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Administrative Law -- Carriers -- the Interstate Commerce Commission's Authority to Approve Tolerance Regulations -- Their Effectiveness

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NOTES AND COMMENTS

Administrative Law—Carriers—the Interstate Commerce Commission's Authority to Approve Tolerance Regulations—Their Effectiveness

In 1947 shell egg carload freight constituted 0.072 per cent of the value of the total carload traffic handled by the railroads that year; but in the same year 1.91 per cent of all claim payments made by the railroads on carload traffic was for damaged eggs![1]

The existence of this condition caused the Interstate Commerce Commission in 1948, on its own motion, to institute proceedings to investigate the transportation of shell eggs in order that it might make findings and prescribe reasonable regulations for the shipments of eggs via railroads.[2] At the hearings testimony was taken as to the damage to eggs caused by inherent weaknesses in eggshell structure,[3] the components of damage claims submitted to the railroads,[4] the geographical areas in which the greatest damage claims arose,[5] and the methods used in packing and loading eggs.[6] At the close of the hearings the Commission adopted regulations[7] to allow the damage to 5% of the eggs packed

[1] Special Regulations, Eggs, 284 I. C. C. 377, 399 (1952). In 1941 claims against railroads for damage to eggs throughout the country amounted to approximately $110,000. In 1947 the claims amounted to $2,338,462.

[2] 284 I. C. C. 377 (1952). One hundred thirty-one railroads participated in the proceedings. The proceedings, begun in 1948, were not concluded until 1952.

[3] *Id.* at 383-384. Undetected weaknesses in the shell structure are known as "checks" and "blind checks." "Checks" are small cracks which do not penetrate below the shell membrane, and which are difficult to discern by ordinary sight inspection. "Blind checks" are small cracks in the shell which occurred prior to the laying of the eggs and over which a calcium deposit has formed, making it impossible to discern the cracks without "candling" the eggs. When these weak-shelled eggs are packed and shipped they are naturally liable to give under even light strain.

[4] Special Regulations, Eggs, 284 I. C. C. 377, 399 (1952). "Many elements other than the actual value of the eggs enter into a damage claim. For instance, such claims include the loss incident to the damage, the labor charges and the materials used in reconditioning the cases, and the warehouse charges covering the extra expense of handling the cases containing damaged eggs."

[5] *Id.* at 396-400. The largest volume of claims arose in the New York City area.

[6] Special Regulations, Eggs, 284 I. C. C. 377, 390 (1952). The packaging and loading procedure had been of concern to the Commission previously, 52 I. C. C. 47 (1919). The railroads have conducted "extensive research" relative to loss and damage claims to shell eggs. Buffing materials of rubber and excelsior pads were utilized to minimize shock. Apparently many of these experiments were unsuccessful, and no practical method was discovered whereby occurrence of damage could be reduced.

[7] *Id.* at 407-408. The following schedule was proposed by the railroads during the hearings:

"Section 6.—On eggs placed in packages at rail point of origin of the shipment, no claim shall be allowed where the physical damage to the eggs at destination does not exceed 4% of the contents of the packages containing damaged eggs. Where

at points other than railheads to go uncompensated, and the damage to 3% of the eggs packed at railheads to go uncompensated. An exception was made when the shipper supplied the carrier with a certificate from a bona fide inspector, either state or federal, indicating the amount of damaged eggs delivered to the carriers in each shipment. In such cases the shipper could recover all damage shown to be in excess of that recorded on the certificate, minus a deduction of 1%.[8] From this, it is patent that the five and three per cent tolerance allowances were intended to offset damage estimated to have occurred prior to the shipment of eggs.

Subsequently, suit was brought to have the order of the Interstate Commerce Commission effectuating the tolerance regulations set aside and enjoined.[9] Taking a long range view of the situation, the district court found the Commission's rules to be reasonable.[10] In so doing, the court pointed to the tremendous economic interests concerned,[11] the difficulties extant in evolving a method whereby those interests could be balanced,[12] and the Commission's responsibility to foster sound economic conditions in transportation.[13]

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damage exceeds 4%, claims shall be for all damage in excess of 4% if investigation develops carrier liability.

"Exception.—Where bona fide certificates of Federal or State egg inspection agencies showing extent of physical damage to eggs determined at rail point of origin of the shipment immediately prior to tender for rail transportation indicate the actual shell damage to be other than 3%, the percentage of actual damage as shown on such certificates, plus 1% shall be used in lieu of 4% specified in this Section.

"Section 7.—On eggs placed in packages at points other than the rail point of origin, no claim shall be allowed where the physical damage to the eggs at destination does not exceed 6% of the contents of the packages containing damaged eggs. Where damage exceeds 6% claims shall be allowed in excess of 6%, if investigation develops carrier liability."

[8] *Id.* at 402-403.

[9] Utah Poultry & Farmers Coop. v. United States, 119 F. Supp. 846 (D. C. Utah 1954).

[10] *Id.* at 864.

[11] *Id.* at 850. "Where such an immense volume of traffic, running into thousands of cars and millions of cases of eggs, . . . and such tremendous freight charges and damage claim payments, running into millions of dollars, . . . are involved, the economic stability of carriers and the maintenance of an adequate national system of railroads, were [*sic*] substantially affected."

[12] *Id.* at 851. "The problem of claims against railroads for damage to egg shipments had been before the railroads and the Commission for many years and never satisfactorily solved. It is extremely difficult of solution. It constitutes a part of the whole problem of the rate structure, which courts many times have held requires the experience and judgment of the Commission.

"The Commission could not expect the railroads to continue to take these losses. That was uneconomic to the point of being injurious to the national railroad transportation system . . . .

". . . . "Rate increases were not the remedy. That would have imposed a greater cost upon the shippers throughout the nation than the present regulation. That would have been more unjust for it would penalize some shippers for the benefit of others. That would not have benefited the shippers of eggs. That would tend to cause the railroads to lose all of the business."

[13] *Id.* at 850.

Complainants[14] appealed to the Supreme Court of the United States,[15] attacking the regulations on six grounds.[16] The Court considered only the appellants' contention that the Commission's findings did not support the conclusion that tolerance regulations placed no limitation on the carrier's liability. On the grounds that the Commission had not shown that the tolerance did not in part consist of damage caused by the carrier, the Supreme Court reversed the decision of the district court.

A crucial point raised by the appellants in the hearings below[17] was not considered by the majority of the Court. Did the Interstate Commerce Commission have the power to promulgate tolerance regulations, or is it precluded from so doing by § 20(11) of the Interstate Commerce Act?[18]

The answer to this question depends upon: (1) the scope of the Commission's power to require and to determine that rates and services established by the common carriers are reasonable, and whether the making of tolerance regulations is a part of this power; (2) the limitation that § 20(11)[19] imposes on the Commission's power to determine

[14] The complainants were: Utah Poultry & Farmers Cooperative; Armour & Co. (Intervenor); Swift & Co. (Intervenor); United States Department of Agriculture.

[15] Secretary of Agriculture v. United States, 350 U. S. 162 (1956).

[16] The bases for attack were: "(1) *the Commission has no jurisdiction over damage claims and hence no power to prescribe regulations governing their disposition;* (2) tolerances based on averages necessarily embrace a forbidden limitation of liability since, by definition, some shipments will contain less than the 'average' damage, resulting in those cases in the carrier being relieved of its full liability; (3) the railroads are liable for in-transit damage even though 'unavoidable'; (4) the averages found by the Commission are not supported by the evidence; (5) the approval of uniform nation-wide tolerances was unreasonable in light of the wide differences in the egg-damage experience of consignees located in different areas of the country; and (6) the conclusion that the tolerances do not limit liability is not supported by the Commission's findings." [Emphasis added.] *Id.* at 165.

[17] This point was raised in the hearing in the District Court, Utah Poultry & Farmers Coop. v. United States, 119 F. Supp. 846 (D. C. Utah 1954), and in the Commission hearings, Special Regulations, Eggs, 284 I. C. C. 377, 401 (1952).

[18] Secretary of Agriculture v. United States, 350 U. S. 162, 176 (1956) (Dissenting opinion).

[19] For the purposes of this note, the pertinent part of 24 STAT. 385 (1887), as amended, 49 U. S. C. § 20(11) (1953) is as follows:

"Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia 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 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 within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad or transportation company so receiving property for transportation, . . . or . . . delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such com-

the reasonableness of rates and services; and (3) the procedure for determining the common law liability of carriers and the exemptions therefrom.

Power to Regulate Rates

Congress amended the Interstate Commerce Act[20] by the Hepburn Amendment of 1906.[21] By that amendment, under § 15,[22] Congress gave the Interstate Commerce Commission the power to establish and enforce "just and reasonable" charges for services "rendered or to be rendered" in the transportation of persons and property.[23] Although the immediate aim of the amendment was to eliminate unfair practices by railroads against the shippers,[24] it was also intended to insure the carriers a reasonable return for their services.[25] Necessarily, the Com-

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mon carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void. . . ."

[20] 24 STAT. 384 (1887). [21] 34 STAT. 589 (1906).

[22] For the purpose of this note the pertinent part of 24 STAT. 384 (1887), as amended, 49 U. S. C. § 15 (1953) is as follows:

"Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of the opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property . . . , or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares or charges, to be thereafter observed in such case. . . ."

[23] 40 CONG. REC. 2230 (1906). "We have declared in virtue of our powers, "That all charges for any service rendered or to be rendered in the transportation of persons or property or in connection therewith shall be just and reasonable."

[24] 40 CONG. REC. 2224 (1906). "The immediate and most pressing need, so far as legislation is concerned, is the enactment into law of some scheme to secure to the agents of the Government such supervision and regulation of the rates charged by the railroads of the country engaged in interstate traffic as shall summarily and effectively prevent the imposition of unjust or unreasonable rates."

[25] 40 CONG. REC. 2234 (1906). "The corporation . . . is bound to render the best service consistent with security of the capital embarked in it, and security of capital includes the right to employ it at a profit. If the community is entitled to the best service consistent with the safety of capital, the just rate to each individual must be the actual cost of the service rendered to him plus a reasonable profit to the company. There can be no other rate consistent with justice, as a moment's reflection will show. . . . All who use a railroad can not have their goods transported for less than the actual cost. If they did, in a very short space of time the railway would be bankrupt and could not transport any goods at all, because it has no source of revenue except the rates which it charges to the people who use its facilities."

mission's power had to be one of a flexible nature to enable the Commission to deal with the conditions affecting both carriers and shippers.[26] Therefore, all the components that affect the rates and thereby the economy of carriers is of concern to the Commission in the exercise of its expert discretion in determining the reasonableness of rates. Indeed, the Supreme Court has refused to take jurisdiction to determine the components of rate charges where to do so would effect a readjustment of the carrier's rate schedule. This the Court held was a matter for primary determination by the Commission.[27]

Unquestionably, habitual damage to a commodity which must be compensated by the carrier affects the over-all cost of the transportation of that commodity regardless of the causes of such damage.[28] In the case of eggs, this cannot be absorbed through rate increases.[29] Tolerance regulations offer one solution whereby adjustments for the habitual breakage of eggs can be made without requiring over-all rate charges.

A tolerance is a margin of damage which must be exceeded before a claim may be made for additional damage.[30] Tolerances were originally allowed by the Commission to account for a difference in weights of coal[31] and grain [32] at points of origin and at destination estimated to be caused by moisture evaporation,[33] and variances in outdoor railway scales.[34] They were first applied to "current receipt" shell eggs in

[26] Board of Trade of Kansas City v. United States, 314 U. S. 534, 546 (1942). "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems." Freas, *Problems in Ratemaking,* 23 I. C. C. PRACTITIONERS' JOURNAL, 552 (March, 1956). ". . . Ratemaking has been referred to as a pragmatic business. By this is meant, no doubt, that in a rate structure the individual considerations are so balanced and interdependent that a manipulation of a part calls for a consideration of the whole, and that the proper functioning of the whole depends upon the adequacy of the parts. . . ."

[27] Armour & Co. v. Alton R. R., 312 U. S. 195 (1941); See also Note 2, following 49 U. S. C. A. § 15 (1929).

[28] LOCKLIN, ECONOMICS OF TRANSPORTATION 143 (4th ed. 1954). "[D]ifferences in rates may be explained on two grounds. First, there are differences in the cost of service. Some articles are more expensive to transport than others—some require more expensive types of equipment; some require special facilities of one sort or another; some require expedited service; some are more bulky than others, and hence the cost, per unit of weight, is greater than when the weight-density is greater. *Differences in liability and risk also make differences in the cost of service.*" [Emphasis added.]

[29] Utah Poultry & Farmers Coop. v. United States, 119 F. Supp. 846, 851 (D. C. Utah 1954); See LOCKLIN, ECONOMICS OF TRANSPORTATION 154 (4th ed. 1954). Probably one reason a higher rate could not be charged for eggs is that the value of the eggs at the market price could not stand the higher rate.

[30] Northwestern Tariff & Service Bureau, Inc. v. Chicago, Milwaukee & St. Paul Ry., 47 I. C. C. 549 (1917).

[31] *Ibid. In Re* Weighing of Freight, 28 I. C. C. 7 (1913).

[32] A. B. Crouch Grain Co. v. Atchison Topeka & Santa Fe Ry., 41 I. C. C. 717 (1916).

[33] *In Re* Weighing of Freight, 28 I. C. C. 7 (1913).

[34] Weight Tolerance Rule, 192 I. C. C. 71 (1933).

1919.[35] A tolerance allowance was first attacked as "limiting the liability of carriers in violation of § 20(11)" in a Commission hearing in 1916.[36] At that time, as in the lower court hearing of the principal case,[37] the Commission defended the tolerance regulations on the grounds that the "limitation was not against losses caused by the carrier, but rather against liability for losses due to the inherent nature of the commodities themselves, and attributable to no human agency."[38] Therefore, it contended, the regulation did not violate § 20(11) of the Interstate Commerce Act. Such an argument is justified by the necessity for making some type of rate adjustment for habitual shrinkage or breakage which affect the transportation cost of grain, coal and eggs. Nevertheless, there is a possible argument that the Interstate Commerce Commission inadvertently may have come through the back door to a violation of § 20(11) of the Interstate Commerce Act.

The Limitations in § 20(11)

The Carmack[39] and Cummins[40] amendments to § 20(11)[41] were passed during the early part of this century. The first was intended to establish uniformity of obligation and liability among carriers. The second was intended to insure the shipper full recovery for the value of his goods transported by the carrier in the event of damage.

Prior to the Carmack amendment:

> ". . . [T]he Federal courts sitting in various States were following the local rule, a carrier being held liable in one court when

[35] National Poultry, Butter & Egg Ass'n v. New York Cent. R. R., 52 I. C. C. 47 (1919).

[36] A. B. Crouch Grain Co. v. Atchison, Topeka & Santa Fe Ry., 41 I. C. C. 717, 717-718 (1916).

[37] Utah Poultry & Farmers Coop. v. United States, 119 F. Supp. 846, 849 (D. C. Utah 1954).

[38] A. B. Crouch Grain Co. v. Atchison, Topeka & Santa Fe Ry., 41 I. C. C. 717 (1916).

[39] 34 STAT. 593 (1906). The Carmack Amendment read as follows:

"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 common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such propety 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 the holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof."

[40] 38 STAT. 1196 (1915).

[41] 24 STAT. 386 (1887), as amended, 49 U. S. C. § 20(11) (1953). See note 19 *supra*.

> 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 diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own State, or a carrier whose lines were extensive, to know without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another. The congressional action has made an end to this diversity. . . ."[42]

The Carmack Amendment, however, had unforeseen effects upon the common law liability of carriers. In *Adams Express Co. v. Croninger*[43] the Supreme Court construed the act to permit a carrier to limit a shipper's recovery for damages to the value of the property stated on the bill of lading. Under this construction, a carrier could file with the Commission two rates, one to cover commodities shipped at an agreed value, and a second and higher rate to cover unlimited carrier liability.[44] In some instances while two rates were allowed, only the first rate was incorporated into the tariff schedules published under the auspices of the Commission. If this was the case, the second rate was agreed upon by the individual carrier and shipper when the shipper did not elect to ship under the "agreed" value and its corresponding published rate.[45] Since the second rate was not always supervised by the Commission, there were abuses. In some instances the second rate was so exhorbitant that the shipper was obliged to accept the lower rate and the corresponding lower valuation of his goods to stay in business.[46]

The Cummins Amendment was passed in 1915 to reinstate the liability of the carrier as it had been prior to 1915.[47] To the earlier act the

[42] Adams Express Co. v. Croninger, 226 U. S. 491, 505 (1913).
[43] 226 U. S. 491 (1913).
[44] *In Re* The Cummins Amendment, 33 I. C. C. 683 (1915).
[45] *Id.* at 686-687.
[46] 51 CONG. REC. 9624 (1914). Such a situation existed in the case of livestock: "All the railroads at this time have rates dependent on value in the shipment of live stock. The value is determined by the declaration of the shipper. . . . If the shipper wants full value, and the value is not beyond the ordinary or common value of registered or pure-bred stock, he must pay 10 per cent or 15 per cent or 25 per cent more than the rate upon an ordinary live-stock shipment. That rate as applied to the ordinary case is prohibitive; the shipper cannot pay it and do business for, of course, the amount of it is absurdly high. It is based only on the idea that the higher rate is necessary to compensate the railway company for the increased risk; but it is greatly more than that in all the cases I have examined. . . . The live-stock shipments that are made under the rule established by the railroad companies, and which we seek to overturn here, I suppose, constitute 90 per cent of all the shipments that would be affected by this rule."
[47] *Id.* at 9621. "In this bill we have tried to restore to the shippers of this country not all, but a measure, of the rights which they possessed and which they exercised prior to the passage of the Carmack amendment, which inadvertently destroyed those rights. Therefore we provided that the railroad company should be liable to

Cummins Amendment added: "[S]hall be liable to the lawful holder of such receipt or bill of lading or to any party entitled to recovery therefrom, whether such receipt or bill of lading has been issued or not, *for the full, actual loss, damage, or injury to such property caused by it.* [Emphasis added.] Thus, the import of the act was to save the shipper from the risk which he had been previously forced to take in accepting the lower rate, and to prevent carriers from limiting their liability.

This amendment was passed by Congress while it was charged with indignation over the repercussions of the decision in the *Croninger* case. At that time there appears to have been no consideration of the effect that § 20(11) would have on the other sections of the Interstate Commerce Act, the Hepburn Amendment, and the rate making power of the Commission. It is, therefore, submitted that Congress did not intend to undermine the Commission's power to determine the fair cost of transportation.

Nevertheless, the amendment did amount to a fiat by Congress to the Commission prohibiting it, in the course of its general rate making power, from limiting the liability of carriers, in any manner inconsistent with the act. The Commission could no longer approve schedules whereby the individual shipper would be obliged to contract away his common law right to recover the full value of his goods.

However, Congress intended the exemptions which were inherent in the common law rule of the liability of carriers to be part of the law.[48] The carrier was not to be "an insurer against the act of God, or the public enemy, the unprecedented storm or anything of the kind."[49] The last, it is submitted, includes damage "for breakage unavoidable in the nature of things."[50] But can the Interstate Commerce Commission make

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the lawful holder of the receipt or any other person to the full actual loss, damage or injury caused by it." See also Notes, 20 MICH. L. REV. 765 (1920); 1 NEW YORK LAW REV. 108 (1924); 12 VA. L. REV. 235 (1925).

[48] *In Re* The Cummins Amendment, 33 I. C. C. 682, 695 (1915). ". . . A carrier, after the Cummins amendment goes into effect, may not contract to limit its liability for loss or damage caused by it to the property. There is, however, no inhibition as to the limitation of the liability of a carrier for losses not caused by it or a succeeding carrier to which the property may be delivered. The amendment has expressly reapplied the limitation of the prior act with respect to loss or damage caused by the carriers chargeable therewith. It follows, therefore, that the interpretation applied to the act before it was amended is equally applicable to the amendment in so far as the latter affects the right of a carrier to establish rates conditional upon the shipper's assumption of the entire risk of loss attributable to causes beyond the carrier's control. From this it follows that under the amendment a contract or tariff may lawfully limit to a reasonable maximum the liability of a carrier for losses which it does not cause."

[49] 51 CONG. REC. 9621 (1914).

[50] Secretary of Agriculture v. United States, 350 U. S. 162, 173 (1956). ". . . [T]he Cummins Amendment to the Interstate Commerce Act, § 20(11), does not constitute an affirmative congressional formulation of a carrier's liability for damage to goods transported by it. The legal import of that Amendment is to bar the Interstate Commerce Commission from legalizing the tariffs limiting the common-law liability of a carrier for such damage. The common law, in imposing liability,

tolerance regulations of uniform effectiveness on the premise that the allowances take care of damage caused by the inherent nature of the goods?

The solution to this problem lies in the procedure for determining that shrinkage and breakage is loss caused by the natural propensity of the goods.

Determination of Common Law Liability

At common law a carrier is in the nature of an insurer.[51] The carrier is exempted from liability only when the loss results from acts of God, the public enemy, the inherent vice of the goods, or the default of the shipper.[52]

After the shipper has established his case by proving that the property was in good condition when received, and in damaged condition when delivered, the carrier must bring the case within one of the excepted causes.[53] In the case of eggs the carrier must show that the damage was occasioned by inherent defects in the eggs.[54] The same rule applies where the shipper has shown loss in transit of grain or coal.[55] Thus each case must stand on its own facts as to whether loss was caused by the inherent vice of the goods. No court is bound to allow any percentage of damage to go uncompensated if it finds that the damage was caused by the carrier. In addition, the courts vary in their determination as to what constitutes causes beyond the control of the carrier. For instance, while one carrier has been held liable for damage to eggs frozen in transit,[56] another was not liable for onions similarly damaged.[57]

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dispensed with proof by a shipper of a carrier's negligence in causing the damage. But for breakage unavoidable in the nature of things—whether nature be operating within a thing or from without, it is equally an 'inherent vice'—there would be no liability since the common law did not impose a liability unrelated to the carrier's conduct."

[51] Beale, *The Carrier's Liability: Its History*, 11 HARV. L. REV. 158 (1897).

[52] Joseph Toker Co., Inc. v. Lehigh Valley R. R., 12 N. J. 608, 97 A. 2d 598, 599 (1953).

[53] Annot., 53 A. L. R. 997 (1928).

[54] Mitchell v. The United States Express Co., 46 Iowa 214 (1877).

[55] In the following cases the carrier clearly had the burden of establishing that loss was caused by the inherent defect of the commodity. Joseph Toker Co. Inc. v. Lehigh Valley R. R., 12 N. J. 608, 97 A. 2d 598 (1953) (the defendant failed to prove that weight loss was due to the natural evaporation of moisture from coal during transit); Smith v. Louisville & N. R. R., 202 Iowa 292, 209 N. W. 465 (1926) (the defendant had the burden of establishing that loss was caused by the evaporation of moisture from coal and was therefor loss caused by a natural propensity); National Elevator Co. v. Great Northern Ry., 137 Minn. 217, 163 N. W. 164 (1917) (defendant had the burden of establishing that the loss of weight from grain was due to the evaporation of moisture). In the following cases evaporation of moisture was judicially recognized as a "natural propensity" causing loss: Nye Schrader-Fowler Co. v. Chicago & N. W. R. R., 106 Neb. 149, 182 N. W. 967 (1921); Shellaberger Elevator Co. v. Illinois Central R. R., 212 Ill. App. 1 (1917). In the following case evaporation of moisture causing loss of weight in wheat was recognized as a "natural propensity" by statute: Cardwell v. Union Pacific R. R., 90 Kan. 707, 136 Pac. 244 (1913).

[56] Akerly v. Railway Express Agency, 96 N. H. 396, 77 A. 2d 856 (1951).

[57] Close v. Missouri Pac. R. R., — La. App. —, 191 So. 596 (1936).

These decisions of the courts are beyond the control of the Interstate Commerce Commission because under § 9[58] of the Interstate Commerce Act the jurisdiction of the Commission over claims is confined to claims arising from violations of the Act.[59] Thus any regulations regarding the "inherent nature" of the commodities that the Commission may make are at best only guides for the discretion of the courts.[60] Under these circumstances the tolerance regulations have no legal effect and the attempts of the Commission to adjust the economic unbalance created by habitual shrinkage or breakage are ineffectual if shippers do not continue to accept claim settlements based on the tolerance regulations.[61]

Admittedly, the above reasoning has its logic. However, it is submitted that to deny effect to tolerance regulations because the Commission has no jurisdiction over claims arising out of the carrier's common law liability is basically unsound. The Commission does have jurisdiction to determine what service is to be offered for what rate. The extent of breakage or other loss which as a matter of experience is chargeable to the nature of the goods is an inherent part of determining the cost of

[58] 24 STAT. 382 (1887), as amended, 49 U. S. C. § 9 (1953) is in part as follows: "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter *may* either *make complaint to the commission* as hereinafter provided for, or *may bring suit* in his or their own behalf *for* the recovery of the *damages for which such common carrier may be liable under the provisions of this chapter. . . .*" [Emphasis added.]

[59] Van Patten v. Chicago, M. & St. P. Ry., 81 Fed. 545, 546 (C. C. Iowa 1897).

[60] An example of the attitudes that courts may take regarding tolerances is conveyed by the following: Joseph Toker Co., Inc., v. Lehigh Valley R. R., 12 N. J. 608, 615, 97 A. 2d 598, 602 (1953). In reference to a tolerance regulation for the shrinkage of the weight of coal the court said: "The tolerance related solely to freight charges within the jurisdiction and control of the Interstate Commerce Commission and had no relation to loss claims beyond the jurisdiction and control of the Commission. It is not disputed that the Commission has no authority and does not purport to exercise authority over civil claims for the recovery of the value of property lost in transit. . . . The shipper's right to assert such claim against the initial carrier where, as here, there has been an interstate shipment is expressly provided for in the Carmack Amendment which provides not only that the initial carrier shall be liable but also that, apart from exceptions not material here, there shall be no limitation of liability for the full actual loss. *Neither the carrier nor the commission could lawfully provide that liability to shipper for loss of coal in transit shall not accrue until the loss exceeds 1½% of coal shipped.*" [Emphasis added.] Shellaberger Elevator Co. v. Illinois Central R. R., 212 Ill. App. 1, 6 (1917). In reference to an allowance for shrinkage of the weight of corn the court said: "The liability of a carrier for loss or damages to an interstate shipment is governed by the federal law and all State statutes . . . are thereby superseded. . . . The only loss or damage the appellant is liable for under the Carmack Amendment is the loss or damage caused by it, and *shrinkage would not come within that rule unless the proof should show the shrinkage was caused by it.*" [Emphasis added.]

[61] Probably the greatest number of claims are settled outside of the courts. For this reason, if most shippers and carriers continued to adhere to the tolerance regulations when settling their claims, the Commission's purpose would be accomplished. That is, the economic adjustment what the Commission intended would operate in the larger number of cases. However, quaere whether shippers will continue to allow adjustments on the basis of tolerances if the Commission cannot legally enforce the regulations, and the courts will do no more than use them as guides, and in some instances will not recognize them at all as in the *Toker* case, 12 N. J. 608, 97 A. 2d 598 (1953).

transportation. The complexity of the economic factors involved in the tolerance problem calls for solution by the expert body.

Since tolerance regulations seem to be reasonable measures for adjusting losses caused by commodities which are by their nature inevitably damaged in transportation, it may be desirable to make express provisions for such regulations. The obvious solution is to amend § 20(11) of the Interstate Commerce Act so as to give the Commission the power either (1) to construe the meaning of "inherent vice" so that it will have uniform application in the courts in suits for loss or damage, or (2) as suggested by one writer,[62] to amend the act so as to allow the "Commission to provide tolerances when reasonably justified." The latter would seem to be the better solution as it would best cover the complex economic factors involved and allow the Commission greater discretion in striking a balance between the interests of the shippers and carriers.

HARRIET D. HOLT.

Appellate Jurisdiction of the United States Supreme Court over State Courts

In the recent case of *Naim v. Naim*,[1] the United States Supreme Court dismissed an appeal from the Supreme Court of Virginia because the federal question was not presented in "clean-cut and concrete form."[2]

The facts of the case were not in dispute. Suit was brought by appellee, a white woman duly domiciled in Virginia. The appellant was a non-resident Chinese. The parties left Virginia, married in North Carolina, and returned immediately to Virginia. There they cohabited as man and wife in direct contravention of the Virginia miscegenation law which forbade their marriage.[3] Both conceded that they left Virginia to marry for the purpose of evading this law. At the instigation of the wife, the marriage was annulled by the Circuit Court of the City of Portsmouth, and an appeal to the Supreme Court of Virginia was based on the sole ground that the Virginia miscegenation statute was unconstitutional because it contravened the due process and equal protection clause of the Fourteenth Amendment. The Supreme Court of Virginia affirmed the decision of the lower court, expressly holding that the Virginia statute in question was not repugnant to the federal constitution.[4] On appeal to the Supreme Court of the United States, the

[62] 103 PENN. L. REV. 113, 115 (1954).

[1] 197 Va. 80, 90 S. E. 2d 749 (1956); *vacated and remanded* 350 U. S. 891 (1956); *reaff'd* 197 Va. 734, 90 S. E. 2d 849 (1956); *appeal dismissed* 350 U. S. 985 (1956).

[2] Naim v. Naim, 350 U. S. 891 (1956).

[3] VA. CODE § 20-54 (1950). The Virginia miscegenation statute declares a marriage between a white person and a person of any other race a nullity.

[4] Naim v. Naim, 197 Va. 80, 90 S. E. 2d 749 (1956).