (citing *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 347 (4th Cir. 1998)).

e. However, some states might limit the cause of action for non-resident plaintiffs. *See, e.g.*, *Hutson v. Rexall Sundown, Inc.*, 837 So. 2d 1090, 1094 (Fla. Dist. Ct. App. 2003).

f. Other states do not allow a private right of action under their unfair and deceptive trade practices act.

g. Also, this claim might be preempted by the Carmack Amendment, which "preempts all state law claims that relate to the loss or damage to goods." *See Cleveland*, 30 F.3d at 378.

III. Problem: Unfair rail pricing

A. STB claim for unreasonable pricing

1. Railroads often have considerable market power, especially in particular regions of the country and on particular routes. Sometimes railroads charge an unreasonable tariff rate under tariffed service.

2. A shipper might have a claim that particular tariffed rates are unreasonable under 49 U.S.C. § 10701.

3. This claim would be brought before the STB.

4. In order to succeed in this claim, the plaintiff would have to show (1) the railroad has market dominance, and (2) the rate is not reasonable.

§ 10701(d)(1); *E.I. Dupont de Nemours & Co. v. CSX Transp., Inc.*, 2008 WL 2588610, at *1 (S.T.B. June 27, 2008) ("Where a railroad has market dominance, its transportation rate must be reasonable.").

5. Market dominance

   a. If a railroad has market dominance, then the STB has jurisdiction to consider whether its tariff rate is reasonable. *See id.* §§ 10701(d)(1), 10707(b), (c).

   b. The statute defines "market dominance" as "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." § 10707(a).

   c. To prove market power, the shipper must show that (1) the railroads rates produce revenues that are more than 180% of its variable cost of providing the service (quantitative analysis); and (2) the shipper lacks "feasible transportation alternatives" (qualitative analysis). *E.I. Dupont De Nemours & Co. v. Norfolk Southern Ry.*, 2014 WL 1009253, at *3 (S.T.B. Mar. 14, 2014).

6. Reasonableness of rates

   a. After the STB determines that it has jurisdiction over a challenged rate, the STB must decide whether the rate is reasonable. *See* 49 U.S.C. § 10701(d)(1).

   b. If the Board finds the rate unreasonable, then it sets the maximum rate the railroad may charge. *See id.* § 10704(a)(1).

   c. In setting that rate, the STB must permit the railroad to cover its costs "plus a reasonable and economic profit or return (or both) on capital employed in the business." *Id.* § 10704(a)(2).

   d. The shipper's relief is "the difference between the challenged rate and the maximum lawful rate, whether in the form of reparations, a rate prescription, or a combination of the two." *Simplified Standards for Rail Rate Cases*, 2007 STB LEXIS 516, at *39 (I.C.C. Sept. 4, 2007).

   e. "In determining whether a rate established by a rail carrier is reasonable," the STB "shall give due consideration to— (A) the amount of traffic which is transported at revenues which do not contribute to going concern value and the efforts made to minimize such traffic; (B) the amount of traffic which contributes only marginally to fixed costs and the extent to which, if any, rates on such traffic can be changed to maximize the revenues from such traffic; and (C) the carrier's mix of rail traffic to determine whether one commodity is paying an unreasonable share of the carrier's overall revenues, recognizing the policy of this part that rail carriers shall earn adequate revenues. 49 U.S.C. § 10701(d)(2).

f. The STB uses numerous different standards for evaluating the reasonableness of a tariff rate. *See generally Simplified Standards for Rail Rate Cases,* 2007 STB LEXIS 516.

g. Such a claim likely requires expert review and analysis of the reasonableness of the rates.

B. Antitrust claims for unreasonable rate practices

1. Some customers have attempted to use the antitrust laws to challenge rate practices among the railroads.

2. For example, in May 2007, customers began bringing class actions around the country against four of the country's largest freight railroads – BNSF Railway Co. ("BNSF"), Union Pacific Railroad Co. ("UP"), CSX Transportation Inc. ("CSX"), and Norfolk Southern Railway Co. ("NS") – claiming that beginning 2003 the defendants coordinated their fuel surcharges in violation of federal antitrust laws and various state laws. Only the antitrust claims remain. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, MDL No. 1869 (D.D.C.).

3. In support of the antitrust claims, the customers alleged that, after an industry meeting in 2003, BNSF and UP (the western railroads) started to impose the same fuel surcharges and that the four defendants manipulated the All Inclusive Index ("AII"), based on which many rail freight transportation contracts determined rates. The customers allege also that, soon after the change in the AII, CSX and NS (the eastern railroads) began imposing the same fuel surcharges.

4. Based on these allegations, the complaint claims that the defendants violated § 1 of the Sherman Act, which prohibits among other things conspiring to fix prices.

5. In November 2007, the Judicial Panel of Multidistrict Litigation transferred the lawsuits and consolidated them before the Honorable Paul L. Friedman of the U.S. District Court of the District of Columbia. In November 2008, the court denied the defendants' motion to dismiss and allowed the parties to move forward with discovery.

6. After the close of discovery there were several changes in the status of the certification of the class. Ultimately, in October 2017, the court denied class certification and that decision is on appeal to the D.C. Circuit.

IV. Problem: Lost or damaged goods shipped by the railroad

A. The Carmack Amendment governs "actual loss or injury to . . . property" during transit. 49 U.S.C. § 11706.

B. "In an action to recover for goods lost in transit, a shipper must show the following to establish a prima facie case: (1) delivery of a quantity of goods to the carrier, (2) arrival at destination of a lesser quantity, (3) the amount of damages." *Continental Grain Co. v. Frank Seitzinger Storage, Inc*., 837 F.2d

836, 839 (8th Cir. 1988); *see also M.I.S. Eng'g, Div. of Research & Dev. Corp. v. U.S. Exp. Enterprises, Inc.*, 438 F. Supp. 2d 1056, 1060 (D. Neb. 2006).

C. Once a shipper has established those facts, it is presumed that the railroad was negligent. *See Plough, Inc. v. Mason & Dixon Lines*, 630 F.2d 468, 470 (6th Cir. 1980).

D. If the railroad has lost or damaged the goods being shipped then this would be the most viable way of obtaining damages for those losses.

V. Problem: Railroad blame game, blaming shippers for delays caused by the railroad

A. There are occasions where the railroad blames the shipper for shipment delays caused by the railroad's inadequate service. The railroad might tell customers that the shipper is not calling for enough trains or that production problems, rather than inadequate train service, are causing delays.

B. Defamatory words that are actionable *per se* include "[t]hose which prejudice such person in his or her profession or trade." *Shupe v. Rose's Stores, Inc.*, 192 S.E.2d 766, 767 (Va. 1972). Defamation *per se* that affects a person's "profession" has been interpreted broadly. *See*, *e.g.*, *Richter v. Muller*, Law No. 131165, 1994 WL 1031247, at *2 (Va. Cir. Ct. July 1, 1994) (allowing a defamation *per se* claim where defendant had stated that doctor "did not do the proper procedure" in treating an injury).

C. "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." *Gen. Prod. Co. v. Meredith Corp.*, 526 F. Supp. 546, 549-50 (E.D. Va. 1981).

D. "[The] elements for the tort of defamation are (1) publication about the plaintiff, (2) an actionable statement, and (3) the requisite intent." *Chapin v. Greve*, 787 F. Supp. 557, 562 (E.D. Va. 1992), *aff'd sub nom. Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993).

E. Punitive damages may be awarded if the defendant published the defamatory comment with knowledge of its falsity or with reckless disregard for the truth. *See General Prods.*, 526 F. Supp. at 552.