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FREIGHT FORWARDERS AND COMMON CARRIAGE

DANIEL J. AHEARN

PUBLIC transportation of goods has always employed the best means available in its time to satisfy the demands of its time for speed and economy. Speed and economy are, of course, relative terms and the emphasis on the one or the other varies not only between but within industries. Even today the plane with its cargo of orchids casts a brief shadow on the cement-laden barge idling along as did its predecessors in DeWitt Clinton's day. Since transportation costs are part of the total cost of goods, every shipper seeks that particular blend of speed and economy which will best permit him to compete in the nation's markets.

Science has continuously stepped up the speed and efficiency of transportation. Looking back at the pageant of American transportation we see how hydraulic canal locks, transcontinental rail lines, twenty ton highway tractor-trailers, and cargo planes have multiplied the "means available". Of equal importance with the accomplishments of science have been the ingenuity and imagination with which the means available have been put to practical use. The spectacular but short-lived pony express is one example; the express companies originating about 1839 are another. In that year one William F. Harnden contracted with the New Jersey Steam Navigation Company for the transportation on its ships between New York and Providence of one "wooden crate . . . five feet by five feet in width and height and six feet in length, (contents unknown)".¹ Harnden then solicited the transportation of small packages, placed them in the wooden crate, and assumed all the risks of carriage.

Current issues of a nationally known business weekly furnish two illustrations of similar attempts in our own day to employ the "best means available". One number² reports the issuance of an Interstate Commerce Commission certificate to a company which will operate converted LCT and LSM landing craft, each carrying a number of 12-wheeled trailers between ports on the Gulf of Mexico. Under the title "Forwarding by Air", a later issue³ describes a company which will "find cargoes and ship them" in planes of independent non-scheduled operators. The use in this magazine article of the phrase "freight forwarder—

1. Express Cases, 117 U. S. 1, 19 (1885). Harnden also leased space on a railroad car running from Boston to New York ". . . and vice versa, via Stonington . . .", Id. at 18.

2. BUSINESS WEEK, June 8, 1946, 36.

3. BUSINESS WEEK, July 27, 1946, 42.

by air" to describe a person who is said to collect a "brokerage fee" for his services emphasizes the importance of what will be said hereafter under the heading "A Problem in Semantics".

Brief reference to another comparatively recent attempt to employ the "best means available" will serve to point up our subject. In *New Automobiles in Interstate Commerce*,⁴ the Maritime Commission was called upon to consider the status of the Western Transit Company. The company held itself out to transport automobiles between Detroit, Michigan and Buffalo, New York on the deck space, otherwise wasted, of Lake vessels operated by bulk cargo carriers. The Commission held the Western Transit Company to be a common carrier by water subject to its regulation even though the bulk cargo carriers were not themselves subject as carriers under the Shipping Act of 1916.⁵ This last illustration is an example of an "overriding carrier", i.e. a carrier which employs the facilities and vehicles of other carriers in the transportation it performs. The air cargo operation described above, despite the magazine writers' use of the term "freight forwarder—by air", does not seem, on the basis of the activity described, to constitute carriage at all. However, if there are other unstated facts which would add up to carriage, it too would be an overriding carrier inasmuch as it employs the planes of other carriers.

Every transportation innovation poses legal problems for attorneys, for the judiciary, and for legislators. First, there is the all important question of common carrier status. In the case of overriding carriers, there are further questions about the legal relationships among the parties—the shipper, the overriding carrier, and the underlying carrier. Finally, should the new method of transportation fill a basic economic need and become a vital link in the nation's transportation system, the question of the necessity for federal regulation eventually arises. Properly to resolve the legal problems incident to new methods of transportation and apply the precedents call at times for the skills of both the philosopher and the frontiersman. The answer to many of these problems lies in the concept of common carriage. The difficulty is to apply that concept to particular instances, and in so doing to distinguish the accidental from the essential. In addition, one must occasionally hack through a heavy terminological undergrowth which has sprung up from the unfortunate or careless use of words. This is particularly true of cases dealing with freight forwarders, which, together with the express com-

4. 2 U. S. M. C. 359, No. 511, 1940.

5. 39 STAT. 728 (1916), 46 U. S. C. A. § 801 (1944).

panies,⁶ are the two most important types of overriding carriers. Both were regarded as innovations at one time.

Freight forwarder history, more than that of express companies, will furnish examples of the legal issues incident to new methods of transportation. A century ago there were freight forwarders—although they were not then called by that name. It was not, however, until after World War I that they began to make themselves felt competitively in American transportation. How important they eventually became may be judged by the fact that in recent years Congress decided that they too should be regulated in much the same way as are railroads, motor carriers, and water carriers. Thus, the main legal problems the freight forwarders encountered should be of interest to those transportation agencies which have recently come into operation. But, first, let us see what the freight forwarder is and does.

Freight forwarders receive for transportation many less-carload and less-truckload shipments for each of which they issue a bill of lading⁷ to the shipper. The individual shipments may originate in the city in which the freight forwarder operates its receiving and consolidating station, or they may have to be brought one hundred miles or more to the forwarder's station, usually by motor common carrier. At its consolidating station the freight forwarder segregates and consolidates the individual small shipments into large lots on which carload, truckload, or other quantity rates apply—each consolidated consignment destined by rail, truck or boat to a different large destination city.⁸ At the destination cities the consolidated consignments are broken down into indi-

6. Today there is only a single express company, the Railway Express Agency, which is owned jointly by some eighty-six railroads. This express monopoly has been operative since 1928 at which time the railroad group bought up the independent express companies—such as Adams Express, American Express, U. S. Express, etc. Some of these names survive as traveler's check banking institutions, as travel bureaus, and in other occupations, but none is engaged in the express transportation of goods. For the purpose of understanding the issues discussed in this article, however, it is important to keep in mind that the express companies involved in the leading cases are the old independent companies, which flourished from the time of the 1830's and which were brought under Federal regulation as common carriers by the Hepburn amendment of 1906. 34 STAT. 584 (1906), 49 U. S. C. A. § 1 (1944). Where reference is made in this article to express companies it is the independent type not the present Railway Express Agency which is meant.

7. The form used is the Uniform Railroad Bill of Lading. 39 STAT. 538 (1916), 49 U. S. C. A. § 81 (1944).

8. Some freight forwarders have already applied to the Civil Aeronautics Board for authority to operate as freight forwarders by air under the Civil Aeronautics Act. 52 STAT. 973 (1938), 49 U. S. C. A. § 681 (1944).

vidual shipments again. The individual shipments are then delivered to the premises of the various consignees, whether they be located in the destination city at which the consolidated consignment is broken down or in smaller communities two hundred miles or more beyond. The forwarder's through bill of lading applies all the way from the shipper's premises to those of the consignee. The shipper pays the freight forwarder one through charge for the entire transportation. Since the forwarders through rates approximate those for rail less-carload service, the forwarder's operating revenue is derived from the difference between the through less-carload rate it charges the public and the carload, truckload or other quantity rate, it pays the railroad, motor carrier or boat line. Out of this difference the forwarder pays for the transportation from the shipper's premises into its consolidating station and beyond its break-bulk station to the consignee's premises.

A Problem in Semantics

The law is clear that it is what one is, not what one calls himself that determines common carrier status. It is equally true, however, that language must be found to describe what one does and in this respect the term "freight forwarder" could hardly be less aptly chosen. The term "forwarder"—without the qualifying adjective "freight"—has a well grounded meaning in transportation as referring to one who as agent of the shipper selects a carrier and turns the goods over to it for transportation. As early as the time of Judge Story there was "class of persons well known in America" who called themselves "forwarding merchants".⁹ Usually they acted in a double capacity as warehousemen and also as agents in the shipment of goods. As agents they were responsible for ordinary care and diligence only, and were not liable as common carriers.¹⁰ Some "forwarding merchants" called themselves "forwarding agents", or simply "forwarders". Historically the term "forwarder" became an antonym for common carrier, and thus we find the transportation companies, dispatch companies, and express freight companies of the nineteenth century pleading that they were "mere forwarders" and not carriers in their efforts to escape carrier liability. How that plea was received, we shall presently see, but we may state before beginning our survey that the term "forwarder" meant, at common law, agent of the shipper, whereas, today under Part IV of the Interstate

9. STORY, COMMENTARIES ON THE LAW OF BAILMENTS (5th ed. 1851) 465.

10. Stannard *et al* v. Prince, 64 N. Y. 300 (1876); *In Re Emerson*, Marlow & Co., 199 Fed. 95 (C. C. A. 7th, 1912); Roberts v. Turner, 12 Johns. 232 (N. Y. 1815).

Commerce Act¹¹ the term "freight forwarder" is deemed to refer to a common carrier. Although the term "freight forwarder" has been defined by statute only since 1942, it can be properly used to describe certain transportation companies, freight express companies, and dispatch companies of the 1800's.

Freight Forwarders as Common Carriers

In May 1942 Congress after much deliberation¹² brought freight forwarders within the scope of the Interstate Commerce Act by adding Part IV¹³ to the Act. In bringing freight forwarders within the Act, Congress was carrying out one of the express purposes of the national transportation policy as set forth in the Transportation Act of 1940.¹⁴ Apparently Congress felt that if the country was to achieve a unified system of transportation, freight forwarders would also have to be brought under regulation. Their inclusion within the Act did not transform freight forwarders into common carriers; for, as will be presently shown, they had already achieved that status almost a century before. In this respect they followed the experience of the express companies which had been held to be common carriers many years¹⁵ before being brought within the Act in 1906. According to Section 402 of the Act:¹⁶

"The term 'freight forwarder' means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to the general public to transport or provide transportation of property or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation

11. 56 STAT. 284 (1942), 49 U. S. C. A. § 1, 301, 901 1001 (1944).

12. For a comprehensive summary of Congressional action from 1930 on with regard to regulation of freight forwarders see *Report to accompany S. 210* by the House Committee on Interstate and Foreign Commerce. Report No. 1172, pp. 3-5, 77th Cong., First Session, August 13, 1941.

13. 56 STAT. 284 (1942), 49 U. S. C. A. § 1, 301, 901, 1001 (1944). Part I regulates, among others, railroads (1887) and express companies (1906), Part II regulates motor carriers (1935), and Part III deals with water carriers (1940).

14. 54 STAT. 899 (1940) 49 U. S. C. A. §§ 1, 8, 12, 13 (1944).

15. As early as 1887 the Interstate Commerce Commission held that although express companies were common carriers they were not subject to the Act as it then read. 1 INTERSTATE COMMERCE REPORTS 677, 682, (1887).

16. 56 STAT. 284, 49 U. S. C. A. § 1002 (1944).

of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act.”

It will be noted that this definition does not explicitly declare that freight forwarders are common carriers. However, there was no necessity to do so for in recent times there have been no cases testing this point of law. At one time, however, in our legal history the question was discussed at some length in a number of cases.

These early cases usually involved attempts to avoid the rigorous liabilities of common carriage. As is generally known the duties imposed upon common carriers by the common law were very strict.¹⁷ Indeed they were so strict that for all practical purposes common carriers were then regarded as insurers of the goods entrusted to their care. Of course they were not responsible for acts of God,¹⁸ or acts of the public enemy,¹⁹ but beyond that their liability was absolute. In time their liability has been modified slightly by statute but then, as now, except for the two instances mentioned, they were not permitted to claim that the loss of damage complained of had occurred through no action or fault of theirs. Accordingly, many transportation agencies were wont to plead, almost as a matter of routine, that they were not engaged in common carriage; and in this respect the dispatch companies and the transportation companies—the freight forwarders of nineteenth century America—were no exception. The courts spent little

17. In *Mercantile Mutual Insurance Co. v. Chase*, 1 E. D. Smith 115 (N. Y. 1850), a case involving a freight forwarder, the court in discussing the strict liability of common carriers stated at 131:

“The reasons for the extraordinary responsibility imposed by the law are uniformly stated to be the security of those whose exigencies compel them to employ the carrier; the danger of collusion and fraud on his part; and the difficulty which the owner must in general find in proving neglect, fraud or misfeasance. (*Coggs v. Bernard*, (Lord Holt) 2d Ld. Raymond R. 909; *Same v. Colton*, (Lord Holt) 1 Ld. Raymond R. 546, 655; 1 Salk. 143; *Riley v. Howe* (Ch. J. Best) 5 Bing. R. 217).

“The whole foundation of the rule is fully and pointedly summed by Lord Holt, as follows: ‘This is a politic establishment contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their dealings; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered, and this is the reason the law is founded in that point.’”

18. “The authorities all agree that the carrier is not an insurer in regards to what is called an Act of God”. 1 MICHIE, A TREATISE ON THE LAW OF CARRIERS (1915) 731, and see there the federal and state cases cited,

19. *Holladay v. Kennard*, 12 Wall. 254 (U. S. 1870).

time evaluating the merits of that claim. Their first step was to examine the undertaking assumed by the freight forwarder, and, in almost all the reported cases they came to the conclusion that it was one of common carriage and, accordingly, that the freight forwarder was liable. Probably this same procedure will be followed by future courts when called upon to determine whether common carriage exists in whatever novel transportation service comes before them.

In *The Propeller Niagara v. Cordes*,²⁰ the Supreme Court of the United States defined a common carrier as ". . . one who undertakes for hire to transport the goods of those who may choose to employ him from place to place". This definition is classic and it would be pointless to recite here the many others readily available in the authorities. It is significant that the great majority of such definitions including that by Kent²¹ use the verb "undertake",²² indicating that the law looks primarily to the terms of the contract. Such was the procedure followed in *Read v. Spaulding*,²³ one of the earlier cases dealing with the common carrier status of freight forwarders. Action in that case was instituted against the proprietor of the Spaulding Express Freight Line to recover for damage to part of a lot of straw goods which, according to the bill of lading issued to the plaintiff, was "to be forwarded" from New York City to Louisville, Kentucky. Most of the shipment was safely delivered, but the five cases upon which the action was brought were damaged by an extraordinary flood while they were in a depot of the New York Central Railroad at Albany. The first defense raised by the defendant was that he was not a common carrier, the second was that the goods were damaged by Act of God. The first defense was overruled by the court of original jurisdiction which was quick to point out that according to the bill of lading

"the defendant declares that he received the goods to be forwarded to the place named in the bill of lading, Louisville; and that all property shipped on that bill of lading will be delivered at the depot of the Company or steam-

20. 21 How. 7, 22 (U. S. 1858).

21. "Common carriers undertake generally, and not as a casual occupation, and for all persons indifferently, to convey goods, and deliver them at a place appointed, for hire as a business [citing *Gisbourne v. Hurst*, 1 Salk. 249; *Brind v. Dale*, 8 Carr. & P. 207] and with or without a special agreement as to price [citing *Harris v. Packwood*, 3 Taunt., 264; *Story on Bailments*, Sec. 495, 3rd Edition]." 2 KENT, COMMENTARIES ON AMERICAN LAW (12th ed. 1873) 599.

22. For example, of the twenty-nine definitions of common carriers set forth in 10 CORPUS JURIS, 39-40, twenty-one employ the term "undertake", and most of the remainder use words of similar import.

23. 18 N. Y. Superior Ct. 395 (5 Bosworth 1859), *aff'd*. 30 N. Y. 630 (1864).

boat landing; and in providing against liability for deficiency in packing it is agreed that no such liability shall exist if the goods "are delivered at Louisville depot in good order"; and the stipulation in respect to amount of freight plainly embraces the compensation to be made to the defendant for the entire transportation from New York to Louisville. . . .

"Upon these facts we have no hesitation in saying that the defendant undertook to carry the goods, and was not a mere forwarder²⁴ whose duty consisted only in receiving and delivering the goods to others, to be carried.

"The observations made in *Mercantile Insurance Co. v. Chase* (1. E. D. Smith 121) where goods were delivered under a contract in terms very similar to that before us, are apt to express our views of the present case, on this point: and *Wilcox v. Parmalee*, (3 Sandf. S. C. R., 610,) is to the like effect."²⁵

Verdict was found for the plaintiff and the defendant appealed to the New York Court of Appeals. That court in affirming the verdict, it should be noted, did not even advert to the question of common carrier status but devoted its opinion to a consideration of the defendant's unreasonable delay in getting the goods to Albany.²⁶ Parenthetically it may be here mentioned that some of the earlier cases involving freight forwarders dealt with their attempts by special contract to limit rather than to avoid their liability.²⁷ But with that aspect of the question we are not here concerned.

*In Block v. Merchants' Despatch Transportation Co.*²⁸ the facts were these: A case of merchandise was received by the defendant company in the City of New York under contract to deliver it to the plaintiff at Clarksville, Tennessee. The bill of lading issued by the defendant recited that it was a "through bill of lading . . . guaranteeing the through rate" and it reserved "the right to forward . . . by any railroad line between point of shipment and destination. . . ." It further stipulated that responsibility for loss or damage would fall on the company

24. The term "forwarder" here was clearly intended to mean a forwarding agent.

25. *Id.* at 404.

26. About this unreasonable delay the Court declared "it can hardly be said such negligence was so remote that it did not contribute to the injury". 30 N. Y. 630, 645 (1864). This decision would seem to be in accord with the weight of authority, *Wald v. Pittsburgh, Cincinnati, Chicago & St. Louis R.R. Co.*, 162 Ill. 545, 44 N. E. 888 (1896), and the cases, in accord and *contra*, cited there at 552.

27. A leading case on the right of common carriers to limit their common law liability by special contract is *New Jersey Steam Navigation Co. v. The Merchants' Bank of Boston*, 6 How. 343 (1848); see also *York Co. v. Central R.R. Co.* 3 Wall 107 (U. S. 1865); *Constable v. National Steamship Co.*, 154 U. S. 51 (1893); *Cox v. Central Vermont R.R. Co.*, 170 Mass. 129, 136-138, 49 N. E. 97, 100-101 (1898).

28. 86 Tenn. 392, 6 S. W. 881 (1888).

having actual custody. The goods were shipped in a car belonging to the defendant from origin to Louisville where they were turned over to a railroad for transportation to destination. The loss occurred while the goods were in custody of the railroad. Defendant sought to escape liability under the terms of the contract. A verdict for the plaintiff was obtained in the lower court and the defendant appealed to the Supreme Court of Tennessee. That court affirmed, and in passing upon a charge given by the lower court, stated:

"This instruction properly treats the defendants as common carriers. The duties which it undertakes, and which it holds itself out to the public as willing to undertake and perform, give it that character. In very many cases it has been expressly adjudged to be a common carrier, and in others, such has been assumed to be its character, without discussion of the question. We cite a few of these cases; *Transportation Co. v. Cornforth*, 3 Colo. 280 (25 Amer. Rep. 757); 45 Iowa 470; 47 Iowa 229 *Ib.* 247; *Ib.* 262; 80 Ill. 472; 89 Ill. 43; *Ib.* 152."²⁹

To the same effect was *Bare v. The American Forwarding Co.*,³⁰ wherein the reader will find an excellent description of the freight forwarder method of operation. In that case action was instituted to recover the value of a trunk and its contents for which the defendant had issued a bill of lading at Englewood, Illinois reading "ship to Los Angeles, Calif.". The rest of the pertinent facts are set forth in the following quotation from the court's opinion:

"The nature of the business carried on by the defendant and of the legal duties and obligations which such business imposes on the defendant, is to be ascertained from a consideration of the kind of service it undertook to render to plaintiffs and the service which it holds itself out to the public as ready to render to those who may have occasion to employ it. The defendant agreed with the plaintiff to transport this trunk from Englewood to Los Angeles and there deliver it to the plaintiffs. The transaction was in the usual course of the business in which the defendant was engaged. It solicited goods for shipment to the Pacific Coast and other parts of the country in less-than-carload lots; had a regulate rate for the transportation of such goods; carried for all persons alike; maintained a general office for the transaction of its business and a warehouse in which it assembled goods until it had a carload destined to one point, when it chartered a car to that point, loaded the car with the goods it had undertaken to carry, consigned the car to its own agent at the point of destination and delivered the car to the railroad company. The defendant paid the railroad company the carload

29. *Id.* at 396, 6 S. W. at 882. The court then went on to discuss under what conditions a common carrier could limit its liability by special contract.

30. 146 Ill. App. Court 388 (1909); *aff'd.* 242 Ill. 298, 89 N. E. 1021 (1909).

rate to the Pacific Coast, \$1.12 a hundred, and charged its shippers \$1.75 a hundred. The undertaking of the defendant to deliver to the plaintiff at Los Angeles the trunk it received from them at Englewood involved the transportation of the trunk and was an undertaking to carry for hire. The contract of the parties made the defendant a carrier of the trunk for hire. The transaction was in the ordinary course of the business in which defendant was engaged. The defendant held itself out as ready to carry for everyone and was therefore a common carrier.³¹

By way of summary it may be said, then, that the court decisions about the common carrier status of early freight forwarders were made to depend upon the nature and extent of their undertaking. How they chose to style themselves, what names they used in the conduct of their business was not material. In the last discussed case the court declared:

"The contention of the plaintiff in error that it was a forwarder³² and not a common carrier cannot be sustained. A forwarder, or wharfinger, only delivers goods to a carrier for transportation to a particular point, there to be delivered by the carrier to the consignee named by the shipper. With the delivery to the carrier the duty of the forwarder or wharfinger is ended. Here the defendants received a trunk from the plaintiffs at Englewood, undertook to transport it to Los Angeles, and there through its agent deliver it to the plaintiffs."³³

If, however, the facts had disclosed that the party involved acted as agent of the shipper then regardless of how he termed himself, whether as a forwarding merchant, as forwarding agent, or a forwarder, his liability was deemed that of an agent only but if he held himself out as a common carrier and acted as such he could not thereafter avoid his proper responsibility by pleading that he contracted merely to forward goods and not to carry them. For example, in *Read v. Spaulding* where the contract was "to forward" merchandise, the court stated:

"The use of the term 'forward' in the contract is controlled by the nature and extent of the actual undertaking, and did not make the defendant a forwarder, in the technical sense of that word. An agreement 'to forward from New York to Louisville', embraced carriage. It became the duty of the defendant to deliver the goods at Louisville. Whether the defendant used the term 'carry', or 'transport', or 'forward', the goods from New York to Louis-

31. *Id.* at 391. For a case involving another unsuccessful effort by the same company to limit its liability, this time by describing itself as "agent", see *Ingram v. American Forwarding Co.*, 162 Ill. App. Court 476 (1911).

32. To revert again to the question of semantics; the court's use of the term "forwarder" here means, quite obviously, agent of the shipper.

33. *Bare v. American Forwarding Co.*, 146 Ill. App. Court 388, 391-392 (1911).

ville, is wholly immaterial, so long as he undertook the reception of the goods here, and their delivery there."³⁴

One argument offered by the early freight forwarders to evade their responsibility as common carriers should be of special interest in determining the present-day legal status of transportation innovations which involve overriding carriers. In substance, this argument ran as follows: since we do not own or manage the means of transportation used in forwarding the goods we are unable to exercise any control over them while they are in the custody of another carrier; hence we are to be regarded as merely agents of the shipper at least while the goods are in the custody of another carrier. That defense in one form or another was presented in many cases but, with the one exception shortly to be noted, it was overruled. *Fairchild v. Slocum*³⁵ concerned a contract to transport entered into by an agent in 1832 for certain of the defendants who represented themselves to the public as a transportation company under the name of the Albany & Oswego Line. Also joined in the action were other defendants who owned and operated vessels on Lake Ontario and the St. Lawrence River between Oswego and Ogdensburg, New York. The goods of the plaintiff were moved from New York to Albany in tow boats owned and operated by third persons not concerned in the action. The defendant contracted directly with them for this portion of the through transportation. From Albany to Oswego the goods moved on canal boats owned by the Albany & Oswego Line. From Oswego to Ogdensburg the goods moved by a vessel owned by the persons other than the contractor who were brought into the action as co-defendants by the plaintiff. The bill of lading contract excepted the carrier from loss through delay by being ice-locked in the canal or "from the dangers of Lake Ontario". The loss occurred when the lake vessel sank and the principal question of law was whether the agent of the Albany & Oswego Line had authority to contract beyond Oswego. Upon the facts the Albany & Oswego Line was held to be a common carrier and its attempted defense was brushed aside by the court in the very first paragraph of its decision:

"It is a matter of no moment that the defendants were not interested in the tow-boats by which the goods were forwarded from New York to Albany; nor is it material, as to the result of this case, that they had no joint interest in the vessels employed on the lake. They were engaged in the business of carriers, and whether they used their own boats and vessels, or employed the

34. 18 N. Y. Superior Ct. 395, 404 (5 Bosworth 1859), *aff'd.* 30 N. Y. 630 (1864).

35. 19 Wend. 329 (N. Y. 1838).

vessels of other persons to carry for them on some part or even all of the route, can be a matter of no consequence."³⁶

Directly contrary is the view expressed in *Hersfield v. Adams*.³⁷ In that case the defendants had agreed "to forward" two trunks of merchandise from New York City to San Francisco. In transit the trunks were damaged while on a flat boat crossing the Chagres River. Said the court

"The defendants in this case, not being owners of, or interested in, the vessels and boats in which these trunks were to be conveyed between New York and San Francisco were not common carriers and are not liable as such. The defendants are bailees for hire . . ."³⁸

Both these conflicting opinions were probably in the minds of every court subsequently called upon to review this question of law. Yet in no case was the doctrine of *Hersfield v. Adams* followed. Indeed, in *Read v. Spaulding* the court pointed out:

"The only case in which a contrary doctrine has been held is *Hersfield et al. v. Adams et al.* (19 Barb., 577 N. Y. Special Term), and there the decision is mainly placed on the ground that the defendants were, by special contract relieved from liability for the cause of loss there proved. So far as it declares, that the defendants were not common carriers the foregoing reasons forbid our concurrence therein."³⁹

No better expression of the general rule as applied to freight forwarders can be found than that expressed in *Cownie Glove Co. v. Merchants' Dispatch Transportation Company*:⁴⁰

"To constitute a common carrier it is not essential that the person or corporation undertaking such service own the means of transportation. If the contract is that the goods will be carried and delivered, it makes the one so contracting a common carrier, regardless of the name or the ownership of the line or lines over which the service extends."

The issue is one of contract. If A in his own behalf undertakes for hire to transport the goods of B from one place to another, he should not later be permitted to claim that he did not own or control the physical means of transportation employed. His agreement is not that he personally, or his agent, will carry the goods but rather that the

36. *Id.* at 332.

37. 19 Barb. 577 (N. Y. 1855).

38. *Id.* at 580.

39. 18 N. Y. Superior Ct. 395, 405 (5 Bosworth 1859); *aff'd*, 30 N. Y. 630 (1864); see also *Place v. Union Express Co.*, 2 Hilt., 19, 25 (N. Y. 1858).

40. 130 Iowa 327, 329, 106 N. W. 749, 750 (1906).

goods will be delivered according to the terms of the contract.⁴¹ Nor is it his agreement that the C railroad will carry the goods. Certainly on his contract with A, B could not sue the C railroad but must of necessity look to A. In *Ingram v. The American Forwarding Co.*,⁴² the defendant contracted to forward from Chicago to Los Angeles goods which were subsequently destroyed by fire while in the custody of a railroad used by the forwarding company. In holding that the relationship between the defendant and the company "must be held to be that of common carrier and shipper" the court pointed out:

"If suit had been brought against the railroad company, it would necessarily have to be based upon a contract between the railroad company and the defendant in error, under and by which the railroad company undertook to convey for the defendant in error household goods weighing 370 pounds. Did the defendant in error or the forwarding company in her behalf, in the present case make any such contract with the railroad? We think not."⁴³

As already stated, express companies were held at common law to be common carriers.⁴⁴ The early express companies used a portion of the baggage car for the transportation of their shipments and like the early freight forwarders they too often argued that they were merely agents of the shipper since as a fact they could not exercise control over the means of transportation they used. This argument was pronounced "unsound" by the Supreme Judicial Court of Massachusetts in *Buckland v. Adams Express Co.*⁴⁵

"Its fallacy consists in the assumption that at common law, in the absence of any express stipulation, the contract with an owner or consignee of goods delivered to a carrier for transportation necessarily implies that they are to be carried by the party with whom the contract is made, or by servants or agents under his immediate direction and control. But such is not the undertaking of the carrier. The essence of the contract is that the goods are to be carried to their destination unless the fulfillment of their undertaking is prevented by the act of God or the public enemy."⁴⁶

41. *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174 (1876); *Buckland v. Adams Express Co.*, 97 Mass. 124 (1867).

42. 162 Ill. App. Court 476 (1911).

43. *Id.* at 482.

44. As early as 1864 it was declared in *Hopper v. Wells Fargo & Co.*, 27 Cal. 11, (1864), that express companies were "undoubtedly common carriers"; see also *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174 (1876).

45. 97 Mass. 124 (1867).

46. *Id.* at 130. This line of reasoning was approved and applied to a freight forwarder by the Supreme Court of Tennessee in *Merchants Dispatch Co. v. Bloch Bros.*, 86 Tenn. 392, 6 S. W. 881, 884 (1888).

Freight Forwarders Relationship With Underlying Carriers

The nuances of the legal relationship between freight forwarders and those who perform the physical carriage can be grasped with least difficulty, if one will keep in mind that what is to be considered is the relationship between two common carriers, both of which are regulated under the Interstate Commerce Act.⁴⁷ One basis of relationship is the tariff basis. When one carrier tenders a shipment to another carrier for transportation under the published tariffs of the latter, the first carrier assumes, in many respects,⁴⁸ the status of shipper with respect to that shipment. This is equally true of tender under tariff by a freight forwarder to a railroad and tender by one railroad to another.⁴⁹ In *Interstate Commerce Commission v. Delaware, Lackawanna & Western Railroad*,⁵⁰ the railroad had established a tariff rule prohibiting the application of carload rates to consolidated consignments on the ground that the various individual shipments comprising them were not the property of one single owner but of many. The Interstate Commerce Commission ordered this tariff rule to be cancelled, and, upon appeal, the Supreme Court upheld the Commission's action saying:

"The contention that a carrier when goods are tendered to him for transportation can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of service rendered in transporting them, but upon the mere circumstances that the shipper is or is not the real owner of the goods is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers as to demonstrate the unsoundness of the proposition by its mere statement."⁵¹

The court referred in its opinion⁵² to two Interstate Commerce Commission decisions, *California Commercial Association v. Wells Fargo*

47. 56 STAT. 284, 49 U. S. C. A. 1002 (1944) Sec. 402 (a) (5) requires freight forwarders to "utilize . . . the services of a carrier subject to part I, II or III of this Act". This section does not apply to operations performed within a terminal area (i.e. local transfer, collection or delivery)—see Sec. 202 (c) (2) and Sec. 303 (f).

48. This qualification will be explained in the discussion of "advances" *infra* note 63, and accompanying text.

49. *Interstate Commerce Comm. v. Baltimore & Ohio R.R. Co.*, 225 U. S. 326 (1912); *New York, N. H. & H. R.R. Co. v. Interstate Commerce Comm.*, 200 U. S. 361 (1905).

50. 220 U. S. 235 (1910).

51. *Id.* at 252. The Court went on to point out that the provisions of Section 2 of the Interstate Commerce Act were taken substantially from Section 90 of the English Railway Clauses Consolidation Act of 1845, known as the Equality Clause. *Id.* at 253.

52. *Id.* at 247-8.

Co.⁵³ and *Export Shipping Co. v. Wabash Railroad*⁵⁴ dealing with similar tariff rules and applied the reasoning of those decisions. It should be noted that in the *Delaware, Lackawanna & Western* case the complaint was brought by a forwarding agent. The rule laid down by the court applies with equal force to common carrier freight forwarders.⁵⁵

A corollary of this decision is the one reached in *Lehigh Valley Railroad Company v. United States*,⁵⁶ in which case a railroad had paid a straight salary and commission to a forwarder named Sheldon⁵⁷ on shipments which the forwarder had tendered to the railroad under the railroad's published tariffs. This was held to be a rebate on the published rates in violation of Section 2 of the Interstate Commerce Act.⁵⁸ In the course of its decision the court said:

"As toward the railroad, George W. Sheldon and Company is consignor and consignee, and although it may be in no case the owner, that does not concern the appellant [the railroad]. Upon the admitted facts there can be no doubt and it is not denied that it is to all legal intents the shipper of the goods."⁵⁹

This language must be read in context. The *Lehigh Valley* case⁶⁰ and the *Delaware, Lackawanna & Western*⁶¹ case upheld the integrity and equality of published tariffs. The doctrine of both those cases presupposes a tender under tariff; yet even where this fact is found it is unwise to extend the doctrine that a carrier becomes a shipper when it tenders shipments to another carrier under tariff beyond the matters of rate and rebate covered by those cases. For example, the Interstate Commerce Commission had refused⁶² prior to the regulation of freight forwarders, to permit rail and motor common carriers to advance⁶³ the

53. 14 I. C. C. 422 (1908) No. 1280.

54. 14 I. C. C. 437 (1908) No. 1228.

55. Neither the California Commercial Association, 141 C. C. 422 (1908) No. 1280, nor the Export Shipping Company, 141 C. C. 437 (1908), No. 1228, was a freight forwarder of the common carrier type. However, the Commission in the California Association case made it clear that its ruling would also apply to a common carrier.

56. 243 U. S. 444 (1916).

57. The reported facts do not make it entirely clear whether Sheldon was a common carrier forwarder or a forwarding agent. This, however, is not material to the principle laid down.

58. 24 STAT. 379 (1887), 49 U. S. C. A. § 1 (1944).

59. 243 U. S. 444, 445 (1916).

60. 243 U. S. 444 (1916).

61. 220 U. S. 235 (1910).

62. 243 I. C. C. 53, 80, No. 27365, FREIGHT FORWARDING INVESTIGATION (1941).

63. "Advances" are transportation charges of one carrier which a second carrier shows as such on his billing and undertakes to collect from the consignee of the goods. The use of "advances" is designed to eliminate unnecessary bookkeeping and clerical costs

charges of freight forwarders. The Commission at that time argued that Rule 8 of the Consolidated Freight Classification reading:

"No charges of any description will be advanced to shippers, owners, consignees, or agents thereof, nor to their draymen or warehousemen."

prohibited such action as being unjustly discriminatory in violation of Sections 2 and 216, and as constituting a departure from published tariffs in violation of Sections 6 and 217 of the Act.⁶⁴ On January 3, 1944, subsequent to the enactment of Part IV of the Act, the Commission reversed itself on this point and said:

"Since the decision in the report on further hearing, part IV of the Act, providing for the regulation of freight forwarders, has become effective. Section 405 of that part imposes upon freight forwarders the duty of establishing, observing, and enforcing just and reasonable rates and charges for such services and just and reasonable classifications, regulations, and practices relating thereto. The requirements and our authority in that respect are similar to these relating to common carriers by railroad, motor vehicle and water carriers under other parts of the Act.

"Forwarders are not themselves the actual transporters of the goods covered by their contracts with shippers. Their ability to carry out those contracts is dependent upon the services of carriers which perform the physical transportation. In the exercise of our power to prescribe just and reasonable rates and charges of freight forwarders, and classifications, regulations, and practices relating thereto, we are required under section 406 (d) to give due consideration, among other factors, to the inherent nature of freight forwarding; to the effect of rates upon the movements of traffic by the forwarders for which the rates and charges are prescribed; and to the need, in the public interest, of adequate and efficient forwarder service at the lowest cost consistent with the furnishing of such service. The forwarder, as defined in the act, is an agency which assembles and consolidates shipments and distributes the freight to the consignees at destination. It assumes responsibility for the freight from the time it is received from the shipper until it is delivered to the ultimate consignee. While occupying a unique status in the field of transportation, the forwarder has been recognized by Congress as an agency of transportation, and forwarder rates, charges, and practices have been made subject to our regulation in a manner similar to those of other transportation agencies subject to the act. Petitioners submit and we agree, that the enactment of part IV has removed the grounds upon which the findings of unlawfulness in the prior reports were based.

"Upon further consideration, the findings in the report on further hearings, 243 I. C. C. 53 with respect to the advancing of forwarder charges as de-

among carriers. The delivering carrier advances the amount of the charges to the prior carrier in their mutual accounts and reimburses itself when collection is made on delivery.

64. 243 I. C. C. 53, 77 No. 27365 FREIGHT FORWARDING INVESTIGATION (1941).

scribed herein, are hereby modified so as to permit the respondent rail and motor carriers to advance public charges of freight forwarders subject to part IV of the Act prior to their collection from the consignee."⁶⁵

Thus, the rule laid down in the *Lehigh Valley* case does not extend to the question of advances. This means that, as to a shipment tendered under tariff by a freight forwarder, the forwarder while holding the status of shipper in matters of rate and rebate would, with respect to the very same shipment, enjoy carrier status in the matter of advances. The distinction is a valid one, and would seem to be justified by "the need in the public interest of adequate and efficient forwarder service at the lowest cost consistent with the furnishing of such service."

Leaving the subject of the freight forwarder's relationship with its underlying carrier on a tariff basis we turn next to that relationship under so-called "joint rates". Here again there are semantic difficulties. Commonplace in the dealings between common carriers is the method of joint rates and divisions. By means of a joint rate the public is able to arrange with a single carrier for transportation which will be performed over the lines of two or more carriers. The shipper is thus spared the inconvenience of dealing separately with the successive carriers and he (or the consignee) pays but a single charge for the entire route. The initial carrier having contracted with the public for transportation beyond its own lines compensates the succeeding carriers not by paying their published tariff rates but by paying them agreed divisions of the through revenue. It is obvious that the freight forwarder does not contract with the public for "transportation beyond its own lines". In fact, as to the public, the freight forwarder performs the entire transportation. The term "joint rates and divisions", therefore, when used in reference to freight forwarders and their underlying carriers must be taken in an analogous, rather than in a strict, sense. Section 409 of the Interstate Commerce Act permits motor common carriers regulated under Part II to handle freight forwarder traffic for compensation less than their published tariff rates.⁶⁶ Such a practice

65. 256 I. C. C. 699, 700-701 No. 27635, FREIGHT FORWARDING INVESTIGATION, (1944).

66. 24 STAT. 379 (1887), 49 U. S. C. A. § 1 (1944). The compensation arrangements between freight forwarders and motor carriers were on a contract basis while both were unregulated prior to 1935. With the passage of Part II the Commission and the courts refused to sanction their so-called joint rates and divisions, on the grounds that one party was regulated and the other was not. However, the Commission held off ordering cancellation of the arrangements then in effect, pending the enactment of freight forwarder regulatory legislation. In 1942 Part IV was enacted containing two sections dealing with forwarder-motor carrier compensation—Section 408, which treats freight forwarders simply as shippers, discounting the public or common nature of their undertaking, and Section

obviously nullifies any thought of shipper-carrier relationship since it would constitute *prima facie* discrimination between shippers. Finding language to describe such arrangements presents difficulties. Section 409 itself, both prior to and after its amendment in February 1946, uses the term "joint rates".⁶⁷ Yet

"A careful analysis of the so-called joint rates and divisions between motor common carriers and forwarders discloses that there has been much confusion from a loose use of words. The so-called joint rates in practice are not joint rates in the usual meaning of that term."⁶⁸

While the analogy between divisions among joint carriers and the compensation paid by freight forwarders to underlying carriers is close, more exact, perhaps, is the term "agreements" used by the Senate Committee on Interstate Commerce. The Committee in directing the Commission to establish "just and equitable terms and conditions" of compensation between freight forwarders and motor carriers, declared:

"There is no foundation for the argument that the payment of compensation to motor carriers by freight forwarders . . . on a basis different from that paid by shippers constitutes discrimination . . . There is every reason, therefore, why freight forwarders and motor carriers should be permitted to make agreements with respect to joint service and the apportionment of revenues accruing therefrom."⁶⁹

Agreement or contract as a basis of relationship between railroads and express companies existed before and after the passage of the Interstate Commerce Act. As early as the 1840's the express companies secured by contract certain rights to space on the passenger trains of

409, which authorized continuation temporarily of the joint rates and divisions. In 1946 Congress, being satisfied that Section 408 as written would not provide a general and workable basis of compensation, amended Section 409 to authorize the Commission to determine and prescribe "reasonable, just, and equitable terms and conditions" of compensation. The Commission is presently holding hearings pursuant thereto in Docket 29493.

67. In 1939 "joint rate" arrangements entered into by freight forwarders and motor carriers immediately after the enactment of Part II were ordered cancelled by the Commission not as objectionable *in se* but because motor carriers were regulated and freight forwarders were not. *Acme Fast Freight, Inc., Common Carrier Application*, 8 M. C. C. 211, 1938, Docket 2200; see supplemental decision 17 M. C. C. 549 (1939) for a discussion of the question of joint rates. The Commission's ruling was affirmed by the Supreme Court in *Acme Fast Freight, Inc., v. U. S.*, 309 U. S. 638 (1939).

68. Chairman Rogers, Commissioners Mahaffie, and Splawn in a report on S. 797 to Hon. Burton K. Wheeler, Chairman of the Senate Committee on Interstate Commerce, April 16, 1945. (Dissenting opinion.)

69. Senate Committee on Interstate Commerce, *Report on H. R. 2764*, Report No. 935, p. 4, 79th Congress, 2nd Session, February 13, 1946.

the railroads. And when in the *Express Cases*⁷⁰ the Supreme Court reviewed comparable contracts it was assumed that railroads had the right to deal with express companies on a contract basis rather than on a tariff basis. No question was then raised of discrimination between express companies on the one hand and the public on the other, but the only question was whether a railroad might contract with one express company to the exclusion of others. As was pointed out by the Supreme Court itself the "real question" in the case was

"Whether it is their [the railroads'] duty to furnish the Adams Company or the Southern Company facilities for doing an express business upon their roads the same in all respects as those they provide for themselves or afford to any other express company."⁷¹

The court went on to enumerate the facts which in its opinion made "special contracts" necessary.⁷² In evaluating these facts and laying down the rule of law, the court's approach and reasoning were similar in many respects to those employed by the Interstate Commerce Commission in 1944 in the matter of advancing the charges of freight forwarders discussed above. Emphasis was placed on the public's interest in adequate and reliable express transportation and also upon the nature of the express business. Conceivably, should the courts today find equally compelling facts the rule would be the same as to freight forwarders. While the doctrine laid down in the *Express Cases* has been distinguished by some circuit courts,⁷³ it has never been modified or distinguished in any case involving an express company. Also to be noted is the fact that the right of a railroad to make special contracts with express companies was not disturbed when the latter were brought within the Interstate Commerce Act (1906),⁷⁴ nor by the passage of

70. 117 U. S. 1 (1885).

71. *Id.* at 20.

72. The court stressed the fact that express transportation required 1) a certain amount of passenger car space to be set aside solely for that purpose 2) speedy transportation and reasonable certainty as to the amount to be carried at any one time and 3) "access to the train for loading at the latest, and for unloading at the earliest, convenient moment", and, then declared "All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers". *Id.* at 23; see also pp. 24-25. For a discussion of the *Express Cases* and related cases see *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 296-299 (1905).

73. *North Carolina Public Service Co. v. Southern Power Co.*, 282 Fed. 837, (C. C. A. 4th, 1922); see also *State ex. rel. Postal Telegraph Cable Co. v. Delaware & A. Telephone & Telegraph Co.*, 47 Fed. 633 (D. Del., 1891).

74. 34 STAT. 584 (1906), 49 U. S. C. A. § 1 (1-9) (1944).

the Elkins Act⁷⁵ which prohibited every type of concession and discrimination.⁷⁶

Finally to be considered is the liability of the underlying carrier to freight forwarders for loss or damage. It seems that freight forwarders here are doubly protected. First, as shippers holding a bill of lading they enjoy all the shipper rights conferred by the common law and the statutes. In addition, they have certain carrier remedies which are co-extensive with those possessed as a shipper. Under Section 20 (11) of the Interstate Commerce Act,⁷⁷ the lawful holder of a bill of lading issued by any carrier subject to Part I of the Act may claim for loss or damage against either the receiving carrier or the delivering carrier. Section 20 (12) provides for subrogation by the carrier so sued against the carrier "on whose line the loss, damage, or injury shall have been sustained". When part IV was added to the Act it was provided in Section 413 that "the freight forwarder shall be deemed both the receiving and delivering transportation company for the purposes of such Section 20 (11) and (12)". If, therefore, a freight forwarder is sued by one of its customers it is entitled to the carrier right of subrogation against the transportation company actually responsible for the loss or damage.

75. 32 STAT. 847 (1903), 49 U. S. C. A. § 41 (1944).

76. "Every person or corporation . . . who shall . . . give, or . . . receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor . . ." 32 STAT. 847 (1903), 49 U. S. C. A. § 41 (1944).

77. Section 20 (11) and (12) was added to the Act by the Carmack Amendment 34 STAT. 593 (1906), 49 U. S. C. A. § 20 (11) and (12) (1944), and subsequently was incorporated by reference into Part II (motor carriers) and, later, into Part III (water carriers).

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