

DELAY CLAIMS

By: George Carl Pezold

We often get questions about delay claims and whether damages can be recovered. The simple answer is “Sometimes” but it depends on the individual facts and circumstances in each case.

A carrier is required by law to deliver with "reasonable dispatch". There is no question that delay can cause actual damage, and if so, such damage may be recoverable. As the Supreme Court said in *New York, P. & N. R. Co. v. Peninsula Produce Exch. of Maryland*, 240 U.S. 34 (1916):

...It is said that there is a different responsibility on the part of the carrier with respect to delay from that which exists where there is a failure to carry safely. But the difference is with respect to the measure of the carrier's obligation; the duty to transport with reasonable despatch is none the less an integral part of the normal undertaking of the carrier.

Reasonable dispatch is defined by the courts as "the usual and customary time for similar shipments between the same origin and destination".

In any case involving delay there are some basic questions to consider:

- Was the shipment delivered with reasonable dispatch (or by a specified date and time)?
- Were there actual damages caused by the delay?
- What kind of damages and in what amount?
- Were they foreseeable (“general damages”) at the time the shipment was made (or prior to delivery)?
- If they were not foreseeable (“special or consequential damages”), did the carrier have actual or constructive notice of the possible consequences and the type and amount of damages if the shipment was delayed?

General Damages

An example where the court held that the shipper was entitled to general damages for a delay is *Paper Magic Group, Inc. v. J.B. Hunt Transport, Inc.*, 2001 WL 1003052 (E.D.Pa. Aug. 29, 2001), affirmed, 318 F.3d 458 (3rd Cir. 2003).

Paper Magic involved a delayed shipment of boxed Christmas cards. J. B. Hunt had picked up the shipment on October 16, 1998 at Paper Magic’s facility in Danville, PA. The shipment was to be delivered to Target Stores in Oconomowoc, WI. Typically, such a shipment would have a transit time of two or three days. Unbeknownst to any of the parties, the shipment had been misplaced by Hunt. On February 5, 1999, almost four months after the shipment was picked up, Hunt found the shipment sitting at its Chicago, IL terminal. Both Paper Magic and Target refused to accept delivery of the shipment

because Christmas had passed and the shipment was now worthless to both. Thereafter, Paper Magic filed a claim for \$130,080.48, which represented the invoice value of the Christmas cards. Hunt was able to salvage the Christmas cards for \$49,645.96 and offered this salvage value to Paper Magic as full and final settlement of the claim. Paper Magic refused this offer.

The district court ruled that Hunt's four-month delay in delivering the Christmas cards was essentially a "non-delivery." The appellate court agreed and determined that Paper Magic was entitled to recover its full invoice price. The issue on appeal was whether Paper Magic was seeking special or general damages. General damages are those that are reasonably foreseeable in an action for breach of contract, whereas special damages are not. After briefly recapping the case law lineage of special versus general damages, the Third Circuit held that:

Paper Magic is not seeking special damages. It is not seeking recovery for its loss of use, its lost future profits, or its additional labor. Instead, it is seeking actual damages: the loss in value of the shipment due to Hunt's delay. We do not think that the District Court erred in concluding that Hunt can be charged with foreseeing that a four-month delay would cause harm to Paper Magic. A carrier has reason to believe that a delay of four months will substantially diminish a shipment's value, particularly when the shipper, with whom the carrier has an ongoing business relationship, is in the business of producing seasonal paper goods. 318 F.3d at 462.

Special Damages

An example where the court found that the damages claimed were special damages, but held that the shipper was entitled to recover was *Marjan International Corp. v. V.K. Putman, Inc.*, 1993 WL 541204 (S.D. N.Y. 1993).

Marjan involved a shipment of oriental rugs was intended for an auction in Tacoma, Washington. The shipment was delayed, missed the auction, and the rugs ultimately returned to the shipper in New York, with two valuable rugs missing. The plaintiff claimed for the value of the missing rugs, plus the expenses of sending its employees to Tacoma for the auction (wages, air fare and hotel accommodations), and also sued for the return of the freight charges, which the carrier had demanded before releasing the shipment upon its return to New York, see Section 7.4.9.

In awarding the plaintiff's expenses in connection with the auction, the court stated:

The court is fully satisfied that the prerequisite to recovery of special damages has been established in this case. Major repeatedly and emphatically advised Putman's driver on the date of loading in New York that Marjan required delivery of the rugs to their destination no later than Friday, November 29 at 2:00 p.m., Pacific time. Major specifically informed Westfall: that the rugs were to be sold at an auction in Tacoma, and that failure to deliver on time would prevent the auction sale; that three or four Marjan employees would be flying to Tacoma with Major to receive

and unload the cargo and to assist in the sale; and finally, that considerable advertising and other expenses would be incurred by Marjan in connection with the auction. Furthermore, Westfall acknowledged the urgency of prompt delivery before leaving Marjan's store in New York.

Contractual Considerations

Damages for a breach of the contract of carriage depend upon general rules of contract law and contract damages. That contract of carriage may be a bill of lading, or it may involve a formal transportation agreement between the shipper and the carrier. A few words of caution are in order.

The most common bills of lading are some version of a "uniform straight bill of lading" such as that published in the National Motor Freight Classification (NMFC). Typically these bills of lading contain language that says: "RECEIVED, subject to individually-determined rates or contracts that have been agreed upon in writing between the carrier and shipper, if applicable, *otherwise to the rates, classifications and rules that have been established by the carrier and are available to the shipper, on request*". In other words, in the absence of a transportation contract, the carrier's "rates, classifications rules" found in its tariffs are incorporated by reference into the contract of carriage. It should be noted that rules tariffs, particularly those published by major LTL carriers, may include provisions excepting or limiting claims for delay.

In addition, many larger shippers enter into "shipper-carrier" contracts with their carriers. Often carriers insist on inserting language to the effect that the carrier "shall not be liable for special or consequential damages, including but not limited to failure to deliver with reasonable dispatch, monetary penalties for service failure or lost profits".

Thus, notwithstanding the established legal principles discussed above, shippers and their attorneys may find that collecting legitimate claims for delay can be difficult.

NOTE: For an in-depth discussion of this subject see "Freight Claims in Plain English" (4th Edition) at Section 7.0 Damages, which is available in a soft-cover edition from the Transportation & Logistics Council.