COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

OVERLAND XPRESS, LLC	**:**	
Plaintiff	**:**	**CASE NO. 2012 CVH 01662**
vs.	**:**	**Judge McBride**
MATRIX TRANSPORT, LLC, et al.	**:**	**DECISION/ENTRY**
Defendants	**:**	

Eberly McMahon LLC, Robert A. McMahon, attorney for the plaintiff Overland Xpress, LLC, 2321 Kemper Lane, Suite 100, Cincinnati, Ohio 45206.

Alden Law, John E. Breen, attorney for defendant/crossclaim plaintiff ABF Freight System, Inc., One East Livingston, Columbus, Ohio 43215.

Alexander Y. Adusei, Jr., attorney for the defendant/crossclaim defendant Matrix Transport, LLC, 2928 Poolside Drive, Columbus, Ohio 43224.

This cause is before the court for consideration of (1) a motion for summary judgment filed by the plaintiff Overland Xpress, LLC and (2) a motion to dismiss filed by the defendant/crossclaim plaintiff ABF Freight System, Inc.

The court scheduled and held hearings on the motion for summary judgment on February 25, 2013 and the motion to dismiss on March 4, 2013. At the conclusion of those hearings, the motions were taken under advisement.

Upon consideration of the motions, the record of the proceeding, the evidence presented for the court' consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

The following are the pertinent facts as set forth in the complaint: The plaintiff Overland Xpress, LLC (hereinafter referred to as "Overland Xpress") is a freight services company.[1] Overland Xpress entered into a contract with the defendant Matrix Transport, LLC (hereinafter referred to as "Matrix Transport") for Matrix Transport to deliver certain goods from Ohio to Texas.[2]

Matrix Transport dropped off the goods to the terminal of the defendant ABF Freight System, Inc. (hereinafter referred to as "ABF Freight") in Cincinnati, and this was done without the consent or knowledge of Overland Xpress.[3] Upon assuming possession of the shipment, ABF Freight requested payment from Overland Xpress before it would deliver the goods.[4]

The goods were ultimately delivered by ABF Freight in a damaged condition and the plaintiff's customer refused the goods.[5] Overland Xpress expended its own money to hire a new truck to return the goods, have the goods shipped to Virginia for repair, and then have the goods shipped back to Texas.[6]

[1] Complaint at ¶ 1.
[2] Id. at ¶ 5.
[3] Id. at ¶ 6.
[4] Id. at ¶ 7.
[5] Id. at ¶¶ 8-9.
[6] Id. at ¶ 9.

Overland Xpress filed its complaint in the present case alleging a breach of contract claim against Matrix Transport and negligence claims against both Matrix Transport and ABF Freight. The negligence claim alleges that the defendants owed a duty to transport the goods in a timely and safe manner so as not to damage the goods and that they failed to do so.[7]

Overland Xpress filed its motion for summary judgment in the present case arguing that ABF Freight failed to respond to the requests for admissions with which it was served on October 8, 2012 and, as such, those facts are deemed admitted. ABF Freight filed a memorandum in opposition to the motion in which it argued that it had timely answered the subject requests for admissions. At the hearing on this matter, counsel for ABF Freight made an oral motion to withdraw any admissions should the court determine they had not been timely filed.

The evidence presented in support of the oral motion to withdraw any admissions demonstrates that on October 28, 2012, counsel for ABF Freight requested a two-week extension on discovery.[8] Counsel for Overland Xpress responded the following day, consenting to a two week extension "even though ABF still has 10+ days to respond."[9] ABF Freight's response to the requests for admission was sent to Overland Xpress's counsel on November 27, 2012, the same date the motion for summary judgment was filed with the court.[10]

[7] Id. at ¶ 15.
[8] Defendant's Exhibit A.
[9] Id.
[10] Defendant's Exhibit C.

After the motion for summary judgment was briefed by the parties, ABF Freight filed a motion to dismiss based on the argument that the claims against it are preempted by the Carmack Amendment.

LEGAL ANALYSIS

I. MOTION FOR SUMMARY JUDGMENT

(A) SUMMARY JUDGMENT STANDARD

The court must grant summary judgment, as requested by a moving party, if "(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion."[11]

The court must view all of the evidence, and the reasonable inferences to be drawn therefrom, in a light most favorable to the non-moving party.[12] Furthermore, the court must not lose sight of the fact that all evidence must be construed in favor of the

[11] Civ. R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Davis v. Loopco Indus., Inc.* (1993), 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144.
[12] *Engel v. Corrigan* (1983), 12 Ohio App.3d 34, 35, 465 N.E.2d 932; *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12-13, 467 N.E.2d 1378; *Welco Indus. Inc. v. Applied Cas.* (1993), 67 Ohio St.3d 344, 356, 617 N.E.2d 1129; *Willis v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186, 188, 497 N.E.2d 1118; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152, 309 N.E.2d 924.

nonmoving party, including all inferences which can be drawn from the underlying facts contained in affidavits, depositions, etc.[13]

Determination of the materiality of facts is discussed in *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211:

> "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[14]

Whether a genuine issue exists meanwhile is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law[?]"[15] "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[16]

The burden is on the moving party to show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law.[17] This burden requires the moving party to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[18]

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[13] *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485, 696 N.E.2d 1044, citing *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 617 N.E.2d 1123.
[14] *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.
[15] Id. at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.
[16] Id. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.
[17] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3fd 157, 161, 553 N.E.2d 597; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.
[18] *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus.

A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.[19] The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case.[20] Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims.[21]

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.[22] However, if the moving party satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains in the case.[23] The duty of a party resisting a motion for summary judgment is more than that of resisting the allegations in the motion.[24] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which that (the nonmoving) party bears the burden of production at trial."[25]

The nonmovant must present documentary evidence of specific facts showing that there is a genuine issue for trial and may not rely on the pleadings or unsupported

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[19] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164.
[20] Id.
[21] Id.
[22] Id.
[23] Id.
[24] *Baughn v. Reynoldsburg* (1992), 78 Ohio App.3d 561, 563, 605 N.E.2d 478.
[25] *Wing v. Anchor Media Ltd. Of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus; *Welco Indus., Inc. v. Applied Companies* (1993), 67 Ohio St.3d 344, 346, 617 N.E.2d 1129; *Gockel v. Ebel* (1994), 98 Ohio App.3d 281, 292, 648 N.E.2d 539.

allegations.[26] Opposing affidavits, as well as supporting affidavits, must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must show affirmatively that the affiant is competent to testify on the matters stated therein.[27]

"Personal knowledge" is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[28]

Accordingly, affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R.56(E), which sets forth the types of evidence which may be considered in support of or in opposition to a summary judgment motion.[29]

Under Civ.R.56(C), the only evidence which may be considered when ruling on a motion for summary judgment are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." These evidentiary restrictions exist with respect to materials which are submitted both in support of and in opposition to a motion for summary judgment.

Where the copy of a document falls outside the rule, the correct method for introducing such items is to incorporate them by reference into a properly framed

[26] *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295.
[27] Civ.R.56(E); *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 646, 662 N.E.2d 1112; *Smith v. A-Best Products Co.* (Feb. 20, 1996), 4th Dist. No 94 CA 2309, unreported.
[28] *Carlton v. Davisson*, 104 Ohio App.3d at 646, 662 N.E.2d at 1119; *Brannon v. Rinzler* (1991), 77 Ohio App.3d 749, 756, 603 N.E.2d 1049.
[29] *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69, 582 N.E.2d 1040.

affidavit.[30] Thus, Civil Rule 56(E) also states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[31] Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[32]

However, the summary judgment procedure is appropriate where a nonmoving party fails to respond with evidence supporting his claim(s). While a summary judgment must be awarded with caution, and while a court in reviewing a summary judgment motion may not substitute its own judgment for the trier of fact in weighing the value of evidence, a claim to survive a summary judgment motion must be more than merely colorable.[33]

In deciding a summary judgment motion, the court may, even if summary judgment is not appropriate upon the whole case, or for all the relief demanded, and a trial is necessary, grant a partial summary judgment, such that a trial will remain necessary as to the remaining controverted facts.[34]

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[30] *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89, 590 N.E.2d 411; *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220, 222, 515 N.E.2d 632.
[31] *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[32] *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150.
[33] *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d at 111, 570 N.E.2d at 1099.
[34] Civ.R.56(D); *Holeski v. Lawrence* (1993), 85 Ohio App.3d 824, 834, 621 N.E.2d 802.

(B) ANALYSIS

Pursuant to Civ.R. 36(A), a party may serve requests for admissions upon an opposing party and "[t]he matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service of a printed copy of the request or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney."[35] Civ.R. 36(B) provides that "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission."

At the hearing on this matter, ABF Freight made an oral motion to withdraw any admissions and offered the evidence cited above in support of that motion. While counsel for the plaintiff objected to this evidence as untimely-filed evidence in opposition to a motion for summary judgment, the court finds that the exhibits are admissible as evidence in support of the oral motion to withdraw admissions.

The parties agree that ABF Freight's response to the requests for admissions was originally due twenty-eight days after October 8th. A two week extension would have given defense counsel until approximately November 20th. The response was sent to Overland Xpress' counsel on November 27th, the same day the present motion for summary judgment was filed.

> " 'In making its determination of whether to permit a withdrawal or amendment of the admissions, the trial court is required to consider the elements of Civ.R. 36(B). Ohio courts have stylized this consideration into a multi-pronged analysis. See *Kutcscherousky v. Integrated Communications*

[35] Civ.R. 36(A)(1).

> *Solutions, LLC,* 5th Dist. No.2004CA00338, 2005–Ohio–4275; *RKT Properties, LLC v. City of Northwood,* 6th Dist. No. WD–05–009, 2005–Ohio–4178, 162 Ohio App.3d 590, 834 N.E.2d 393; *Farmers Ins. Of Columbus, Inc. v. Lister,* 5th Dist. No, 2005–CA–29, 2006–Ohio–142; *B & T Distributors v. CSK Const., Inc.,* 6th Dist. No. L–07–1362, 2008–Ohio–1855. First, there is the overreaching goal that cases should be resolved on their merits. The court must determine whether the amendment or withdrawal of the admissions will aid in presenting the merits of the case. *Cleveland Trust,* 20 Ohio St.3d at 67, 485 N.E.2d 1052. If the court so determines, the burden then shifts to the party who obtained the admissions to establish that the withdrawal or amendment will prejudice the party in maintaining their action. *Id.; Balson v. Dodds* (1980), 62 Ohio St.2d 287, 405 N.E.2d 293, paragraph two of the syllabus. 'Against this prejudice, the court must weigh the 'compelling' circumstances that led to the failure to respond to the request for admissions.' *RKT Properties,* supra at ¶ 12, citing *Cleveland Trust,* supra and *Balson,* supra.'"[36]

In the case at bar, ABF Freight's response to the requests for admissions was sent to plaintiff's counsel on November 27th, approximately seven days, by this court's calculation, after the extended deadline. The responses essentially crossed in the mail with the summary judgment motion, as the motion for summary judgment was filed on the same day that the responses were sent to the plaintiff's counsel.

The withdrawal of the admissions will serve to allow this case to be considered on its merits. While summary judgment has been filed in reliance on the admissions, it was filed on the same day that the responses were sent to the plaintiff's counsel. The court finds no prejudice to the plaintiff in allowing the withdrawal of the admissions.

[36] *Himes v. Smith* (Jan. 17, 2012), 5th Dist. No. 2011CA00086, 2012-Ohio-184, ¶ 14, quoting *Bush v. Eckman* (Sept. 30, 2008), 5th Dist. No. 07CA0115, 2008-Ohio-5080, ¶ 23.

The court finds that ABF Freight's oral motion to withdraw the admissions is well-taken and shall be granted. As a result, the plaintiff's motion for summary judgment shall be denied.

II. MOTION TO DISMISS

(A) MOTION TO DISMISS STANDARD

The defendant's motion to dismiss is made pursuant to Civ.R. 12(B)(6), which provides that a party may move to dismiss an action of the basis of failure to state a claim upon which relief can be granted.

"A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint."[37] "Thus, the movant may not rely on allegations or evidence outside the complaint; such matters must be excluded * * * ."[38] " 'The factual allegations of the complaint and items properly incorporated therein must be accepted as true. Furthermore, the plaintiff must be afforded all reasonable inferences possibly derived therefrom.' "[39] "It must appear beyond doubt that [the counterclaimant] can prove no set of facts entitling [it] to relief."[40]

[37] *Volbers-Klarich v. Middletown Mgt., Inc.* (2010), 125 Ohio St.3d 494, 929 N.E.2d 434, 2010-Ohio-2057, ¶ 11, citing *Assn. for the Defense of the Washington Local School Dist. v. Kiger* (1989), 42 Ohio St.3d 116, 117, 537 N.E.2d 1292.
[38] Id., citing Civ.R. 12(B).
[39] Id. at ¶ 12, quoting *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753, 756.
[40] Id., citing *Vail v. Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 280, 649 N.E.2d 182.

(B) ANALYSIS

The sole basis of ABF Freight's motion to dismiss is its contention that the state law claim for negligence brought against it in this action is preempted by the Carmack Amendment.

" 'The Carmack Amendment was enacted in 1906 as an amendment to the Interstate Commerce Act of 1887 and addresses the liability of common carriers for goods lost or damaged during a shipment[.]' "[41] "The goal of the law 'was to facilitate shippers' recoveries against carriers for damage to transported cargo.'"[42]

"The Carmack Amendment requires carriers to issue a receipt or bill of lading for cargo and establishes carrier liability: '[A]ny * * * carrier that delivers the property and is providing transportation or service subject to [the Carmack Amendment is] liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by [a carrier.]' "[43]

The Carmack Amendment defines a "carrier" as "a motor carrier, a water carrier, and a freight forwarder."[44] An "individual shipper" is defined as:

> " * * * any person who –
>
> (A) is the shipper, consignor, or consignee of a household goods shipment;
>
> (B) is identified as the shipper, consignor, or consignee on the face of the bill of lading;
>
> (C) owns the goods being transported; and

[41] *Excel, Inc. v. Southern Refrigerated Transport, Inc.* (July 27, 2012), S.D. Ohio No. 2:10-CV-994, 2012 WL 3064106, *4, quoting *Shao v. Link Cargo (Taiwan) Limited*, 986 F.2d 700, 704 (4th Cir.1993).
[42] Id., quoting *Intransit, Inc. v. Excel North American Road Transport, Inc*., 426 F.Supp.2d 1136, 1140 (D.Or.2006).
[43] Id., quoting 49 U.S.C. § 14706(a)(1).
[44] 49 U.S.C. § 13102(3).

(D) pays his or her own tariff transportation charges."[45]

The Carmack Amendment defines a "broker" as "a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation."[46]

" 'In general, a federal law may preempt a state law in any of the following three scenarios. First, a federal statute may expressly preempt the state law. Second, a federal law may impliedly preempt a state law. Third, preemption results from an actual conflict between a federal and a state law.' "[47] Implied preemption occurs as follows:

> " 'Implied preemption occurs 'if a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it ....' *Gibson v. Am. Bankers Ins. Co.,* 289 F.3d 943, 949 (6th Cir.2002) (quoting *Pub. Intervenor v. Mortier,* 501 U.S. 597, 605, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991)). The Carmack Amendment broadly regulates the liability of a carrier under a bill of lading. *See Adams Express Co. v. E.H. Croninger,* 226 U.S. 491, 505–06, 33 S.Ct. 148, 57 L.Ed. 314 (1913). Within a certain field, this regulation is sufficiently pervasive to imply preemption of state regulation and state causes of action. *See REI Transp., Inc. v. C.H. Robinson Worldwide, Inc.,* 519 F.3d 693, 697 (7th Cir.2008) (citing *Adams Express,* 226 U.S. at 505) ('The Carmack Amendment generally preempts separate state-law causes of action that a shipper might pursue against a carrier for lost or damaged goods.')."[48]

The issue of whether the Carmack Amendment preempts state law claims brought by brokers against carriers is not well settled in this country's jurisprudence.

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[45] 49 U.S.C. § 13102(13).
[46] 49 U.S.C. § 13102(2).
[47] *Exel, Inc.*, supra, at *4, quoting *Garcia v. Wyeth–Ayerst Labs.*, 385 F.3d 961, 965 (6th Cir.2004).
[48] Id.

In *Excel, Inc. v. Southern Refrigerated Transport, Inc.* (July 27, 2012), S.D. Ohio No. 2:10-CV-994, 2012 WL 3064106, the plaintiff Excel was a freight broker who brought suit against a motor carrier when a shipment was lost or stolen and never recovered.[49] Excel and the motor carrier had a Master Transportation Services Agreement between them which included a clause making the carrier liable for any lost shipment.[50] The district court acknowledged a split in the law amongst several courts on the issue of whether these types of claims are preempted by the Carmack Amendment.[51] It should be noted that the analysis used in the *Exel* case is heavily dependent on the fact that the claim brought in that case by the broker was for breach of contract. The district court held that that master agreement between the broker and the carrier was a negotiated contract that established an ongoing business relationship between the parties.[52] The court pointed out that this contract did not "focus on shipping under a bill of lading, but instead establishes the basics of a brokerage relationship[,]" and that this relationship "falls outside of the shipper-carrier relationship and outside the preemptive field of the Carmack Amendment."[53]

In reaching this conclusion, the court in *Exel* discussed and found persuasive the reasoning of two similar cases: *Intransit, Inc. v. Excel North American Road Transport, Inc*., 426 F.Supp.2d 1136, 1140 (D.Or.2006), and *Edward Bros. v. Overdrive Logistics*, 260 Ga.App. 222, 581 S.E.2d 570 (Ga.App.2003). In both the *Intransit* and *Edward Bros.* cases, the brokers brought suit against the carriers under the contracts between them, the former under an indemnity clause and the latter under a general clause

[49] Id. at *1-2.
[50] Id. at *1.
[51] Id. at *5.
[52] Id.
[53] Id.

holding the carrier liable for any loss or damage to a shipment.[54] In *Edward Bros.*, the court found that the broker was not seeking damages under a bill of lading and " '[b]ecause the Carmack Amendment was enacted to protect the rights of shippers suing under a receipt or bill of lading, not brokers, it does not preempt [the broker's] breach of contract claim* * * ."[55] The *Intransit* court held that an indemnity claim between a broker and a carrier stems from a different relationship then the shipper-carrier relationship covered by the Carmack Amendment and, consequently, such claims fall outside the Carmack's Amendment's preemptive field.[56]

The *Intransit* court noted in its decision that strangers to a bill of lading may not be able to escape the reach of the Carmack Amendment in a true subrogation case where the suing party stands in the shoes of the shipper.[57] The court also explained that "[t]he purpose of Carmack is to prevent carriers from being placed in the untenable position of having to determine what their liability may be in many jurisdictions with differing laws."[58] The court reasoned that the alleged liability in its case arose "from a contract that will not be interpreted differently from one jurisdiction to the next-the jurisdiction of the state in which the contract was made will apply."[59]

The court in *R.E.I. Transport, Inc. v .C.H. Robinson Worldwide, Inc.* (March 16, 2007), No. 05-57-GPM, 2007 WL 854005 (S.D.Ill.2007) came to a different conclusion. In that case, the broker, CHR, hired R.E.I. Transport, a carrier, to ship a load of DVD

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[54] Id. at *5.
[55] Id., quoting, *Edward Bros.* at 572. See also, *TransCorr Nat. Logistics, LLC v. Chaler Corp*. (Dec. 19, 2008), No. 1:08-CV-00375-TAB-SEB, 2008 WL 5272895, *5 (S.D.Ind.,2008) (breach of contract claims by broker against carrier were not preempted because the claims were governed by the brokerage agreement, not the Carmack Amendment.).
[56] Id., discussing, *Intransit* at 1141.
[57] *Intransit* at 1141, citing, *Taft Equipment Sales Co. v. Ace Trans., Inc.,* 851 F.Supp. 1208 (N.D.Il.1994).
[58] Id.
[59] Id.

players for CHR's client Circuit City.[60] When the shipment arrived at its destination, 295 of the DVD players were missing.[61] CHR paid Circuit City for the full amounts of its loss and received an assignment of its rights.[62] When CHR withheld payment from R.E.I. Transport, it filed suit and CHR filed a counterclaim for the value of the lost goods under the Carmack Amendment.[63] R.E.I. Transport argued that CHR could not pursue the claim because it was a broker and not a shipper of goods.[64] The court noted that R.E.I. Transport owed a duty to CHR to transport the goods and CHR arranged the shipment on Circuit City's behalf and was responsible to Circuit City for the loss of any goods.[65] The court also reasoned that the language of the Carmack Amendment imposing liability on carriers for a claim brought by the person entitled to recover under the bill of lading has been interpreted broadly and is not limited to shippers.[66] The court distinguished the *Intransit* case, noting that the claim at issue in that case was for direct contractual indemnity.[67]

In *Propak Logistics, Inc. v. Landstar Ranger, Inc.* (March 29, 2012), No. 2:11-CV-02202, 2012 WL 1068118 (W.D.Ark.,2012), Propak, a broker, entered into a contract with Landstar, a motor carrier, for motor carrier transportation services.[68] Propak brokered an agreement for Landstar to transport goods for Pace Edwards and that shipment ultimately sustained moisture damage while in transit.[69] That court noted that "[t]here are relatively few cases discussing Carmack Amendment preemption for

[60] *R.E.I. Transport* at *1.
[61] Id.
[62] Id. at *2.
[63]
[64] Id. at *5.
[65] Id.
[66] Id.
[67] Id. at *6.
[68] *Propak* at *1.
[69] Id.

brokers' claims against carriers[,]" and, "[t]hose that exist specify that only claims based on separate contractual obligations between brokers and carriers—unrelated to the bills of lading or claims for damage to goods due to a carrier's negligent transport—will survive preemption."[70] The court further stated that "[t]he Carmack Amendment, which serves to secure the rights of shippers who have suffered losses due to a negligent carrier's handling of an interstate shipment of goods, applies when a broker or other party steps into the shoes of a shipper and asserts a claim for damages pursuant to a bill of lading for the transportation of goods."[71] Propak became a subrogee of the shipper and, therefore, stepped into the shoes of the shipper with regard to its rights under the bill of lading.[72] Consequently, the court concluded that the Carmack Amendment clearly operated to preempt Propak's state law claims.[73]

Similarly, the court in *Pyramid Transp., Inc. v. Greatwide Dallas Mavis, LLC* (March 7, 2013), No. 3:12-CV-0149-D, 2013 WL 840664 (N.D.Tex.,2013), held that "[w]hen a broker is not entitled to recover under a bill of lading, it can nonetheless maintain a Carmack Amendment action against a carrier if it stands in the shoes of a party who is entitled to recover[,]" which "usually occurs through assignment or some other form of subrogation."[74]

In *TransCorr Nat. Logistics, LLC v. Chaler Corp.* (Dec. 19, 2008), No. 1:08-CV-00375-TAB-SEB, 2008 WL 5272895, TransCorr, a broker, had a general transportation services contract with Chaler, a motor carrier.[75] TransCorr brokered an agreement for

[70] Id. at *2.
[71] Id. at *3.
[72] Id.
[73] Id.
[74] *Pyramid Transp.*, supra, at *4.
[75] *TransCorr* at *1.

Chaler to transport a load for its customer, but the shipment was never delivered and instead remained for reasons unknown on the defendant's lot.[76] Due to the fact that failure to timely deliver the goods would result in a shutdown of the TransCorr's client's plant, the goods were shipped by air.[77] TransCorr pursued an action for the cost of the air shipment against Chaler pursuant to the brokerage contract between them.[78] The court discussed the legal issues as follows:

> "It is possible that a broker might bring a claim against a carrier under the Carmack Amendment on behalf of the shipper under a bill of lading, such as by subrogation. However, based on the allegations set forth in the complaint, it was Plaintiff, not the shipper, that experienced losses, and therefore the shipper has no claim for Plaintiff to take over. * * * While the Plaintiff does have an equitable subrogation claim, the entity assigning Plaintiff all rights is Air Care, the carrier that replaced Defendant to promptly ship the goods so that the shipper-customer did not sustain any losses. As Plaintiff correctly argues, the claim at issue in this action is not for loss or damage to property. Thus, Plaintiff's subrogation claim does not arise under the Carmack Amendment because it is not the subrogation of the shipper's claim.
>
> Because Plaintiff could not reasonably be the holder of the bill of lading, nor is Plaintiff suing on behalf of or taking over the claim of its shipper-customer, Plaintiff has no claim against Defendant under the Carmack Amendment. Therefore, Plaintiff's claims against Defendant must arise under the brokerage agreement.
>
> Because Plaintiff's claims against Defendant are governed by the brokerage agreement rather than the Carmack Amendment, Defendant has failed to prove that federal preemption applies in this case."[79]

[76] Id.
[77] Id.
[78] Id.
[79] Id. at *4-5.

These cases represent only a sampling of the jurisprudence at it currently stands on this topic. In the case at bar, the claims do not fit squarely into the analysis of any of these cases. As noted above, the plaintiff sets forth two claims in its complaint, one for breach of contract and one for negligence. The damages sought are for a fuel advance to Matrix Transport, an advance for shipping services to ABF Freight, and the costs incurred by Overland Xpress in shipping the goods back to Ohio, then to Virginia for repair, and then to Texas.

The only contract mentioned in the complaint is one between Matrix Transport and Overland Xpress and the breach of contract claim only seeks recovery from Matrix Transport (who is no longer a party to this case as the claims against it have been settled). There being no contract between Overland Xpress and ABF Freight, the reasoning set forth in the *Exel*, *Intransit*, and *Edward Bros.* cases is not directly on-point to the situation currently before this court.

What remains in this case is a claim for negligence against ABF Freight. That claim alleges that ABF Freight acted in a negligent manner so as to cause damage to the property when the goods were delivered in late and damaged condition. However, despite the way that particular paragraph in the complaint is written, the damages sought are not for actual loss or injury to the property, and Overland Xpress has not been assigned the rights of the shipper under the bill of lading nor does it have a subrogation interest in any claim by the shipper.

While this is a close question, the court finds that these claims do not fall within the language or spirit of the Carmack Amendment. As such, there is no basis to dismiss the present action against ABF Freight.

CONCLUSION

The plaintiff's motion to dismiss is not well-taken and is hereby denied.

The defendant's oral motion to withdraw admissions is well-taken and is hereby granted.

The defendant's motion to dismiss is not well-taken and is hereby denied. Consequently, the defendant's motion for fees and expenses for frivolous conduct, which was based solely on the theory that the plaintiff's case would be dismissed under Civ.R. 12(B)(6), shall not be set for hearing and is hereby denied.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 6th day of May 2013 to all counsel of record and unrepresented parties.

_____
Administrative Assistant to Judge McBride