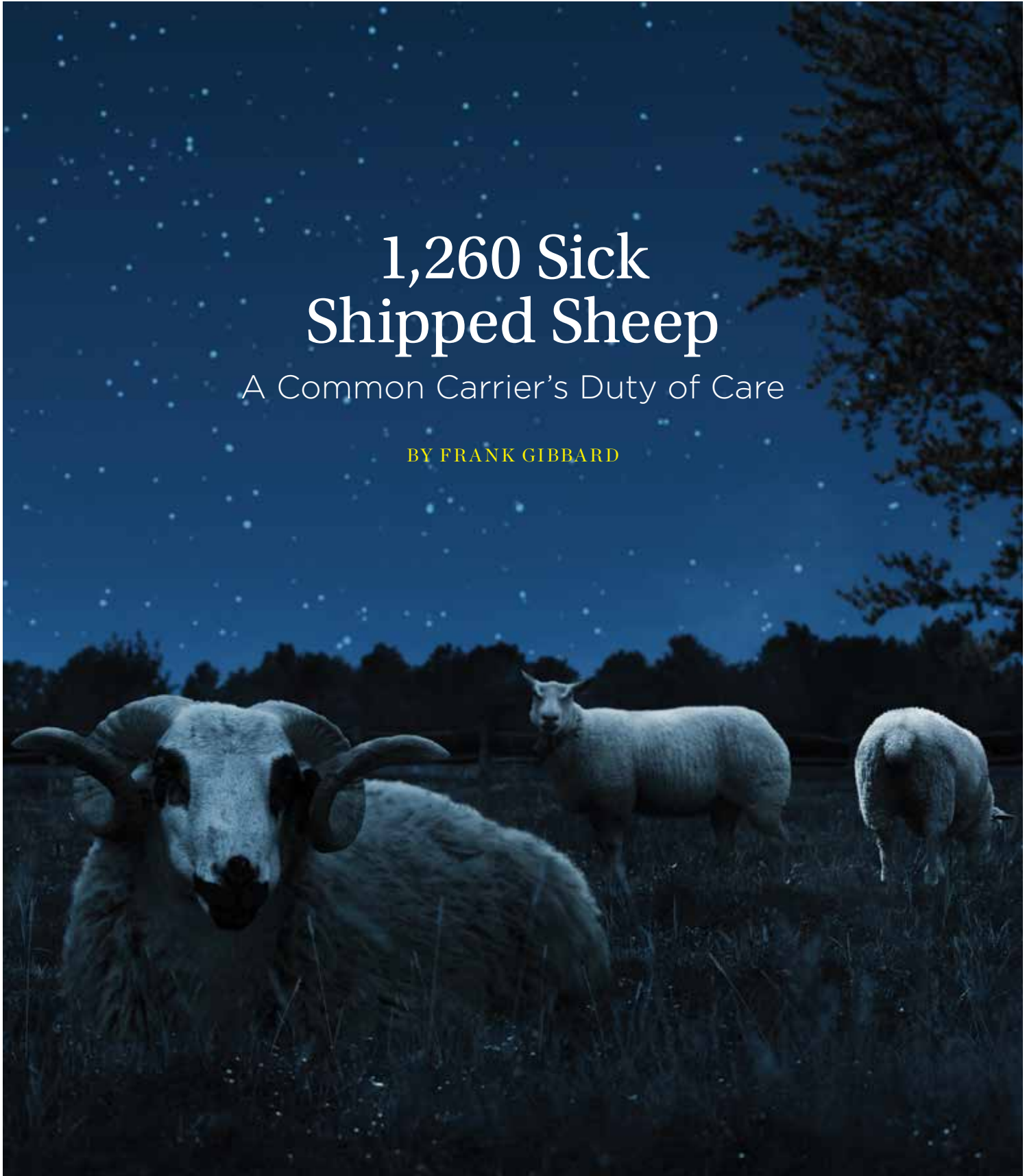


# 1,260 Sick Shipped Sheep

A Common Carrier's Duty of Care

BY FRANK GIBBARD



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**I**n 1913, an Ohio couple mailed their 8-month-old son to his grandmother by Parcel Post.<sup>1</sup> The couple paid 15 cents to ship the boy, who weighed just under the 11-pound limit for parcels.<sup>2</sup> The mail carrier picked the boy up and took him in his mail wagon to his destination a few miles away.<sup>3</sup> The short trip apparently did not require the carrier to care for the child. But according to the USPS website, other people also managed to ship children by mail in the early days, possibly for greater distances.<sup>4</sup> This leads to some interesting questions: If a child had to travel a longer distance, perhaps even overnight, who was responsible for caring for the child along the way? And what happened if the mail was delayed?

The USPS website doesn't answer those questions, but a 1912 Colorado case addressed similarly intriguing issues about caring for shipments of living beings. In *Colorado & Southern Railway Co. v. Breniman*,<sup>5</sup> the Colorado Court of Appeals considered a railroad's duty to care for sheep shipped from New Mexico to Fort Collins. When many of the sheep arrived dead or dying, and the rest scrawny and sickly, their owners sued the railroad for damages. A jury ruled in the plaintiffs' favor, and the railroad appealed.

### **The Sick Shipped Sheep**

On October 29, 1906, the plaintiffs' 1,260 sheep left Chama, New Mexico, traveling north on the Denver & Rio Grande Western Railroad (D&RGW). The plaintiffs had signed a shipping contract with the railroad to transport the sheep to Fort Collins. The plan was to feed and fatten them after their arrival in Fort Collins.

The animals completed the first leg of their journey over the D&RGW. On October 31, at about 8:00 in the evening, they arrived in Denver.

F.F. Breniman, the brother of plaintiff Frank P. Breniman, was traveling with the sheep. When he arrived in Denver, he went to the D&RGW office to see if the sheep could be immediately sent on to Fort Collins. But the railroad's representative told him the sheep would need to be turned over to the Colorado and Southern Railway Co. (C&S) to complete their journey. C&S's agent, however, refused to

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The next morning, November 1, Breniman went to C&S's office at the stockyards and asked when the sheep would be shipped. The agent replied he thought they would be shipped at 5:00 that evening. Breniman returned at 5:00 and was told they would be shipped on the 10:00 p.m. train. But around 10:00 he was told they would go out at midnight, and at midnight he was told they would go out at 3:00 a.m. At 3:00 a.m. the agent finally told him to go to bed and they would call him.

On the morning of November 2, Breniman again visited C&S's agent, who told him that the sheep had not yet been loaded because D&RGW had not turned over the bills of lading that accompanied them. Breniman then went

and got the D&RGW agent, who accompanied him to C&S's office.

At the office, Breniman and the D&RGW agent determined that the bills of lading had in fact been turned over the C&S agent. That agent then offered a different excuse, saying the sheep had not been "billed out" and "would not have been billed" even if the bills of lading were delivered, because "where they were accompanied it was expected that the man in company would order them loaded," and Breniman hadn't given the order to load them.<sup>7</sup> The agent now finally ordered cars to be allocated and the sheep to be loaded. He admitted there had been a general shortage of cars, but he later denied that he knew of the shortage or that it affected the loading of the plaintiffs' sheep.

Several railroad companies had agencies and offices at the stockyards. The yards were very crowded when the plaintiffs' sheep arrived. Perhaps for this reason, during their stay in the yard, the plaintiffs' sheep "were confined, without shelter, in open pens in cold and stormy weather, and the yards [were] deep in mud without facilities for feeding."<sup>8</sup> When the sheep finally arrived in Fort Collins, 12 of them were dead. Within a few days, another 160 of them had died.<sup>9</sup> The rest of them were "so weak that many of them had to be hauled to the feeding pens."<sup>10</sup>

Frank Breniman and another plaintiff sued the C&S in Larimer County District Court. The primary witnesses at trial were F.F. Breniman and T.J. Burns, who was C&S's agent at the stockyard. Burns stated he couldn't remember when he received the bills of lading from D&RGW. His waybills showed that the sheep had been "consigned to plaintiffs at Ft. Collins with final destination at Omaha, under a through rate with 'feed in transit' provisions, but not on a through contract."<sup>11</sup> Burns explained that there were two reasons for the delay: a shortage of cars and Breniman's failure to order that the sheep be loaded.

The jury ruled in the plaintiffs' favor.

### **The Appeal**

C&S had raised several defenses to its liability for damage to the plaintiffs' sheep. One was founded

on a “limited liability live stock contract” that the plaintiffs allegedly signed with C&S on November 4.<sup>12</sup> This contract required plaintiffs to file any claim for loss or damage within 10 days from when the sheep were unloaded at their destination, “and before said stock has been mingled with other stock.”<sup>13</sup> In exchange for a “reduced rate,” the contract also purportedly waived any causes of action for damages “by reason of any written or verbal contract for the shipment of said cattle [sic], or any of them, prior to the execution hereof.”<sup>14</sup> The court of appeals rejected this theory, noting that “the contract was not entered into, nor mentioned, until the 4th day of November, whereas the alleged acts or default of defendant by which the injuries complained of were caused occurred between the morning of November 1st and the afternoon of November 4th when the contract was signed.”<sup>15</sup> There was no indication that the contract acted retrospectively, except in its waiver provision, which the court held was void because the railroad “had no right, at the time of shipment, to impose upon the shipper a contract for exemption from liability for damages which had already occurred.”<sup>16</sup>

A significant question in the case was whether C&S could be held liable for the stockyard’s failure to properly care for the sheep. The court of appeals concluded that it could, because there was sufficient evidence from which the jury could have found that the pens in which the sheep were kept, though part of the stockyards, were furnished by the railroad or were part of its system for shipping livestock. And, as a common carrier, the railroad was responsible “to provide suitable and necessary means and facilities, such as good and sufficient stock pans and yards for receiving, loading, and unloading live stock offered it for shipment, and for its delivery to the consignee, and for stock unloaded en route to be fed.”<sup>17</sup>


The real question was therefore a factual one: were the sheep delivered to and accepted by C&S on November 1 for immediate shipment? If they were, neither the shortage of cars nor the fact that it was the stockyard that had failed to properly care for the sheep would excuse C&S from liability. The court of appeals held that the jury was properly

instructed on this point and that its verdict in favor of the plaintiffs was sufficiently supported by the evidence.

Finally, the court turned to the railroad’s post-verdict motion for a new trial on the ground of newly discovered evidence. C&S claimed it had discovered that the plaintiffs’ written contract with D&RGW “did not require delivery to [C&S], and contained no reference to shipment to any point beyond Denver, except Chicago [sic],” and that the transfer sheet from D&RGW to C&S showed “that said transfer could not have been delivered to [C&S] until the sheep had been long confined in the pens, and the damage complained of had already been sustained.”<sup>18</sup> Although C&S’s attorneys filed affidavits explaining why they had failed to present the contract and transfer sheet at trial, they did not attach the contract to the affidavits or set forth its substance. Therefore, neither the trial court nor the court of appeals could discern what effect the written contract

might have had at trial. The court concluded that “[c]ounsel’s affidavit fails to show diligent effort to secure this evidence, which it seems ordinary caution would have required them to investigate prior to or during the trial.”<sup>19</sup> The trial court thus did not abuse its discretion by denying the motion for a new trial. The court of appeals affirmed the judgment in favor of the plaintiffs.

### Conclusion

1912 must have been a tough year for animal lovers on the Colorado Court of Appeals. In addition to *Breniman*, in that year the court decided *Seigle v. Bromley*, a nuisance suit that detailed appalling and disgusting conditions and animal cruelty on a defendant’s hog farms.<sup>20</sup> Today, the 28-hour law mentioned in *Breniman* requiring the feeding and watering of transported livestock remains in effect, and other, more recent laws have also been enacted to protect animals during transport.<sup>21</sup> 



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### NOTES

1. <https://facts.usps.com/fun/#fact386>.

2. *Id.*

3. *Id.*

4. *See id.*

5. *Colo. & S. Ry. Co. v. Breniman*, 125 P. 855 (Colo.App. 1912).

6. *See id.* at 857. The Union Stockyards, founded in 1881, evolved into the location of Denver’s well-known National Western Stock Show and will soon become the National Western Center. <https://nationalwesterncenter.com/about/what-is-the-nwc/history-about-the-site>.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 856.

13. *Id.*

14. *Id.* (internal quotation marks omitted).

15. *Id.* at 859.

16. *Id.*

17. *Id.* at 858.

18. *Id.* at 860.

19. *Id.*

20. *Seigle v. Bromley*, 124 P. 191 (Colo.App. 1912).

21. *See* Animal Welfare Institute, “Legal Protections for Farm Animals During Transport,” <https://awionline.org/sites/default/files/uploads/documents/21LegalProtectionsTransport.pdf>. *See also* 49 USC § 80502.