

TRANSPORTATION OF FREIGHT BY A MOTOR CARRIER

General Overview

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PART TWO

D. Liability Standards -- Exempt Commodities

1. The Carmack Amendment is federal law which preempts all state and common law with regards to remedies relating to cargo loss or damage in an interstate shipment.
2. The Carmack Amendment limits the motor carrier's liability to the actual loss or injury to the property.
3. Courts have generally interpreted this to be the difference between the market value of the property in which it should have arrived at the destination, less the market value of the actual condition in which it arrives.
4. Contracts can extend or overrule any provisions of the Carmack Amendment. Contract language, for example, can be used to incorporate Carmack for intrastate moves and for exempt commodities.
5. Contract terms can also waive any rights or responsibilities outlined under Carmack. The waiver must be expressed and in writing, and if waived, parties are left to the terms of the contract and state laws when determining who is responsible for cargo loss and damage.
6. The Carmack Amendment also provides that a carrier may limit its liability "to a value established by written declaration of the shipper or by a written agreement."
7. The Carmack Amendment encompasses not only all liability related to the payment for the loss or damage to goods but also any liability that may arise out of the claims handling process.
8. Carmack only applies if the carrier is providing a regulated service subject to federal jurisdiction. When transporting an exempt commodity, like livestock, or operating in intrastate commerce (totally within one state), Carmack does not apply.
9. However, the FAAAA, 49 USC § 14501 preempts claims for damages arising from intrastate transportation, but it also concludes that this preemption is broad and complete enough to support removal to Federal Court even where the plaintiff does not plead a federal cause of

action on the face of the complaint.

10. If a shipment is exempt, it is not required to be transported by an authorized motor carrier, and a broker is not required to have authority as a property broker to broker the shipment.

11. Does the “broker” have a bond, and, if so, does it cover an exempt shipment?

12. A driver is not liable for loss under Carmack.

13. Carmack Amendment preemption embraces all losses resulting from any failure to discharge a carrier's duty as to any part of an agreed transportation.

14. Preempted state law claims include negligence, fraud, conversion, and unfair trade practices, if the claims arise out of a bill of lading issued for shipment of property.

15. Carmack Amendment preempts fraud and conversion claims arising from a carrier’s misrepresentations regarding delivery conditions and failure to carry out delivery.

16. Also, preempted: intentional infliction of emotional distress claims; claims under Deceptive Trade Practice Act; fraud claims relating to the making of a contract; and claims based on an alleged fraudulent estimate made to induce a transportation contract.

17. Florida declined to extend the Carmack preemption to larcenous misconduct by the carrier that was intended to “and in fact resulted in the separation of goods from their owner,” concluding that Mlinar’s conversion, criminal activity, and FDUTPA claims arose from conduct or harms independent from the loss of goods in the shipping process. *Mlinar v. United Parcel Serv., Inc.*, 186 So.3d 997, 1004 (Fla.2016).

18. Claims under state law must be separate and independently actionable from the loss or damage to goods actionable under Carmack.

19. The Carmack Amendment applies only to transportation subject to motor carrier or freight forwarder jurisdiction of the Secretary of Transportation or the Surface Transportation Board. 49 U.S.C. § 13506 addresses “Miscellaneous motor carrier transportation exemptions.”

20. 49 U.S. Code §13506 – Miscellaneous motor carrier transportation exemptions

(a) In General.—Neither the Secretary nor the Board has jurisdiction under this part over—

...

(4) a motor vehicle controlled and operated by a farmer and transporting—

(A) the farmer's agricultural or horticultural commodities and products; or

(B) supplies to the farm of the farmer;

...

(6) transportation by motor vehicle of—

(A) ordinary livestock;

(B) agricultural or horticultural commodities (other than manufactured products thereof);

(C) commodities listed as exempt in the Commodity List incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, other than frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, or wool imported from a foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted);

(D) cooked or uncooked fish, whether breaded or not, or frozen or fresh shellfish, or byproducts thereof not intended for human consumption, other than fish or shellfish that have been treated for preserving, such as canned, smoked, pickled, spiced, corned, or kippered products; and

(E) livestock and poultry feed and agricultural seeds and plants, if such products (excluding products otherwise exempt under this paragraph) are transported to a site of agricultural production or to a business enterprise engaged in the sale to agricultural producers of goods used in agricultural production;

....

(11) transportation of used pallets and used empty shipping containers (including intermodal cargo containers), and other used shipping devices (other than containers or devices used in the transportation of motor vehicles or parts of motor vehicles);

(12) transportation of natural, crushed, vesicular rock to be used for decorative purposes;

(13) transportation of wood chips;

...

(15) transportation of broken, crushed, or powdered glass.

21. The exemption of a commodity precludes preemption by the Carmack Amendment. *Alpine Fresh, Inc. v Jala Trucking Corp*, 181 F. Supp. 3d 250 (D.C. New Jersey 2016).

22. While permitting farmers to use non-regulated truckers at lower rates, Congress relegated farmers to state law remedies when goods being transported by truck are damaged or lost. *Taiyo Americas, Inc. v Honey Transport, Inc.*, 464 F.Supp. 1249 (S.D. New York 1979)

23. Administrative Ruling 107, now Composite Commodity List Administrative Ruling 119, includes as exempt commodities:

(1) Bagged commodities: Placing exempt commodities in bags does not effect the exempt status (page 1);

(2) Horticultural commodities.
Plants, vegetables, flowers,
Exempt - Law (page 17);

(3) Packaged commodities:
Packaging exempt commodities
does not affect their exempt
status - Law, (page 21);

(4) Vegetables; Bagged - Exempt
- Law (page 26);

(5) Vegetables - Cut up - fresh, in
cellophane bags - Exempt - law
(page 27);

(6) Vegetables - Washed, fresh,
in cellophane bags - Exempt -
Law (page 28).

24. *Service First Logistics, Inc. V J. Rodriguez Trucking, Inc.*, No. 16-14337, United States District Court, E.D., Michigan, Southern Division, April 14, 2017

25. A shipment of produce (lettuce products) that Plaintiff contracted with Defendant to have Defendant deliver. Plaintiff alleged that Defendant failed to properly refrigerate the load at 35 degrees Fahrenheit, which caused the products to spoil and the consignee to reject the entire load. The spoiled products caused Plaintiff to incur a loss of \$21,863.32, which amount Defendant refused to reimburse Plaintiff.

26. Courts have ruled that produce like the commodity at issue here is exempt, with such rulings being affirmed by the U.S. Supreme Court. See, e.g., *Frozen Food Express v. United States*, 148 F.Supp. 399, 402-03 (S.D. Tex. 1956) (“the following commodities . . . [are] exempt: . . . fresh cutup vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged in cellophane bags or boxes; . . .”), affirmed 355 U.S. 6 (1957).

27. Because the products at issue are exempt commodities, neither the Secretary of Transportation nor the Service Transportation Board had jurisdiction over them under Chapter 135, Subchapter 1, and the Carmack Amendment does not apply to the products at issue. And, as the Carmack Amendment does not apply, there is no subject matter jurisdiction in this Court.

28. As the sole alleged basis for the Court's jurisdiction in this case is the Carmack Amendment, the absence of a viable claim under the Carmack Amendment deprives the Court of subject matter jurisdiction.

28. 49 CFR § 372.115 Commodities that are not exempt under 49 U.S.C. 13506(a)(6). 49 U.S.C. 13506(a)(6) provides an exemption from regulation for motor vehicles used in carrying ordinary livestock, fish, and unmanufactured agricultural commodities. Certain specific commodities have been statutorily determined to be non-exempt. Administrative Ruling No. 133, which is reproduced below, is a list of those commodities that are non-exempt by statute.

Administrative Ruling No. 133

List of Commodities That Are Not Exempt by Statute Under 49 U.S.C. 13506(A)(6)

Animal fats
Butter
Canned fruits and vegetables
Carnauba wax as imported in slabs or chunks
Cattle, slaughtered
Charcoal
Cheese
Coal
Cocoa beans
Coffee, beans, roasted, or instant
Copra meal
Cotton yarn
Cottonseed cake or meal
Diatomaceous earth
Dinners, frozen
Feeds:
Alfalfa meal

Alfalfa pellets
Beet pulp
Bran shorts
Copra meal
Corn gluten
Distilled corn grain residues, with or without solubles added
Fish meal
Hominy feed
Middlings
Pelletized ground refuse screenings
Wheat bran
Wheat shorts
Fertilizer, commercial
Fish:
Canned or salted as a treatment for preserving
Cooked or partially cooked fish or shrimp, frozen or unfrozen
Hermetically sealed in containers as a treatment for preserving
Oil from fishes
Preserved, or treated for preserving, such as smoked, salted, pickled,
spiced, corned or kippered
Flagstone
Flaxseed meal
Flour
Forest products:
Resin products, such as turpentine
Fruits and Berries:
Bananas, fresh, dried, dehydrated, or frozen
Canned
Frozen
Hulls of oranges after juice extractions
Juice, fruit, plain or concentrated
Pies, frozen
Preserved, such as jam
Purees, strawberry and other, frozen
Grains:
Oils extracted from grain
Popcorn, popped
Rice, precooked
Wheat germ
Gravel
Hair, hog or other animal, product of slaughter of animal
Hay, sweetened with 3 percent molasses by weight
Hemp fiber

Hides, green and salted
Insecticides
Limestone, agricultural
Livestock:
Monkeys
Race horses
Show horses
Zoo animals
Lumber, rough sawed or planed
Maple syrup
Meal:
Alfalfa
Copra
Cottonseed
Fish
Flaxseed
Linseed
Peanut
Soybean
Meat and meat products, fresh, frozen or canned
Milk and Cream:
Chocolate
Condensed
Sterilized in hermetically sealed cans
Molasses
Nuts (including peanuts):
Peanut meal
Roasted or boiled
Oil, mint
Oil, extracted from vegetables, grain, seed, fish or other commodity
Pelts
Pies, frozen
Pigeons, racing
Pulp, beet
Pulp, sugar cane
Rock (except natural crushed, vesicular rock to be used for decorative purposes)
Rubber, crude, in bales
Rubber, latex, natural, liquid, from which water has been extracted and to which ammonia has been added
Sand
Seeds:
Oil extracted from seeds

Skins, animal
Soil, potting
Soil, top
Soup, frozen
Sugar
Sugar cane pulp
Sugar raw
Syrup, cane
Syrup, maple
Tea
Tobacco:
Cigars and cigarettes
Homogenized
Smoking
Top Soil
Trees:
Sawed into lumber
Vegetables:
Candied sweet potatoes, frozen
Canned
Cooked
French fried potatoes
Oil, extracted from vegetables
Soup, frozen
Soybean meal
Wool imported from a foreign country
Wool tops and noils
Wool waste (carded, spun, woven, or knitted)
Wool yarn

Note 1:

Under 49 U.S.C. 13506(a)(6)(D), any listed fish or shellfish product that is not intended for human consumption is exempt.

Note 2:

Under 49 U.S.C. 13506(a)(6)(E), any listed livestock feed, poultry feed, agricultural seeds, or plants that are transported to a site of agricultural production or to a business enterprise engaged in the sale to agricultural producers of goods used in agricultural production is exempt

E. SANITARY TRANSPORTATION OF HUMAN AND ANIMAL FOOD

1. Scope – the sanitary transportation of food (human and animal food) establish establishing criteria and definitions that apply in determining whether food is

- adulterated because it has been transported or offered for transport by a

- shipper, loader, carrier by motor vehicle or rail vehicle, or

- receiver engaged in the transportation of food

under conditions that are not in compliance with the sanitary food transportation regulations.¹

2. Applicability – requirements for sanitary transportation practices applicable to

- shippers,

- loaders,

- carriers by motor vehicle and rail vehicle, and

- receivers

engaged in food transportation operations.²

Produce – applies to transportation of produce after it leaves the farm.

3. Goal – prevention of food becoming “unsafe, i.e., adulterated within the meaning of section 402(a)(1), (2), and (4) of the FD&C Act² during transportation operations.

¹ Format changed to outline for emphasis.

² If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health.

If it bears or contains any added poisonous or added deleterious substance (other than a substance that is a pesticide chemical residue in or on a raw agricultural commodity or processed

4. Liability Point – if a person subject to this rule³ becomes aware of an indication of a possible material failure of temperature control or other conditions that may render the food unsafe during transportation, the person must take appropriate action, to ensure that the food is not sold or otherwise distributed unless a determination is made by a qualified individual,⁴ that the temperature deviation or other condition did not render the food unsafe.

Rejection of Load – the Rule does not require a receiver to reject a shipment that is transported under conditions that deviate from those specified by the shipper to the carrier and loader in accordance with Sec.1.908(b)(1).

Disposition of Tendered Produce Outside Quality Standards – the Rule does not address the disposition of any produce delivered to a receiver that might deviate from quality standards set by a shipper

5. Primary Responsibility – primarily places the responsibility for determinations about appropriate transportation operations --

- whether food needs temperature control for safety and the relevant operating temperature and mode of temperature

food, a food additive, a color additive, or a new animal drug) that is unsafe within the meaning of section 346 of this title.

If it bears or contains a pesticide chemical residue that is unsafe within the meaning of section 346a(a) of this title.

If it is or if it bears or contains (i) any food additive that is unsafe within the meaning of section 348 of this title; or (ii) a new animal drug (or conversion product thereof) that is unsafe within the meaning of section 360b of this title.

If it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health;

³ If a shipper, loader, receiver, or carrier becomes aware of an indication of a possible material failure of temperature control or other conditions that may render the food unsafe during transportation, the food shall not be sold or otherwise distributed, and these persons must take appropriate action including, as necessary, communication with other parties to ensure that the food is not sold or otherwise distributed unless a determination is made by a qualified individual that the temperature deviation or other condition did not render the food unsafe.

⁴ “Qualified Individual” is not a defined term.

monitoring,

- whether particular clean out procedures are needed, and
- whether previous cargo must be identified

on the shipper.^{2 & 5}

Contractual Transfer – The shipper may rely on contractual agreements to assign some of these responsibilities to other parties, such as a loader or carrier, if they agree to accept the responsibility

6. Best Practices – allows the food transportation industry to continue to use best practices concerning the

- cleaning,
- inspection,
- maintenance,
- loading and unloading of, and
- operation of

vehicles and transportation equipment that it has developed to ensure that food is transported under the conditions and controls necessary to prevent contamination and other safety hazards.²

7. Definitions –

Carrier – a person who physically moves food by rail or motor vehicle in commerce within the United States

Loader -- a person that loads food onto a motor or rail vehicle during transportation operations

Receiver -- any person who receives food at a point in the United States after transportation, whether or not that person represents the final point of receipt for the food

Shipper – a person who arranges for the transportation of food in

⁵ FDA believes that the shipper is in the best position of the parties covered by the Rule to know the appropriate specifications for transport of its food.

the United States by a carrier or multiple carriers sequentially

includes the manufacturer or

a freight broker.

Designated Person – The FDA has determined that, inasmuch as these functions involve communicating important information to the carrier about operating conditions during transportation,⁶ the appropriate person to perform these functions is the person who makes the transportation arrangements with the carrier because this person communicates directly with the carrier and can directly provide the carrier with the information required by this rule notwithstanding that brokers may not possess the degree of knowledge about food safety that a food manufacturer would, current industry practices demonstrate that these persons – brokers and other third-party logistics providers, obtain the vehicle preparation and sanitary transportation information, as needed, from manufacturers, to provide it to the carriers

FOB – The responsibilities of a shipper under this rule are not affected by the type of shipping arrangement, e.g., an FOB contract, and nothing in this rule specifies which party assumes the risk of loss.

8. Equipment – vehicles and transportation equipment used in transportation operations for food requiring temperature control for safety must be designed, maintained, and equipped as necessary to provide adequate temperature control to prevent the food from becoming unsafe during transportation operations

9. Standards of Care – all transportation operations must be conducted under such conditions and controls necessary to prevent the food from becoming unsafe during transportation operations including:

⁶ Functions which include specifying to the carrier all necessary sanitary requirements for the carrier's vehicle and transportation equipment to ensure that the vehicle is in appropriate sanitary condition, and specifying temperature control parameters to the carrier if the food requires temperature control during transportation

- Taking effective measures such as segregation, isolation, or the use of packaging to protect food from contamination by raw foods and nonfood items in the same load

- Taking effective measures such as segregation, isolation, or other protective measures, such as hand washing, to protect food transported in bulk vehicles or food not completely enclosed by a container from contamination and cross-contact during transportation operations

- Taking effective measures to ensure that food that requires temperature control for safety is transported under adequate temperature control

10. Requirements applicable to shippers engaged in transportation operations --

Unless the shipper takes other measures in accordance with paragraph (b)(3) of this section to ensure that vehicles and equipment used in its transportation operations are in appropriate sanitary condition for the transportation of the food, i.e., that will prevent the food from becoming unsafe, the shipper must specify to the carrier and, when necessary, the loader, in writing, all necessary sanitary specifications for the carrier's vehicle and transportation equipment to achieve this purpose, including any specific design specifications and cleaning procedures

Unless the shipper takes other measures in accordance with paragraph (b)(5) of this section to ensure that adequate temperature control is provided during the transportation of food that requires temperature control for safety under the conditions of shipment, a shipper of such food must specify in writing to the carrier, except a carrier who transports the food in a thermally insulated tank, and, when necessary, the loader, an operating temperature for the transportation operation including, if necessary, the pre-cooling phase

A shipper must develop and implement written procedures, subject to the records requirements of Sec. 1.912(a), adequate to ensure that vehicles and equipment used in its transportation operations are in appropriate sanitary condition for the transportation of the food, i.e., will prevent the food from becoming unsafe during the transportation operation. Measures to implement these procedures may be accomplished by the shipper or by the carrier or another party covered by this subpart under a written agreement subject to the records requirements of Sec 1.912(a)

A shipper of food transported in bulk must develop and implement written procedures, subject to the records requirements of Sec. 1.912(a), adequate to ensure that a previous cargo does not make the food unsafe. Measures to ensure the safety of the food may be accomplished by the shipper or by the carrier or another party covered by this subpart under a written agreement subject to the records requirements of Sec. 1.912(a)

The shipper of food that requires temperature control for safety under the conditions of shipment must develop and implement written procedures, subject to the records requirements of Sec. 1.912(a), to ensure that the food is transported under adequate temperature control. Measures to ensure the safety of the food may be accomplished by the shipper or by the carrier or another party covered by this subpart under a written agreement subject to the records requirements of Sec. 1.912(a) and must include measures equivalent to those specified for carriers under paragraphs (e)(1) through (3) of this section

11. Requirements applicable to loaders engaged in transportation operations --

Before loading food not completely enclosed by a container onto a vehicle or into transportation equipment the loader must determine, considering, as appropriate, specifications provided by the shipper in accordance with paragraph (b)(1) of this section, that the vehicle or transportation equipment is in appropriate sanitary condition for the transport of the food, e.g., it is in adequate physical condition, and free of visible evidence of pest infestation and previous cargo that could cause the food to become unsafe during transportation. This may be accomplished by any appropriate means.

Before loading food that requires temperature control for safety, the loader must verify, considering, as appropriate, specifications provided by the shipper in accordance with paragraph (b)(2) of this section, that each mechanically refrigerated cold storage compartment or container is adequately prepared for the transportation of such food, including that it has been properly pre-cooled, if necessary, and meets other sanitary conditions for food transportation.

12. Requirements applicable to receivers engaged in transportation operations –

Upon receipt of food that requires temperature control for safety under the conditions of shipment, the receiver must take steps to adequately assess that the food was not subjected to significant temperature abuse, such as determining the food's temperature, the ambient temperature of the vehicle and its temperature setting, and conducting a sensory inspection, e.g., for off-odors

13. Requirements applicable to carriers engaged in transportation operations –

When the carrier and shipper have a written agreement that the carrier is responsible, in whole or in part, for sanitary conditions during the transportation operation, the carrier is responsible for the following functions as applicable per the agreement:

- ensure that vehicles and transportation equipment meet the shipper's specifications and are otherwise appropriate to prevent the food from becoming unsafe during the transportation operation.

- once the transportation operation is complete and if requested by

the receiver, provide the operating temperature specified by the shipper in accordance with paragraph (b)(2) of this section and, if requested by the shipper or receiver, demonstrate that it has maintained temperature conditions during the transportation operation consistent with the operating temperature specified by the shipper in accordance with paragraph (b)(2) of this section. Such demonstration may be accomplished by any appropriate means agreeable to the carrier and shipper, such as the carrier presenting measurements of the ambient temperature upon loading and unloading or time/temperature data taken during the shipment.

– Before offering a vehicle or transportation equipment with an auxiliary refrigeration unit for use for the transportation of food that requires temperature control for safety under the conditions of the shipment during transportation, a carrier must pre-cool each mechanically refrigerated cold storage compartment as specified by the shipper in accordance with paragraph (b)(2) of this section.

A carrier must develop and implement written procedures subject to the records requirements of Sec.1.912(b) that:

Specify practices for cleaning, sanitizing if necessary, and inspecting vehicles and transportation equipment that the carrier provides for use in the transportation of food to maintain the vehicles and the transportation equipment in appropriate sanitary condition as required by Sec. 1.906(b);

Describe how it will comply with the provisions for temperature control in paragraph (e)(2) of this section, and;

Describe how it will comply with the provisions for the use of bulk vehicles in paragraphs (e)(4) and (5) of this section.

14. Shippers must retain records – that demonstrate that they provide specifications and operating temperatures to carriers as required by Sec. 1.908(b)(1) and (2) as a regular part of their transportation operations for a period of 12 months beyond the termination of the agreements with the carriers.