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Volume 30 | Issue 3

Article 8

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1985

## Administrative Law - Airline Deregulation - Deregulatory Scheme Had No Effect on the Applicable Substantive Law to Determine Liability of Shipper for Lost Shipment of Goods

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### Recommended Citation

Bruce G. Leto, *Administrative Law - Airline Deregulation - Deregulatory Scheme Had No Effect on the Applicable Substantive Law to Determine Liability of Shipper for Lost Shipment of Goods*, 30 Vill. L. Rev. 890 (1985).

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1985]

## Recent Developments

### ADMINISTRATIVE LAW—AIRLINE DEREGULATION—DEREGULATORY SCHEME HAD NO EFFECT ON THE APPLICABLE SUBSTANTIVE LAW TO DETERMINE LIABILITY OF SHIPPER FOR LOST SHIPMENT OF GOODS

*First Pennsylvania Bank v. Eastern Airlines* (1984)

Inspired by the prospect of competitive market forces determining the quality and prices of air services, Congress, in the late 1970's, undertook the complicated task of deregulating the airline industry.<sup>1</sup> Despite the potential for much litigation, few courts have addressed the various legal aspects of deregulation as of yet.<sup>2</sup> The Third Circuit, however, in

1. See Air Cargo Deregulation Act (ACDA), Pub. L. No. 95-163, 91 Stat. 1278-89 (1977) (codified as amended at 49 U.S.C. §§ 1301-1552 (1982)); Airline Deregulation Act (ADA), Pub. L. No. 95-504, 92 Stat. 1705-54 (1978) (codified as amended at 49 U.S.C. §§ 1301-1552 (1982)). The ACDA and ADA, passed in 1977 and 1978 respectively, effectively dismantled the existing government regulatory scheme for the airline industry. See generally Comment, *Limitations on Air Carrier Liability: An Inadvertent Return to Common Law Principles*, 48 J. AIR L. & COM. 111 (1982).

For a further discussion of the effect of the ACDA, see *infra* notes 37-40 and accompanying text. For a further discussion of the ADA, see *infra* notes 41-45 and accompanying text.

2. The limited number of postderegulation cases have focused on the scope of the CAB's remaining authority. See, e.g., *Air Line Pilots Ass'n Int'l v. CAB*, 667 F.2d 181 (D.C. Cir. 1981) (effect of deregulation on CAB's application of safety and fitness standards not substantial); *Air Line Pilots Ass'n Int'l v. CAB*, 643 F.2d 935 (2d Cir. 1981) (standards used by CAB in considering applications to conduct new service substantially unchanged by ADA); *Frontier Air Lines v. CAB*, 621 F.2d 369 (10th Cir. 1980) (after deregulation, when carrier stops servicing a route, CAB has authority to impose back-up orders on that carrier until replacement carrier found); *National Small Shipments Traffic Conference v. CAB*, 618 F.2d 819 (D.C. Cir. 1980) (ADA granted CAB broad authority to grant tariff-filing exemptions to air cargo carriers); *Shippers Nat'l Freight Claim Council, Inc. v. United Air Lines*, 15 Av. Cas. (CCH) 17,439 (1978) (CAB no longer empowered to determine reasonableness of rates; courts must apply common law principles). For a further discussion of *Shipper's National*, see *infra* note 39. For a further discussion of *National Small Shipments*, see *infra* note 45.

Commentators have begun to explore the effects of deregulation. See generally Callison, *Airline Deregulation—Only Partially a Hoax: The Current Status of the Airline Deregulation Movement*, 45 J. AIR L. & COM. 961 (1980); Dubuc, *Significant Legislative Developments in the Field of Aviation Law*, 45 J. AIR L. & COM. 1, 21-34 (1979); Levine, *Revisionism Revised? Airline Deregulation and the Public Interest*, 44 LAW & CONTEMP. PROBS. 179 (1981); Comment, "Deregulation"—Has it Finally Arrived? *The Airline Deregulation Act of 1978*, 44 J. AIR L. & COM. 799 (1979). For commentary concerning the effect of deregulation on specific areas of the law, see generally Beane, *The Antitrust Implications of Airline Deregulation*, 45 J. AIR L. & COM. 1001 (1980); Cohen, *New Air Service and Deregulation: A Study in Transition*,

(890)

*First Pennsylvania Bank v. Eastern Airlines*,<sup>3</sup> confronted the issue of an air carrier's ability to limit its liability for a lost shipment of air cargo after deregulation.<sup>4</sup> The court held that federal common law as it developed prior to regulation of the air industry was now applicable to determine the rights and liabilities of parties,<sup>5</sup> and that deregulation had had essentially no effect on the substantive content of the applicable law.<sup>6</sup>

The case arose as a result of a contract between First Pennsylvania Bank (Bank) and Eastern Airlines (Eastern) to transport checks from the Virgin Islands to Philadelphia via Eastern's express cargo service, SPRINT.<sup>7</sup> During the negotiation period, an Eastern officer informed the Bank's Caribbean branch manager that the SPRINT service was available only for shipments valued at \$500 or less.<sup>8</sup> When the Bank's branch manager notified Eastern that the checks were worth far more than \$500, the Eastern executive's only response was that the airline had never lost any SPRINT packages.<sup>9</sup>

The Bank used the SPRINT service to ship checks from January 31,

44 J. AIR L. & COM. 695 (1979); Comment, *Commuter Airlines and the Airline Deregulation Act of 1978*, 45 J. AIR L. & COM. 685 (1980); Comment, *supra* note 1; Comment, *Route Exit Regulation Under the Airline Deregulation Act: The Impact of Fuel Cost and Availability*, 45 J. AIR L. & COM. 1029 (1980); Comment, *Section 419 of the Airline Deregulation Act: What has been the Effect on Air Service to Small Communities*, 47 J. AIR L. & COM. 151 (1981); Note, *Essential Air Transportation for Small Communities—Delta Air Lines, Inc. v. CAB*, 48 J. AIR L. & COM. 435 (1983).

3. 731 F.2d 1113 (3d Cir. 1984).

4. *Id.* at 1122-23.

5. *Id.* at 1115-16. For a complete discussion of the court's analysis of the applicability of federal common law, see *infra* notes 28-36 and accompanying text.

6. *Id.* at 1122-23. The Third Circuit concluded that the most substantial effect of deregulation was that the Civil Aeronautics Board (CAB) could no longer determine the reasonableness of tariffs and that the courts were free to directly apply federal common law principles relating to released value rates. *Id.* at 1120. For a further discussion of the court's analysis of the effects of deregulation in the instant case, see *infra* notes 46-50 and accompanying text. For a further discussion of the effects of deregulation generally, see *infra* notes 37-45 and accompanying text.

7. 731 F.2d at 1114-15. Before contracting with Eastern, the Bank had employed a courier to personally deliver the checks in a pouch to Philadelphia. *Id.* at 1115. The Bank, however, sought a more expedient shipping method because "[t]he sooner the checks reach[ed] the bank in Philadelphia the sooner the large sums of money involved [could] be invested profitably." *Id.* at 1114-15. Under the SPRINT service, a shipper could deliver a small package to Eastern which would then ship it on the next flight for the destination city. *Id.* at 1115. An employee of Eastern explained to the Bank's Caribbean branch manager that the SPRINT service was faster than the courier service that the Bank was then using. *Id.*

8. *Id.* at 1115.

9. *Id.* At no time did Eastern suggest that the Bank should consult the tariff provisions to become aware of the shipping systems. *Id.* Also, the Third Circuit's discussion implies that Eastern never objected to the fact that the Bank was shipping more than \$500 worth of checks via the SPRINT service. *Id.*

1978 through January 17, 1981.<sup>10</sup> During this period, a published tariff limited Eastern's liability to \$500 for packages shipped through the SPRINT service.<sup>11</sup> Moreover, an air bill on each individual package shipped by the Bank stated that the shipment had a declared value of \$500.<sup>12</sup> Although Eastern had an alternative air freight service,<sup>13</sup> at no time did Eastern expressly inform the Bank that such an alternative existed.<sup>14</sup>

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10. *Id.* The Bank used the SPRINT service for a total of 147 shipments. *Id.*

11. *Id.* A "tariff" is a "public document setting forth the services [being offered by a] carrier . . . , the rates and charges with respect to the services and the governing rules, regulations and practices relating to those services." *International Tel. & Tel. v. United Tel. Co.*, 433 F. Supp. 352, 357 n.4 (M.D. Fla. 1975), *aff'd*, 550 F.2d 287 (5th Cir. 1977). The provisions of Eastern's tariff applicable to the instant case provide:

2. It is mutually agreed that the goods described herein are accepted on the validation date hereof in apparent good order except as noted for carriage as specified herein subject to the governing classifications and tariffs of each of the transporting carriers over their respective segments of the routing in effect on the dates of transportation and which are filed in accordance with law. Said classifications and tariffs are available for inspection by the parties hereto and are hereby incorporated into and made a part of this contract.

3. Declared value is agreed and understood to be not more than the value stated in the governing tariffs for each pound on which charges are assessed unless a higher value not exceeding \$500 is declared herein and applicable charges paid thereon.

731 F.2d at 1118 (quoting Appendix to Appellee's Brief at A-265).

Before deregulation, all air carriers were required to file tariffs with the CAB pursuant to the Federal Aviation Act (FAA). *See* 49 U.S.C.A. § 1373 (1976) (amended 1977, 1978, 1980). Since Eastern had complied with this provision since the passage of the Act, Eastern's tariffs were on file with the CAB when the Bank first began using the SPRINT service. 731 F.2d at 1115. However, after the passage of the ADA, the CAB promulgated regulations providing that tariffs no longer were required to be filed with the Board. *See* 14 C.F.R. § 291.31 (1978). For a further discussion of the evolution of the tariff filing exemption, *see infra* note 47 and accompanying text.

Despite the filing exemption after deregulation, Eastern's tariffs were still available in a compendium entitled *Official Airline Freight Rate Tariff Book*, which was located at Dulles International Airport in Washington, D.C. 731 F.2d at 1122. Although the tariff book was available to the public and, consequently, to the Bank, one of the central controversies of this case concerned the location and feasibility of finding this compendium. *See* Brief for Appellant at 20-30, *Eastern*; Brief for Appellee at 27-33, *Eastern*; Tape of Oral Argument, *Eastern*. For a further discussion of the importance of the location of the compendium to the instant case, *see infra* note 66.

12. 731 F.2d at 1115. Because of the explicit notation on the air bill limiting Eastern's liability to \$500 and because Eastern had informed the Bank that the SPRINT service was only available for shipments valued at \$500 or less, the court concluded that by signing the shipping papers, the Bank knew that Eastern's tariffs limited liability to the \$500 released value. *Id.*

13. *Id.* Under Eastern's alternate air freight service, another published tariff permitted a higher valuation for packages in exchange for a greater transportation fee. *Id.*

14. *Id.* Eastern argued that it had informed the bank of its alternate services through a notation on the air bill stating that the goods were accepted and

On January 17, 1981, the Bank used the SPRINT service to ship checks, valued at more than four million dollars, which were lost and never recovered.<sup>15</sup> The Bank filed suit against Eastern in federal district court to recover damages for the amount of the unreimbursed checks in excess of the declared \$500 limit.<sup>16</sup> On March 8, 1983, the district court entered judgment in favor of the Bank for \$500, enforcing the declared valuation provision of the air bill.<sup>17</sup>

On appeal, the Third Circuit affirmed the holding of the lower court.<sup>18</sup> The Third Circuit focused on two primary issues: (1) whether federal common law was applicable<sup>19</sup> and (2) whether deregulation had had any effect on the applicable law.<sup>20</sup>

Prior to Congress' entry into the field of interstate commerce,<sup>21</sup> the law governing a common carrier's ability to limit its liability lacked uniformity.<sup>22</sup> Under state common law and statutory principles, a carrier

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shipped pursuant to "governing classifications and tariffs." Brief for Appellee at 23-24, *Eastern*. The district court held that this reference constituted notice of the alternative service. *First Pennsylvania Bank v. Eastern Air Lines*, No. 82-0390, Findings and Conclusions, 2-10 to 2-11 (E.D. Pa. Mar. 8, 1983). The Third Circuit, however, did not specifically address the issue. In its summary of the case, the Third Circuit concluded that Eastern never informed the Bank of any alternative, implying that it had rejected Eastern's argument. 731 F.2d at 1115. For the complete text of the applicable SPRINT tariff provisions, see *supra* note 11.

15. 731 F.2d at 1115. The lost shipment, which had an aggregate value of \$4,152,080.45, contained 574 checks, including a Treasury check for \$3,787,767. *Id.* Apparently, a notation of the declared \$500 value appeared on the air bill for this final shipment. *Id.*

16. The Bank eventually recovered all but \$12,932.12 of the funds represented by the lost checks. *Id.*

17. *First Pennsylvania Bank v. Eastern Air Lines*, No. 82-0390, Findings and Conclusions, at 2-16 (E.D. Pa. Mar. 8, 1983). The case was heard by the Honorable Louis C. Bechtle in the United States District Court for the Eastern District of Pennsylvania. The court delivered its opinion from the bench.

18. 731 F.2d 1113 (3d Cir. 1984). The case was heard by Circuit Judges Gibbons and Becker and Senior Judge Dumbauld of the United States District Court for the Western District of Pennsylvania, who was sitting by designation. Judge Dumbauld wrote the opinion for the unanimous court.

19. *Id.* at 1115. For a discussion of the applicability of federal law to common carrier liability, see *infra* notes 21-27 and accompanying text.

20. 731 F.2d at 1119. For a discussion of the effect of deregulation on the previously existing law, see *infra* notes 37-45 and accompanying text.

21. Congress first entered the field of interstate commerce rate and practice regulation in 1887 when it enacted the Interstate Commerce Act. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 (codified as amended at 49 U.S.C. §§ 10101-11917 (1982)). Congress' primary purpose in adopting the Interstate Commerce Act was to "impose upon railroads engaged in interstate commerce the duty of making the charges for transportation rendered reasonable and just, and to prohibit unjust discrimination, preferences, partiality and inequality between persons, traffic and localities similarly situated." See M.G. ROBERTS, *FEDERAL LIABILITIES OF CARRIERS* § 59, at 157 (2d ed. 1929).

22. See, e.g., *Adams Express Co. v. Croninger*, 226 U.S. 491, 504-05 (1913) (confusing early law governing common carriers created lack of uniformity of obligation and of liability); *Pennsylvania R.R. v. Hughes*, 191 U.S. 447, 486

was often liable for the actual value of the goods shipped.<sup>23</sup> Under the federal common law, however, the “released value doctrine” developed, permitting a limitation of the carrier’s liability to the agreed upon value of the cargo, when the agreed upon value was used to determine the shipping rate.<sup>24</sup> This inconsistency between state and federal principles

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(1903) (“The cases are numerous and conflicting, different rules prevailing in different States.”); *Southern Pac. Co. v. Crenshaw*, 5 Ga. App. 675, 687, 63 S.E. 865, 870 (1909) (under same facts, carriers could be liable in one state and not liable in another).

Commentators have reached a similar conclusion as to the lack of uniformity in the law. See, e.g., M.G. ROBERTS, *supra* note 21, § 346, at 684 (“With such diversity of legislative enactments and judicial holdings, neither uniformity of obligation nor of liability existed as to interstate and foreign shipments.”); Biklé, *Agreed Valuation as Affecting the Liability of Common Carriers for Negligence*, 21 HARV. L. REV. 32, 34 (1907-08) (“[There is] much indefiniteness of principle in the reported cases, and a decided lack of agreement.”).

23. See, e.g., *Pennsylvania R.R. v. Hughes*, 191 U.S. 477 (1903). In *Hughes*, the plaintiff-shipper sued the Pennsylvania Railroad Company for damages which his horse sustained when injured while being shipped from New York to Pennsylvania. *Id.* at 478. The jury in the trial court awarded \$10,000 damages to the plaintiff, rejecting the defendant railroad’s attempt to limit its liability to \$100 as stated in the contract of carriage. *Id.* at 479. In upholding the state supreme court’s affirmance of the trial court, the Supreme Court of the United States recognized that under federal common law, a carrier could limit its liability to a stated or “released” amount. *Id.* at 485. The Court went on to hold, however, that since Congress had not preempted the interstate commerce field, the public policy of a state may properly require a carrier “to use great care and diligence in the carrying of passengers and transportation of goods, and to be liable for the *whole loss* resulting from negligence in the discharge of its duties.” *Id.* at 491 (emphasis added). For a further discussion of a carrier’s ability to limit its liability to a released amount, see *infra* note 24 and accompanying text.

The Supreme Court took a similar position with respect to a state statute requiring a carrier to compensate a shipper for the full, as opposed to the released, value of shipped goods. See *Chicago, M. & St. P. Ry. v. Solan*, 169 U.S. 133 (1898). In *Solan*, the Court held that a limitation of liability clause was void under an Iowa statute requiring that “no contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into.” *Id.* at 136 (quoting 1866 Iowa Acts 113). The Court, once again, acknowledged the ability of a carrier under federal common law to limit its liability to an agreed value but held that the state statute did not violate the United States Constitution and could properly be invoked to hold carriers liable for the full value of lost shipments. *Id.* at 138. See also *Missouri, K. & T. Ry. v. McCann*, 174 U.S. 580 (1899) (Missouri statute allowing carrier to limit liability upheld); *Richmond & A.R.R. v. R.A. Patterson Tobacco Co.*, 169 U.S. 311 (1898) (Virginia statute allowing carrier to limit liability upheld).

24. See, e.g., *New York, N.H. & H.R.R. v. Nothnagle*, 346 U.S. 128 (1953); *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913); *Hart v. Pennsylvania R.R.*, 112 U.S. 331 (1884). See also M.G. ROBERTS, *supra* note 21, § 346, at 684.

The released value doctrine was first articulated by the United States Supreme Court in *Hart v. Pennsylvania R.R.*, 112 U.S. 331 (1884). In *Hart*, the plaintiff shipped race horses from New Jersey to St. Louis, Missouri on defendant’s railroad. *Id.* at 331. One of the horses was killed and others were injured en route. *Id.* at 334. Although the dead horse had been worth \$15,000 and the injured ones had been worth between \$3000 and \$3500 each and were now ren-

created confusion for shippers since they could be liable, under identical tariff provisions, for the full value of goods in one court, and for only the agreed upon value in others.<sup>25</sup> Congress, however, remedied this problem when it passed the Carmack Amendment to the Interstate Commerce Act in 1906.<sup>26</sup> This Act specified that federal law, including the

dered worthless, the Supreme Court limited the shipper's recovery to \$1200 in accordance with the limitations contained in the contract of carriage. *Id.* at 343. The Court reached this conclusion stating that it was unjust to allow "the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss." *Id.* at 340. The Court further explained that "[such] contract[s] will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." *Id.* at 343 (citing *Squire v. New York Central R.R.*, 98 Mass. 239, 245 (1867)).

The Supreme Court expressly reiterated the *Hart* Court's approval of the released value doctrine in subsequent cases. *See, e.g.*, *Liverpool & Great W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 442 (1889); *Primrose v. Western Union Tel. Co.*, 154 U.S. 1, 15 (1893).

While courts have permitted the released value doctrine to limit liability, they have never sanctioned complete exculpation from liability for a shipper's negligence. *See, e.g.*, *New York, N.H. & H.R.R. v. Nothnagle*, 346 U.S. 128, 135-36 (1953) (carrier may not exonerate itself completely from liability for its negligent acts); *Santa Fe, P. & P. Ry. v. Grant Bros. Constr.*, 228 U.S. 177, 184 (1913) ("carriers cannot secure immunity from liability for their negligenc[act]s"); *Bank of Kentucky v. Adams Express Co.*, 93 U.S. 174, 181 (1876) (well-established that carrier cannot, by any contract with its customers, relieve himself completely of liability for its own negligence); *Railroad Co. v. Lockwood*, 84 U.S. (17 Wall.) 357, 384 (1873) ("not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants"). The prohibition against complete exculpation from liability was specifically embodied in the Carmack Amendment to the Interstate Commerce Act. *See* 49 U.S.C. § 20(11) (1982). For a further discussion of the Carmack Amendment, see *infra* notes 26-27 and accompanying text.

25. *See* *Southern Pac. Co. v. Crenshaw Bros.*, 5 Ga. App. 675, 687, 63 S.E. 865, 870 (1909). The Georgia Supreme Court commented on the confusing state of the law:

Some states allowed carriers to exempt themselves from all or a part of the common-law liability by rule, regulation, or contract, others did not. The federal courts sitting in the various states were following the local rule, a carrier being held liable in one court when under the same state of facts he would be exempt from liability in another. Hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a[n interstate] business . . . to know without considerable investigation and trouble, and even then oftentimes with but little certainty what would be the carrier's actual responsibility . . . .

*Id.* For a further discussion of the confusion in the law with respect to this issue, see *supra* note 22.

26. Act of June 29, 1906, ch. 3591, § 7, 34 Stat. 593. In its original version, the Carmack Amendment provided, in pertinent part:

That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to

released value doctrine, controlled interstate shipments.<sup>27</sup>

Against this background, the Third Circuit, in *First Pennsylvania Bank v. Eastern Airlines*, began its discussion of the applicability of federal common law.<sup>28</sup> First, the court acknowledged that a significant distinction existed between complete exculpation from liability, never sanctioned by the common law, and liability limited to an agreed upon valuation.<sup>29</sup> The released value doctrine, concluded the court, allowed a carrier to limit its liability to an agreed upon value when the shipper was given a bona fide opportunity to declare a higher valuation in return for a greater shipping rate.<sup>30</sup> The court further explained that in order for

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such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

*Id.* For a discussion of the purpose behind the passage of the Carmack Amendment, see generally M.G. ROBERTS, *supra* note 21, §§ 66-67, at 168-74.

27. See *Adams Express Co. v. Croninger*, 226 U.S. 491, 510 (1913). Immediately following the passage of the Carmack Amendment, courts and commentators believed that the remedy saving clause of the amendment was designed to preserve the various and divergent rights that shippers had under state statutes and common law. See, e.g., *Donlon Bros. v. Southern Pac. Co.*, 151 Cal. 763, 91 P. 603 (1907); *Cutter v. Wells Fargo & Co.*, 237 Ill. 247, 86 N.E. 695 (1908); *Miller v. Chicago, B. & Q. Ry.*, 85 Neb. 458, 123 N.W. 449 (1909), *rev'd*, 226 U.S. 513 (1913); *Missouri, K. & T. Ry. v. Harriman Bros.*, 128 S.W. 932 (Tex. Civ. App. 1910), *rev'd*, 227 U.S. 657 (1913); Goddard, *The Liability of the Common Carrier as Determined by Recent Decisions of the United States Supreme Court*, 15 COL. L. REV. 475, 476-77 (1915); Sanford, *The Carmack Amendment in the State Courts*, 15 MICH. L. REV. 314 (1917). However, in *Adams Express*, the Supreme Court held that the Carmack Amendment was intended to save only such rights previously existing under federal common law. 226 U.S. at 507. After determining that the shipper was aware of alternate rates and services, thereby allowing the railroad to limit its liability as stated in the bill of lading, the Supreme Court specifically held that the Carmack Amendment had superseded all state policies and regulations dealing with liability limitations, because of its general character. *Id.* at 505. The Court wrote:

To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing Federal law at the time of his action, gives to [the remedy saving clause] a more rational interpretation than one which would preserve rights and remedies under existing state laws, for the latter view would cause the proviso to destroy the act itself.

*Id.* at 507-08. The Court went on to explain that the released value doctrine was one such preserved federal common law right. *Id.* at 509-10. *Accord Boston & M.R.R. v. Piper*, 246 U.S. 439, 444 (1918); *Kansas City S. Ry. v. Carl*, 227 U.S. 639, 648-49 (1913).

28. 731 F.2d at 1115.

29. *Id.* at 1116. For a further discussion of the common law distinction between complete exculpation from liability and the released value doctrine, see *supra* note 24 and accompanying text.

30. 731 F.2d at 1117 (citing *New York, N.H. & H.R.R. v. Nothnagle*, 346



the opportunity to be "bona fide," the shipper must be given notice of the availability of alternate rates for differing degrees of protection.<sup>31</sup> The Third Circuit then recognized the continued vitality of a notice rule first articulated over seventy years ago in *Kansas City Southern Railway v. Carl*.<sup>32</sup> In *Carl*, the court stated in dicta that shippers are charged with constructive notice of duly filed tariffs when carriers are required to file their rate tariff schedules with a regulatory agency.<sup>33</sup>

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U.S. 128 (1953); *Union Pac. R.R. v. Burke*, 255 U.S. 317 (1921)). In *Nothnagle*, although a filed tariff limited the railroad's liability to \$500, the Supreme Court held that a carrier could not take advantage of the limited liability tariff when no value was agreed to in writing. 346 U.S. at 135. The Supreme Court stated: "[O]nly by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained." *Id.* at 135.

In *Burke*, after cargo was destroyed en route from San Francisco to New York, the railroad attempted to limit its liability to the amount stated on the shipping bill. 255 U.S. at 318. Because the shipper was not given a bona fide option of declaring a higher amount, the railroad company was required to pay for the full value of the goods. *Id.* at 323. The *Burke* Court explained:

Having but one applicable published rate east of San Francisco the petitioner did not give, and could not lawfully have given, the shipper a choice of rates, and therefore the stipulation of value in the . . . bill of lading, . . . cannot bring the case within the valuation exception, [e.g., where the shipper is given a choice of declaring one of several rates] and the carrier's liability must be determined by the rules of the common law.

*Id.*

31. 731 F.2d at 1117 (citing *Klicker v. Northwest Airlines*, 563 F.2d 1310 (9th Cir. 1977)). In *Klicker*, the plaintiff shipped a valuable golden retriever that died during an interstate flight. 563 F.2d at 1311-12. The Ninth Circuit did not allow the airline to limit its liability because, after being informed of the dog's value, the airline did not inform the shipper that there were alternate services available with greater protection. *Id.* at 1316. The court stated: "[T]he released valuation limitations bind the passenger-shipper to the restriction on liability, however, only if he has notice of the rate structure and is given the opportunity to pay the higher rate in order to obtain greater protection." *Id.* at 1315. See also *Nothnagle*, 346 U.S. at 135-36 ("[b]inding [shipper] by a limitation which she had no reasonable opportunity to discover would effectively deprive her of the requisite choice") (footnote omitted).

32. 731 F.2d at 1116-17 (citing *Kansas City S. Ry. v. Carl*, 227 U.S. 639 (1913)).

33. *Carl*, 227 U.S. at 653. In *Carl*, the plaintiff shipped several boxes of household goods on defendant's railroad. *Id.* at 640. One box was never delivered and the shipper sued for the full value, despite the existence of a liability limiting clause on the bill of lading. *Id.* After explaining that the Carmack Amendment, as interpreted by the Supreme Court in *Adams Express*, was applicable, the Court stated:

Where there are two published rates, based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value . . . . The shipper's knowledge of the lawful rate is conclusively presumed, and the carrier may not be required to surrender the goods carried upon the payment of the rate paid, if that was less than the lawful rate, until the full legal rate has been paid.

227 U.S. at 652-53. See also *Pierce Co. v. Wells, Fargo & Co.*, 236 U.S. 278, 285

The Third Circuit then cited with approval *Universal Computer System v. Allegheny Airlines*,<sup>34</sup> in which the District Court for the Middle District of Pennsylvania upheld a liability limitation by relying upon the released value doctrine.<sup>35</sup> The Third Circuit concluded that because the tariff provisions in *Allegheny* were identical to those in question in *Eastern*, *Allegheny* was “strong precedent” for affirming the case at bar.<sup>36</sup>

Deregulation of the airline industry began with the Air Cargo Deregulation Act of 1977 (ACDA).<sup>37</sup> The ACDA eliminated the Civil Aer-

(1915) (filed tariffs give shippers opportunity to have recovery in a greater value upon paying a higher rate); *Boston & M. R.R. v. Hooker*, 233 U.S. 97, 113 (1914) (“if it be found that the limitation of liability for baggage is required to be filed in the carrier’s tariffs, the [shipper is] bound by such limitation”); *Texas & Pac. Ry. v. Mugg*, 202 U.S. 242, 245 (1906) (even where shipper agrees to pay lesser rate than that established in filed tariffs, filed tariffs are applicable and shipper must pay full amount).

34. 731 F.2d at 1117 (citing *Universal Computer Sys. v. Allegheny Airlines*, 479 F. Supp. 639 (M.D. Pa. 1979), *aff’d mem.*, 622 F.2d 579 (3d Cir. 1980)).

35. 479 F. Supp. at 643. In *Allegheny*, the plaintiff, Universal Computer Services (Universal), prepared a bid for the lease of a computer in response to Blue Shield’s solicitation. *Id.* at 640. Universal contacted an employee at Blue Shield who agreed to pick up the bid at Allegheny Airlines’ (Allegheny) ticket counter and to deliver it in time to meet the submission deadline. *Id.* The bid was sent through Allegheny’s PDQ express air courier service. *Id.* As a result of a misunderstanding on the part of Allegheny as to who was to pick up the bid, Universal was not able to submit it until after the deadline had lapsed. *Id.*

Universal sued in tort on the grounds of conversion and wrongful interference with its property. *Id.* Allegheny claimed that its applicable filed tariff provisions provided that the airline could not be held liable for the tort damages in excess of the valuation limitation provision. *Id.* In upholding the liability limiting clause in this prederegulation case, the district court explained:

[Universal] never could have had an expectation of recovering more than the \$500 [upper] valuation limit on items shipped in this manner [pursuant to the terms of the Small Package Airbill]. Because it did not take the opportunity to pay for greater liability coverage by declaring a higher value the shipment had a \$50 [lowest possible] declared value pursuant to the tariff. The rates are set considering the risk assumed . . . . The \$50 limitation would apply to all liability including any claim for consequential or special damages.

*Id.* at 643 (citations omitted).

36. 731 F.2d at 1119 (citing *Universal Computer Sys. v. Allegheny Airlines*, 479 F. Supp. 639). For a description of the provisions in effect in *Eastern*, see *supra* note 11.

37. Pub. L. No. 95-163, 91 Stat. 1278-89 (1977) (codified as amended at 49 U.S.C. §§ 1301-1552 (1982)). The essential goal of the act was to promote “[t]he encouragement and development of an integrated transportation system relying upon competitive market forces to determine the extent, variety, quality and price of [all cargo air] services.” 49 U.S.C. § 1302(b) (1982).

The ACDA pertained exclusively to air carriers providing all-cargo air service. See Pub. L. No. 95-163, 91 Stat. 1278-89, 1284 (1977) (codified as amended at 49 U.S.C. §§ 1301-1552 (1982)). As defined by the ACDA, “All-cargo air service” refers to the carriage of property or mail exclusively. 49 U.S.C. § 1301(11) (1982). Thus, the ACDA had no deregulatory effect upon air carriers transporting both cargo and passengers. See generally *National Small Shipments Traffic Conference v. CAB*, 618 F.2d 819, 823-24 n.5 (D.C. Cir. 1980); *Liability and Claim Rules and Practices*, C.A.B. Order 78-7-100, 77

onautics Board's<sup>38</sup> (CAB or Board) primary jurisdiction to determine the reasonableness of a cargo carrier's rates and practices,<sup>39</sup> and also facilitated a cargo carrier's ability to obtain exemptions from various provisions of the Federal Aviation Act.<sup>40</sup> One year later, Congress con-

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C.A.B. 763, 765 (July 21, 1978). *But cf.* ADA, Pub. L. No. 95-504, 92 Stat. 1705-54 (1978) (codified as amended at 49 U.S.C. §§ 1301-1552 (1982)). For a further discussion of the air carriers affected by the ADA, see *infra* note 41.

38. The predecessor to the CAB, the Civil Aeronautics Authority, was created by the Civil Aeronautics Act of 1938 with authority to regulate both safety and economic aspects of the airline industry. See Civil Aeronautics Act of 1938, Pub. L. No. 706, § 201, 52 Stat. 973, 980-81 (amended 1958). The Federal Aviation Act of 1958, despite changing the name of the Civil Aeronautics Authority to the Civil Aeronautics Board, kept economic regulatory power in the CAB. See Federal Aviation Act of 1958, Pub. L. No. 85-726, §§ 201-205, 72 Stat. 731, 741-44 (codified as amended at 49 U.S.C. §§ 1321-1325 (1982)). Safety regulation, however, was transferred to a newly created Federal Aviation Authority. *Id.* §§ 301-304, 72 Stat. at 744-49 (codified as amended at 49 U.S.C. §§ 1341-1345 (1982)).

39. See Comment, *supra* note 1, at 124-27. The CAB's primary jurisdiction originated from § 1382 of the Federal Aviation Act, which granted the Board the authority to reject and alter tariffs that were challenged as "unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial." 49 U.S.C.A. § 1482(d) (1976), amended by ACDA, Pub. L. No. 95-163, § 18(a), 91 Stat. 1286-87 (1977). As a result of this section, any claim as to the reasonableness of a tariff was properly before the Board in the first instance. See *Lichten v. Eastern Airlines, Inc.*, 189 F.2d 939, 941 (2d Cir. 1951). Under this doctrine of primary jurisdiction, any tariff duly filed was considered valid until rejected by the CAB. See *Mack v. Eastern Air Lines, Inc.*, 87 F. Supp. 113, 115 (D. Mass. 1949); Comment, *supra* note 1, at 114-15. Therefore, when the industry was regulated, courts had no power to determine the reasonableness of an air carrier's rates, tariffs and practices. Pratt, *Tariff Limitations on Air Carriage Contracts*, 29 J. AIR L. & COM. 14 (1963).

The ACDA substantially altered the CAB's authority with respect to the regulation of rates. The amended § 1482(d) no longer includes "unreasonableness" as a grounds for the CAB to alter a rate or practice. See 49 U.S.C. § 1482(d)(3) (1982). The Board's authority over tariffs was limited to cases in which a rate or practice was challenged as "unjustly discriminatory, or unduly preferential, or unduly prejudicial, or predatory." *Id.* This change in the CAB's authority has been interpreted to deprive the Board of primary jurisdiction. See *Shipper's Nat'l Freight Claim Council, Inc. v. United Air Lines*, 15 Av. Cas. (CCH) 17,439 (D.D.C. 1978). In *Shipper's National*, the United States District Court for the District of Columbia held that the primary jurisdiction doctrine had essentially been eliminated by deregulation and that the district court was the proper forum for the case. *Id.* at 17,440. With respect to the judiciary's new-found authority, the court declared that it now had the power to directly apply common law liability rules. *Id.* at 17,441. For a further discussion of the Third Circuit's treatment of the primary jurisdiction issue, see *infra* notes 48-50 and accompanying text.

40. The ACDA facilitated a cargo carrier's ability to be exempt from provisions of the Federal Aviation Act by setting up a new certification procedure for all-cargo air carriers. See 49 U.S.C. § 1388 (1982). Prior to the enactment of the ACDA, any air carrier wishing to service a new route was required to obtain a § 1371 certificate from the CAB stating that the proposed service was for "the public convenience and necessity." 49 U.S.C.A. § 1371(a) (1976), amended by ACDA, Pub. L. No. 95-163, § 11, 91 Stat. 1284-86 (1977). The ACDA, however, set up a dichotomy between all-cargo air carriers, operating under the new

tinued the dismantling process by passing the Airline Deregulation Act of 1978 (ADA).<sup>41</sup> Specifically, the ADA called for a cessation of the CAB's authority to determine rates and practices of all air carriers by January 1, 1983,<sup>42</sup> and for a complete abolition of the Board by January 1, 1985.<sup>43</sup> To allow more independence to all air carriers, as opposed to only cargo carriers, Congress further broadened the CAB's power to exempt air carriers from any provision of the Federal Aviation Act.<sup>44</sup> Pursuant to the exemption authority given the CAB under the two deregulation acts, the Board, on November 8, 1978, promulgated regulations exempting from the tariff filing provision all air carriers of property.<sup>45</sup>

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§ 1388 certificates, and all other air carriers operating under the § 1371 "public convenience and necessity" certificates. Compare 49 U.S.C.A. § 1371 (1976), amended by ACDA, Pub. L. No. 95-163, § 9, 91 Stat. 1281 & 1284-86 (1977) with 49 U.S.C. § 1388 (1982). The ACDA specifically provided that cargo carriers holding § 1388 certificates were exempt from the § 1371 "public convenience and necessity" certification procedure, and that the Board could also exempt such carriers from any other provisions of the Federal Aviation Act. 49 U.S.C. § 1388(c) (1982). Pursuant to this new lenient exemption section, the CAB exempted all-cargo air carriers from the tariff-filing provisions of the Federal Aviation Act. 14 C.F.R. § 291.31 (1978). See also National Small Shipments Traffic Conference v. CAB, 618 F.2d 819, 827-31 (D.C. Cir. 1980) (discussion of CAB's authority to grant exemptions to tariff filing requirements).

41. Pub. L. No. 95-504, 92 Stat. 1705-54 (1978) (codified as amended at 49 U.S.C. §§ 1301-1552 (1982)). In contrast to the ACDA, the ADA pertained to all air carriers generally and not merely air-cargo carriers. *Id.* For a further discussion of the scope of the ACDA, see *supra* note 37.

42. 49 U.S.C. § 1551(a)(2) (1982). For a discussion of how the ACDA changed the CAB's authority to determine the reasonableness of an air-cargo carrier's rates and practices, see *supra* note 39.

43. 49 U.S.C. § 1551(a)(3) (1982). See generally N.Y. Times, Jan. 3, 1985, at A20, col. 1; Dallos, *Once-Powerful CAB Gets Set to Self-Destruct*, L.A. Times, Dec. 23, 1984, § 5, at 1, col. 2.

44. 49 U.S.C. § 1386(b) (1982). After the ADA, an air carrier could be exempted from any provision of the Federal Aviation Act so long as it was "consistent with the public interest." *Id.* Under the ACDA, any cargo carrier operating under a § 1388 certificate could be exempted from any provision of the Federal Aviation Act which the Board determined to be "appropriate." *Id.* § 1388(c). For a further discussion of the exemption authority granted by the ACDA, see *supra* note 40.

45. 14 C.F.R. § 291.31 (1978). The Board used its new-found authority granted by the ACDA and the ADA to enact these exemptions. See 49 U.S.C. §§ 1386(b), 1388(c) (1982). The ACDA had specifically granted the authority to exempt all-cargo carriers operating under the new § 1388 certificates. 49 U.S.C. § 1388(c) (1982). Since most of the nation's freight is moved by carriers providing combination service (i.e. both passenger and cargo) acting under § 1371(a) "public convenience and necessity" certificates, the Board used its new § 1386(b) authority granted by the ADA to exempt the "combination" air carriers of property. See *National Small Shipments*, 618 F.2d at 824 n.5; Liability and Claim Rules and Practices, C.A.B. Order 78-7-100, 77 C.A.B., 763, 765 (July 21, 1978) ("It would be anomalous to create different liability systems depending on whether cargo is carried on all-cargo plane or on a combination plane."); General Rules for All-Cargo Carriers, 43 Fed. Reg. 53628 (1978) (exemption applies to all carriers providing domestic air cargo transportation).

The Third Circuit began the second part of its analysis by assessing the impact of deregulation on existing law.<sup>46</sup> According to the court, deregulation of the air industry had had essentially two effects pertinent to the case at bar: first, it eliminated the obligation imposed on all air carriers of property to file tariffs with the CAB and to adhere to them;<sup>47</sup> second, it eliminated the Board's primary jurisdiction in assessing the reasonableness of freight rates and tariffs.<sup>48</sup> Consequently, reasoned the Third Circuit, the courts were left to directly apply the common law when confronted with the reasonableness issue.<sup>49</sup> Thus, the Third Circuit concluded that deregulation of the airline industry had had no effect on the substantive aspects of the released value doctrine but had merely changed the forum in which the reasonableness of an air carrier's rates would be determined.<sup>50</sup>

After concluding that the released value doctrine would apply to the instant case despite deregulation, the court addressed the merits of the case.<sup>51</sup> The court held that because the Bank had begun using the SPRINT service while Eastern was still subject to CAB regulation, the Bank would be charged with constructive notice of the available alternative tariffs for air cargo transport.<sup>52</sup> Consequently, under the released

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These tariff-filing exemptions, promulgated by the CAB, were upheld by the Court of Appeals for the District of Columbia Circuit in *National Small Shipments Traffic Conference v. CAB*, 618 F.2d 819 (D.C. Cir. 1980). The court in *National Small Shipments* held that the CAB's authority under new § 1386(b) and § 1388 granted the Board broad discretion to issue exemptions to the Federal Aviation Act and that, consequently, the regulations promulgated by the Board were not arbitrary and capricious. *Id.* at 827-31.

46. 731 F.2d at 1119-22.

47. *Id.* at 1120. For a further discussion of the evolution of this exemption, see *supra* note 45 and accompanying text.

48. 731 F.2d at 1120. In concluding that the Board's primary jurisdiction had been eliminated, the court examined the regulatory scheme before and after deregulation. *Id.* The court explained that because the CAB's authority to invalidate tariffs was now limited to situations in which it found the tariffs unduly discriminatory, preferential or predatory, the proper forum in which to determine the reasonableness of a cargo carrier's tariffs was the court. *Id.* at 1122. For a further discussion of the change in the CAB's authority, see *supra* notes 39-40 & 44 and accompanying text.

49. 731 F.2d at 1122 (citing *Liability and Claim Rules and Practices*, C.A.B. order 78-7-100, 77 C.A.B. 763, 765 (July 21, 1978)). For a further exposition of the effect of deregulation on primary jurisdiction, see *supra* note 39 and accompanying text.

50. 731 F.2d at 1122. The court stated: "After deregulation, the validity of the agreed value provision in Eastern's . . . tariff . . . became a purely judicial question for determination by application of the federal common law patterned upon the policy of the Carmack Amendment." *Id.* For a further discussion of the released value doctrine, see *supra* note 24 and accompanying text. For a further discussion of the Carmack Amendment, see *supra* notes 26-27 and accompanying text.

51. 731 F.2d at 1122.

52. *Id.* The court reasoned that because the Bank had constructive notice of the tariff provisions and the shipping documents on its first shipment in Janu-

value doctrine, the Third Circuit found that Eastern could properly limit its liability for the lost checks to \$500.<sup>53</sup> However, the court specifically declined to decide whether shippers entering into contracts with air carriers subsequent to deregulation would have constructive notice of the tariffs listed in the *Official Airline Freight Rate Tariff Book*.<sup>54</sup>

In reviewing the court's opinion in *Eastern*, it is submitted that the Third Circuit properly found federal common law applicable to the instant case.<sup>55</sup> In reaching this conclusion, the Third Circuit responded in a manner consistent with earlier CAB speculation<sup>56</sup> and a recent federal district court decision concerning liability limitations.<sup>57</sup>

In its application of the federal common law principle of the released value doctrine,<sup>58</sup> however, the Third Circuit pushed the notion of constructive notice to its limits.<sup>59</sup> The court imputed constructive notice to the Bank despite the fact that Eastern's tariffs were no longer on

ary, 1978, the Bank should be imputed with knowledge of these provisions on all subsequent shipments because they were made in accordance with the same procedure. *Id.* For a further discussion of the constructive notice principle, see *supra* notes 32-33 and accompanying text.

53. 731 F.2d at 1122. The court noted:

As sophisticated men of affairs, appellant's officers knew that there was substantial risk arising from the discrepancy when the shipments had an actual value of millions of dollars and the carrier disclaimed in writing any liability in excess of \$500. They made a business judgment when they decided not to explore the possibility of obtaining greater protection from the airline at a higher rate, or even of taking out a policy themselves with an insurance company to cover their exposure. Having made their bed they must lie in it. We are not at liberty to "second guess" their cost-benefit analysis.

*Id.*

54. *Id.* at 1123. The court wrote: "We express no opinion as to whether the current practice of referencing schedules located in the 'Official Airline Freight Rate Tariff Book' would be sufficient to inform a shipper of the availability of alternative services providing for full loss liability coverage." *Id.*

55. *See id.* at 1122. For a further discussion of the Third Circuit's discussion of the applicability of federal common law to the instant case, see *supra* notes 28-36 and accompanying text.

56. Liability and Claim Rules and Practices, C.A.B. Order 78-7-100, 77 C.A.B. 763, 766 (July 21, 1978) (citing *Klicker*, 563 F.2d 1310 (9th Cir. 1977)) (CAB implicitly approved of post-deregulation application of federal common law). *See also* Brief for Appellee at 13-18, *Eastern*.

57. *See Fireman's Fund Ins. Cos. v. Barnes Elec. Co.*, 540 F. Supp. 640, 645 (N.D. Ind. 1982) (citing *Nothnagle*, 346 U.S. 128 (1953)). *Fireman's Fund* involved the validity of a liability limiting clause after deregulation. 540 F. Supp. at 641. In *Fireman's Fund*, United Air Lines was charged with failing to complete the delivery of shipments of the plaintiff's art works. *Id.* In considering the choice of law issue with respect to the validity of United's liability limiting clause, the court held that "questions concerning the validity of tariffs or contracts limiting liability of carriers engaged in interstate transportation are to be determined in accordance with federal law." *Id.* at 645 (emphasis added).

58. 731 F.2d at 1115-19. For a further discussion of the court's analysis of the released value doctrine, see *supra* notes 28-36 and accompanying text.

59. 731 F.2d at 1122-23. For a further discussion of the court's application of the constructive notice principle to the instant case, see *supra* notes 52-53 and

file with the CAB at the time the shipment in question occurred.<sup>60</sup> The court reasoned that the constructive notice principle should be applied because tariffs were on file when the first shipment was made, and all subsequent shipments were made in accordance with the same procedure.<sup>61</sup> It is submitted that the Third Circuit, while purporting to use the constructive notice principle as developed in the *Carl* case,<sup>62</sup> instead balanced the equities to come to the conclusion that the Bank could not recover the full amount of its loss. In its opinion, the Third Circuit was aware of several equitable considerations: the Bank was a large banking concern which made an informed business decision to ship checks of great value through an inexpensive air carrier service;<sup>63</sup> it had numerous opportunities to examine the tariff provisions;<sup>64</sup> and it was aware of the limited liability provision in each air bill from the beginning of its contractual relationship with Eastern.<sup>65</sup> In acknowledging these factors, the Third Circuit manifested a desire to reach the proper equitable result, and used the constructive notice principle as a means by which to reach this conclusion.<sup>66</sup>

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accompanying text. For a general discussion of the constructive notice principle, see *supra* notes 32-33 and accompanying text.

60. See 731 F.2d at 1122.

61. See *id.*

62. See *id.* at 1116-17 (citing *Kansas City S. Ry. v. Carl*, 227 U.S. 639 (1913)). For a discussion of the *Carl* case, see *supra* notes 32-33 and accompanying text.

63. See 731 F.2d at 1122. The Third Circuit specifically noted that the decision to use the SPRINT service was not consistent with the Bank's relative size and implicit business acumen. *Id.* For the text of the court's opinion concerning the Bank's business judgment, see *supra* note 53.

64. See 731 F.2d at 1115. The court noted that the Bank used the SPRINT service 147 times before the shipment in question. *Id.*

65. See *id.* For a discussion of the court's findings with respect to the Bank's knowledge of the alternate tariffs, see *supra* note 12 and accompanying text. These factors, along with the fact that the Bank would have had constructive notice of alternate services under *Carl* at the beginning of its business relationship with Eastern, support the conclusion that it would have been inequitable to allow the Bank to recover any more than the stated value as it appeared on each air bill.

66. 731 F.2d at 1115-19, 1122. The court's difficulty in applying the strict principle of the *Carl* case is also exemplified by its failure to address the issue of whether publication of alternate tariffs in the *Official Airline Freight Rate Tariff Book* would constitute sufficient notice to shippers. 731 F.2d at 1123. Although the Third Circuit specifically declined to address the issue, the briefs and tape of the oral argument suggest that the parties considered the location and availability of the tariff provisions to be a major controversy in the case. Brief for Appellant at 29-30, *Eastern*; Brief for Appellee at 27-44, *Eastern*. The Bank argued that it was unaware of the alternative rates, despite language on the reverse side of the contract concerning alternate services. Brief for Appellant at 24-30, *Eastern*. Moreover, at oral argument, the Bank argued that it was unable to locate this compendium in preparation for trial. Tape of oral argument, *Eastern*. The Bank also argued that if the compendium exists, a shipper should not be expected to take extreme measures to find it, particularly because the compendium's location at Dulles International Airport is not central. *Id.*

Although the Third Circuit may have reached the proper, equitable conclusion on these facts, the court's strained application of the constructive notice doctrine suggests that some of the old federal common law cases relied on by the court may no longer have continued vitality in the deregulated air industry context.<sup>67</sup> The federal common law cases upon which the Third Circuit relied were decided almost a century ago in the context of the regulated railroad industry.<sup>68</sup> When the airline industry was regulated,<sup>69</sup> these cases were consistently invoked for their general principles in assessing a carrier's liability for lost shipments.<sup>70</sup> It is submitted that this reliance was proper during airline regulation since both airlines and railroad companies were subject to similar statutory schemes which attempted to provide uniformity of rates and practices, and equality to all shippers.<sup>71</sup> When the airline industry was

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Eastern, conversely, argued that the publication of tariffs in the *Official Airline Freight Rate Tariff Book* was adequate notice and that Dulles International Airport was a central location for the compendium. Brief for Appellee at 27-33, *Eastern*; Tape of Oral Argument, *Eastern*.

67. For a discussion of the court's use of the old federal common law cases, see *supra* notes 28-36 & 51-54 and accompanying text.

68. See *Burke*, 255 U.S. 317 (1921); *Carl*, 227 U.S. 639 (1913); *Adams Express*, 226 U.S. 491 (1913); *Hart*, 112 U.S. 331 (1884). For a further discussion of *Burke*, see *supra* note 30. For a further discussion of *Carl*, see *supra* notes 32-33. For a further discussion of *Adams Express*, see *supra* note 27. For a further discussion of *Hart*, see *supra* note 24.

69. The airline industry was regulated from 1938 until 1977. See Civil Aeronautics Act of 1938, Pub. L. No. 605, 52 Stat. 973 (1938) (setting up regulatory scheme), amended by Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958); ACDA, Pub. L. No. 95-163, 91 Stat. 1278-89 (1977) (first deregulation act); ADA, Pub. L. No. 95-504, 94 Stat. 1705-52 (1978) (second deregulation act).

70. See, e.g., *Klicker*, 562 F.2d 1310 (9th Cir. 1977) (citing *Burke*, 255 U.S. 317 (1921); *Piper*, 246 U.S. 439 (1918)); *Lichten v. Eastern Airlines*, 189 F.2d 939 (2d Cir. 1951) (citing *Adams Express*, 226 U.S. 491 (1913)); *Mustard v. Eastern Air Lines*, 338 Mass. 674, 156 N.E.2d 696 (1959) (citing *Carl*, 227 U.S. 639 (1913); *Adams Express*, 226 U.S. 491 (1913); *Hart*, 112 U.S. 331 (1884)).

71. Compare 49 U.S.C. §§ 10101-11917 (1982) (Interstate Commerce Act) with 49 U.S.C.A. §§ 1301-1552 (1976) (Federal Aviation Act) (amended 1977-1982). The essential purpose of the Interstate Commerce Act was to assure equality to all shippers in interstate commerce and to prevent unjust discrimination, preferences, partiality and inequality between shippers and carriers. See *United States v. Union Stock Yard & Transit Co.*, 226 U.S. 286 (1912); *Armour Packing Co. v. United States*, 209 U.S. 56 (1908); *New York, N.H. & H.R.R. v. ICC*, 200 U.S. 361 (1906); *American Silver Mfg. Co. v. Wabash R. Co.*, 174 Mo. App. 184, 196-97, 156 S.W. 830, 834 (1913); M.G. ROBERTS, *supra* note 21, § 59, at 157.

Similarly, the Federal Aviation Act attempted to "promot[e] . . . adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices." 49 U.S.C.A. § 1302(c) (1976), repealed by Pub. L. No. 96-192, § 3(a), 94 Stat. 36 (1980). See also *Transcontinental Bus Sys. v. CAB*, 383 F.2d 466, 477 (5th Cir. 1967) (power-granting sections of Federal Aviation Act infuse a "rule of equality" into the regulatory policy controlling rates in air industry), *cert. denied*, 390 U.S. 920 (1967).



deregulated, however, this similarity between the two industries ended.<sup>72</sup> It is submitted that since this parallelism no longer exists, future courts will be forced to examine whether the principles for which the old federal common law cases stand are still applicable. In making this examination, it is submitted that courts will continue to rely on the released value doctrine generally but will not readily apply the constructive notice principle.

The released value doctrine developed before the railroad industry was regulated<sup>73</sup> and has been recognized as being beneficial to both shippers and carriers.<sup>74</sup> As a result, it is submitted that the released value doctrine will be given continued vitality. The constructive notice principle, however, which is inextricably tied to the regulatory scheme, originally developed to further Congress' goal of achieving uniformity of rates.<sup>75</sup> Since there is no longer an artificial uniform rate structure in the airline industry and tariffs no longer must be filed with the CAB,<sup>76</sup> the reasons for conclusively presuming a shipper's knowledge of alter-

72. The purpose behind the deregulation acts was to allow market forces, as opposed to the artificial uniformity of regulation, to determine rates and practices. 49 U.S.C. § 1302 (1982). See also 123 Cong. Rec. 34,663 (1977) (remarks of Sen. Cannon) (market forces can adequately determine the cost of all-cargo transportation).

73. The released value doctrine was first comprehensively articulated in *Hart v. Pennsylvania R.R.*, 112 U.S. 331 (1884). For a further discussion of the *Hart* case and the development of the released value doctrine, see *supra* note 24 and accompanying text.

74. See, e.g., *Hart v. Pennsylvania R.R.*, 112 U.S. 331 (1884). As stated by the Supreme Court in *Hart*:

The effect of the agreements is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. . . . The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on.

112 U.S. at 340. See also *Adams Express*, 226 U.S. at 509 ("The inherent right to receive a compensation commensurate with the risk involved the right to protect [the carrier] from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported.").

75. See *Boston & M.R.R. v. Hooker*, 233 U.S. 97 (1914); *Kansas City S. Ry. v. Carl*, 227 U.S. 639 (1913); *Texas & Pac. Ry. v. Cisco Oil Mill*, 204 U.S. 449 (1907); *Texas & Pac. Ry. v. Mugg*, 202 U.S. 242 (1906). The *Hooker* Court stated that "the effect of filing schedules of rates with the Interstate Commerce Commission was to make the published rates binding upon shipper and carrier alike, thus making effectual the purpose of the act to have but one rate, open to all alike and from which there could be no departure." 233 U.S. at 112. The Court in *Hooker*, although without referring to the specific designation "constructive notice," went on to hold that a shipper's knowledge of rates will be conclusively presumed if the tariffs are filed. *Id.* at 119. For a further discussion of the constructive notice principle, see *supra* notes 32-33 and accompanying text.

76. For a further discussion of the tariff filing exemption, see *supra* notes 45 & 47 and accompanying text.

nate filed tariffs may no longer exist.<sup>77</sup> Thus, it is submitted that future courts will not impute to shippers knowledge of alternate rates even if such rates appear in a commercially published compendium as in the instant case.<sup>78</sup>

Thus, the Third Circuit's opinion has three significant implications for practitioners. First, since the precise holding of the court is quite narrow and factually specific,<sup>79</sup> its potential application to future cases is limited. As the years since airline regulation increase, it is unlikely that many shippers will fit into the same contractual positions as did Eastern and the Bank. Consequently, the court's narrow holding will be inapposite for most shippers and carriers.

Second, although many of the federal common law cases relied on by the court were decided almost a century ago in the context of railroad travel, practitioners should be aware that until a significant body of case law develops, these old cases, by necessity, will be given renewed vitality by courts in the Third Circuit.<sup>80</sup>

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77. Since tariffs no longer must be filed with the CAB, it is submitted that fairness principles dictate that shippers should not be deemed to have constructive notice of such tariffs. The CAB was centrally located and all shippers were aware that tariffs were filed with it. Charging shippers with constructive notice of tariffs filed in the central location led to a system of uniform rates and practices. 46 Fed. Reg. 35,937 (July 13, 1981). Since the deregulatory scheme contemplates the elimination of the artificial uniformity provided by filing and subjecting tariffs to CAB scrutiny, it is submitted that the underlying purpose of constructive notice has been eliminated. This position was specifically anticipated by the CAB in its notice of proposed rules concerning the elimination of tariff filing requirements for passenger carriers. 46 Fed. Reg. 35,936 (July 13, 1981). The CAB stated: "The carriers would have responsibility to communicate the terms of their contract of carriage, without the constructive notice that has up to now been afforded by tariff filing. The reasonableness of the terms and the adequacy of notice to the passengers would be subject to court review." *Id.* at 35,937.

78. The record in the instant case shows that Eastern referenced on each air bill the tariffs applicable for each shipment. 731 F.2d at 1123. These tariffs were published in a commercial compendium which presumably listed the alternate services provided by Eastern. *Id.* If such a compendium were available at the shipping desk or in the originating and/or destination city, it is submitted that the inference of constructive notice may attach. When the compendium is located in an arbitrary and inconvenient location, however, as in the instant case, adherence to the constructive notice doctrine would be inequitable and illogical. Since there also is no longer a desire for artificial uniformity of rates, submission of tariffs to any such compendium would be purely voluntary. Moreover, because the compendium is privately published, there would be no guarantee of its accuracy or completeness. Given these potential deficiencies with a private compendium, it would be unreasonable to impute knowledge to a shipper. For a further discussion of the importance of this compendium to the instant case, see *supra* note 66. For a further discussion of the constructive notice principle, see *supra* notes 32-33 and accompanying text.

79. The narrowness of the decision results from the fact that the shipping contract was entered into prior to deregulation and the shipment was lost after deregulation. See 731 F.2d at 1115.

80. It is submitted that a significant body of case law will develop quickly as a result of the demise of the primary jurisdiction doctrine in this area. Courts

Finally, in light of the Third Circuit's manipulation of the constructive notice principle,<sup>81</sup> the doctrine's fate remains uncertain. Until the Third Circuit addresses this issue more comprehensively, however, shippers should be advised to protect themselves before entering a contractual relationship with an air carrier by inquiring into the alternative rates and services. Carriers, conversely, must be advised to examine new methods of informing their customers of alternate rates and services in order to take advantage of the released value doctrine.<sup>82</sup> Only in this way may both shippers and carriers be adequately protected, while courts struggle to determine whether or not constructive notice will continue to be applied.

*Bruce G. Leto*

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now will be forced to hear cases in the first instance which, under regulation, they would only have heard after an initial CAB disposition. For a further discussion of the applicability of federal common law to the instant case, see *supra* notes 21-36 & 55-61 and accompanying text. For a further discussion of the primary jurisdiction doctrine, see *supra* note 39 and accompanying text.

81. For a further discussion of the court's manipulation of the constructive notice principle, see *supra* notes 62-66 and accompanying text.

82. The linchpin of the released value doctrine is that the shipper be given notice of alternate freight rates for which he can obtain differing degrees of protection depending on the rate, and that the shipper be given the opportunity to make an informed choice. For a further discussion of the released value doctrine, see *supra* note 24 and accompanying text. Since there is no longer a central agency with which to file tariffs, air carriers apparently must devise a means by which to give notice to shippers of various alternate services and rates.

One commentator has suggested that as a result of the elimination of the CAB, the released value doctrine will apply only if carriers give notice to shippers by listing on tickets or air bills the information that was previously set forth in the filed tariffs. Comment, *supra* note 1, at 128. The commentator concludes that as a result of the added burden on carriers to give actual notice to shippers, ticketing, boarding and shipping practices will become much more complicated and expensive. *Id.* at 147.

It is submitted that such reasoning may be alarmist in its approach. While it is most likely true that shippers rarely read liability limiting clauses until a loss occurs, and even more rarely choose a carrier based on favorable liability limiting practices, it is submitted that it would not be as difficult as the commentator suggests for carriers to comply with the requirements of the released value doctrine. Air carriers could include a notice on all air bills stating that alternate freight services, providing varying degrees of protection, are available for shippers. The specifics of these alternate services could be kept at the shipping desks much like the passenger timetables which currently occupy a prominent position on ticket counters. For shippers using a SPRINT-type courier service, these alternate rate pamphlets could be available at the passenger ticket counters because the packages are often delivered directly to this location.