JUNE 2008, VOL. 43, NO. 4

ILLINOIS STATE BAR ASSOCIATION

ENERGY, UTILITIES, TELECOMMUNICATIONS & TRANSPORTATION LAW

The newsletter of the ISBA's Section on Energy, Utilities, Telecommunications & Transportation Law

No railroad liability when auto's driver hits a stopped train on dark, foggy night

By William D. Brejcha; Scopelitis, Garvin, Light, Hanson & Feary, P.C.

In *Phillip Morris v. Illinois Central Railroad Company*, No. 4-07-0816 (5/18/08), the Illinois Appellate Court for the Fourth District affirmed a trial court's dismissal of a wrongful death claim arising from a January 1, 2004 incident where the plaintiff's decedent crashed his car into an Illinois Central train that was stopped at a rail crossing at 7:04 p.m. The plaintiff alleged that the Illinois Central was negligent by not illuminating the stopped train or otherwise making it visible to a motorist approaching the rail crossing.

The court recited what it characterized as a "longstanding rule" in Illinois that a train stopped at a crossing is generally held to be adequate notice and warning in and of itself to any traveler exercising ordinary care with no railroad duty to provide additional signs, signals or warnings, citing *Dunn v. Baltimore & Ohio R.R. Co.*, 127 Ill. 2d 350, 357 (1989). The court added that *Dunn* also held that only the existence of "special circumstances" beyond the stopped train itself would create any duty to warn and "darkness, heavy fog and poor visibility do not constitute special circumstances." Id. The court further stated that *Dunn* specifically found that the following conditions would not create any "special circumstances:" (1) darkness; (2) the presence of vehicular traffic at the rail crossing; (3) the absence of lighting at the rail crossing; (4) the grade of the rail crossing; and (5) unnecessary distractions in the vicinity of the rail crossing. Id. at 360-361. The court added that in *Malcome v. Toledo, Peoria & Western Ry. Co.*, 349 Ill. App. 3d 1005, 1007 (4th Dist. 2004), the 4th District had previously found that the presence of a flat car on a crossing during a dark night also failed to create a "special circumstance" under *Dunn*.

The *Morris* plaintiff asserted that on the night of the crash, the stopped train's presence was obstructed by heavy fog and darkness. The plaintiff further argued that the Supreme Court's analysis in *Dunn* had been flawed. The court rejected these arguments, finding both that the issue was one of duty and therefore was one to be resolved by the court, not the finder of fact. The court next concluded that the presence of darkness, fog, overcast conditions and rain is a common occurrence in Midwest winters and therefore did not create the "special circumstance" required for any railroad duty or liability under *Dunn*.

Justice Knecht, however, dissented. He asserted that the historical favorable treatment of railroads by Illinois courts in "the standing car rule" had questionable "vitality" in the current twenty-first century. Justice Knecht further found that the question of whether heavy fog and darkness constituted "special circumstances" under *Dunn* were questions for the jury, not for the court.

Given the state of Illinois law as to railroad duty, the majority's approach to this matter was predictable. The Illinois

IN THIS ISSUE

- No railroad liability when auto's driver hits a stopped train on dark, foggy night 1
- Carmack damages do not allow for any shipper windfall 2

Supreme Court might revisit this issue if the plaintiff tries to appeal. However, the majority's observation that a driver exercising ordinary care would be able to observe a stopped train at a rail crossing on a dark and heavily foggy night does not necessarily square with the real life experience of driving on a very dark and foggy evening. But if the fog was so thick that a driver could not see a stopped train at a rail crossing, one would also expect that the driver would drive with sufficient care and at a reduced speed so that the driver could safely react to obstacles not readily visible. As this driver drove into the fog at a high enough rate of speed that his car's collision with the Illinois Central train killed him, it appears that this driver was driving faster than he should have been driving through the thick fog. All things considered, this writer agrees with the majority view on this case.

Carmack damages do not allow for any shipper windfall

By William D. Brejcha; Scopelitis, Garvin, Light, Hanson & Feary, P.C.

In *Houmani v. Roadway Express, Inc.*, 2008 U.S. Dist. LEXIS 20774 (N.D. Oh., 3/17/08), the Court granted Roadway partial summary judgment in an action where the appropriate damage standard under the Carmack Amendment, 49 U.S.C. §14706, was at issue. The plaintiff had bought a used commercial oven on E-Bay and shipped the oven to Toledo, OH via Roadway. On arrival, the plaintiff claimed that the oven had been damaged in transit.

Roadway was prepared to pay plaintiff damages in the amount he had paid for the oven or $1,1545. But the plaintiff contended that a $1,545 payment would not make him whole, asserting instead that he was entitled to either the repair cost for the oven of $16,240 or else a brand new commercial oven that would cost from $75 - 100,000.

The court found that the measure of Carmack Amendment damages was a question of law and granted Roadway's motion for partial summary judgment, finding that Roadway was only obligated to repay plaintiff's purchase price. The court noted that Carmack Amendment damages are the "actual loss" caused by the carrier.

The court next stated that the general rule is that the shipper's "actual loss" is the difference in market value of the cargo between what that value should have been if the cargo was delivered in good order and the actual value of the cargo in its damaged condition. However, the court also noted that this measure of damages cannot be applied in order to give the owner of damaged cargo a windfall. Based on the "windfall" damage limitation, the court found that the plaintiff's loss was limited to the purchase price. The court found the mere fact that the plaintiff "may have gotten a good deal—or even a really good deal—does not mean that he should now enjoy a windfall of the damages beyond the purchase price that he seeks."

Accordingly, cargo loss and damage plaintiffs will not be allowed to turn great internet deals into windfall damage awards under the Carmack Amendment. This case teaches that courts will apply Carmack Amendment damages as a matter of law so that they do justice to both the carriers and the owners of damaged cargo.

For copies of bills, amendments, veto messages and public acts, contact the ISBA Department of Legislative Affairs in Springfield

Energy, Utilities, Telecommunications & Transportation Law

Published at least four times per year.

Annual subscription rate for ISBA members: $20.

To subscribe, visit www.isba.org or call (217)525-1760

OFFICE
Illinois Bar Center
424 S. 2nd Street
Springfield, IL 62701
Phones: (217) 525-1760 OR 800-252-8908

Web site: www.isba.org

Editor
William D. Brejcha
30 W. Monroe, Suite 600
Chicago, IL 60603

Managing Editor/Production
Katie Underwood
kunderwood@isba.org

Postmaster: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.