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Congestion – of the Port Variety

By Marilyn Raia

For several months, West Coast ports have suffered work slowdowns. Carriers and cargo owners have attributed the resulting port congestion to the longshore union's strategy in negotiating a new contract. The longshore union denies employing such strategy and attributes the slowdown to other causes.

Faced with port congestion, some carriers at their own expense have discharged cargo intended for one port at another port, and then arranged land-based transportation to the originally intended discharge port. Other carriers have discharged cargo intended for one port at another port and abandoned it there, leaving the cargo owner to arrange and pay for on-carriage by other means. No matter what the cause of the port congestion is, carriers and cargo owners have been seeking advice on their respective obligations and rights.

The Carrier's Obligation and Breach Thereof

Bills of lading reflecting contracts of carriage for goods coming into the United States from a foreign country are mandatorily governed by the United States Carriage of Goods by Sea Act [COGSA] which is found following 46 U.S.C. § 30701. Under COGSA, a carrier has an obligation to deliver the goods to the port set forth on the bill of lading, and not to another port it unilaterally chooses. If the carrier does not deliver the cargo to the port set forth on the bill of lading, it has committed a geographic "deviation". An unreasonable geographic deviation deprives the carrier of its defenses to a claim for cargo loss or damage, and precludes it from limiting its liability. Instead, the carrier is considered an insurer of the cargo.

Under COGSA, a carrier's deviation for the purpose of loading or unloading goods is considered prima facie unreasonable. It has been said a carrier "should not be allowed to deviate with no other motive than the increase of his own revenues". Economics are often the basis for a geographic deviation. A carrier may have very little cargo to discharge at a port and decide to not call there on a particular voyage because the cost of doing so would outweigh the revenue to be achieved.

The Liberties Clause

In an effort to avoid committing an unreasonable deviation and losing their defenses and liability limitations, carriers commonly insert broad "liberties clauses" in their bills of lading. Among other things, such clauses purport to authorize the carrier to discharge the cargo at a port other than that specified on the bill of lading when certain conditions occur, without incurring liability for an unreasonable deviation. Typically those conditions include circumstances under which the carrier perceives a risk to the vessel or the inability to get to the intended port and safely discharge cargo. Liberties clauses sometimes list "port congestion" as one of the reasons a carrier can change the discharge port for a shipment. However, no matter what a liberties clause says, the courts will construe it to authorize only reasonable variances from the bill of lading terms. Moreover, the reasonableness of a variance from the bill of lading terms cannot be determined in light of "knowledge gained after the event" or "knowledge of subsequent events".

If a carrier attempts to rely on "port congestion" in a liberties clause to justify its failure to deliver cargo at the port specified on the bill of lading, the court will determine what was known by the carrier at the time it entered into the bill of lading contract. That is, a carrier cannot rely on "port congestion" in a liberties clause to excuse its failure to deliver cargo at the specified port if such

congestion and the attendant delay were anticipated when the cargo was received for transportation. But if the port congestion encountered by the vessel at the contracted for destination port was not and could not be reasonably anticipated, the carrier may not have committed an unreasonable deviation when delivering the cargo to another port.

Carrier Liable for Deviation

A leading case on the carrier's right to assert port congestion as justification for delivery of goods to a port not specified on the bill of lading is *Ross Industries, Inc. v. M/V Gretke Oldendorff*, 483 F.Supp. 195 (E.D. Tx. 1980). In that case, Ross Industries contracted with Triton, the time charterer of the *Gretke Oldendorff*, for the transportation of 30,000 bags of wheat flour from Beaumont, Texas to Jeddah, Saudi Arabia. On August 9, 1975, a clean on board, freight prepaid bill of lading was issued specifying Jeddah as the discharge port. After the vessel departed for Saudi Arabia, Triton filed a bankruptcy proceeding, and ceased business operations. The vessel owner, Egon Oldendorff, assumed control of the vessel and took responsibility for completion of the voyage. However, it later advised Ross Industries and others that their cargo would be discharged in Djibouti, not Jeddah, unless additional freight was paid. Ross Industries refused to pay the additional freight and its cargo was discharged in Djibouti in October 1975. Egon Oldendorff told Ross Industries that the shipment had to be discharged in Djibouti due to port congestion at Jeddah.

In July 1975, the delay in discharging cargo at Jeddah was 35 days. By October 1975, the delay had increased to 70 days and by the end of 1975, the delay was 100 days due to Ramadan, a holiday period during the fourth quarter of the year.

Ross Industries incurred expenses to transport its cargo to Jeddah and sued Egon Oldendorff for reimbursement. The district court held Egon Oldendorff liable for the expenses Ross Industries incurred together with prejudgment interest. It reasoned Egon Oldendorff: 1) made a business decision to discharge Ross Industries's cargo in Djibouti because it was less expensive than discharging at Jeddah due to the port congestion; and 2) made a business decision to discharge the cargo in Djibouti because Ross Industries refused to pay additional freight for carriage to Jeddah. The district court held Egon Oldendorff should have known about the port congestion at Jeddah at the time the bill of lading was issued because another of its vessels had called at Jeddah in August 1975. Further, it was common knowledge in the shipping industry that port congestion would increase toward the end of 1975. Accordingly, the district court held Egon Oldendorff committed an unreasonable deviation under COGSA because the deviation to Djibouti was for the purpose of unloading cargo. It also held Egon Oldendorff could not rely on the liberties clause in the bill of lading because the port congestion at Jeddah at the time of the scheduled discharge was not greater than what was anticipated when the bill of lading was issued.

Carrier Not Liable for Deviation

A different result was reached by the court in *E.C.L. Sporting Goods v. United States Lines, Inc.*, 317 F.Supp.1245 (D. Mass. 1969). In that case, E.C.L. was the intended receiver of two shipments of skis that were to be transported by United States Lines from Germany to Boston, Massachusetts. The vessel arrived at Boston Harbor on Monday November 13, 1967. The previous Friday, the vessel owner requested its stevedoring company to provide six gangs to begin unloading the vessel upon arrival. The stevedoring company already had committed all but three of its gangs to other jobs and was unable to borrow gangs from other companies. Upon learning of the congestion at Boston, the carrier ordered the vessel to go to Philadelphia

where there were plenty of gangs available to unload the vessel. The carrier arranged, at its own expense, for the shipments to be trucked to the pier in Boston. They were available for pick up on the same day they would have been available had the vessel remained in Boston with the three available gangs working overtime.

E.C.L. took delivery of the skis in sound condition and then sued the carrier for damages resulting from their discharge at Philadelphia including loss of customers and good will. The district court held the carrier was not liable. It noted the bills of lading had a liberties clause but recognized such clauses were to be construed to allow only reasonable departures from the normal routes. The burden of proof was on the carrier to overcome the presumption in COGSA that a deviation for the purpose of unloading cargo was unreasonable. In this case, the carrier sustained its burden. The district court considered various factors including the closeness of the two ports, the carrier's arrangement for delivery of the goods in Boston on the day they otherwise would have been available there, the lack of special instructions from E.C.L., and the achievement of the commercial purpose of the transaction between the parties. The district court also noted that in cases in which the carrier was held liable for delivering cargo at a different port from that specified on the bill of lading, the carrier had good reason to expect congestion at the originally intended destination port.

Port congestion is not necessarily a justification for a carrier to discharge goods somewhere other than the discharge port set forth on the bill of lading it has issued. If the carrier had reason to expect port congestion at the contracted for discharge port and encountered what was or should have been expected, it is likely to be held liable for an unreasonable deviation when discharging the goods elsewhere.