

# ***TRANSDIGEST***

**Transportation & Logistics Council, Inc.**

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## **Still Time to Register – TLC's 45<sup>th</sup> Annual Conference**

- **IPS Worldwide Files for Chapter 11 Bankruptcy**
- **NEMF Files for Chapter 11 Bankruptcy**
- **Driver Classification Update**
- **Dangers of Cargo Misdeclaration**
- **NTSB “Most Wanted” List**
- **Impacts of ELD Use**
- **The Need to Properly Plead a Case**
- **More Q&A's**

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## GUEST EDITORIAL

### THE AMAZON EFFECT

By a TLC Board Member

The Amazon Effect. This is something that is being discussed more and more frequently, in the “ecommerce” world. But, what exactly does The Amazon Effect mean? Literally defined, it generally refers to the challenges that many retail, brick-and-mortar locations face when trying to compete with Amazon. Their vast selection, low prices, varied shipping options, “Prime” membership subscriptions, and free returns make it difficult for many retailers to compete.

This does not necessarily mean that Amazon is completely eliminating the competition though. Studies show that their success has been detrimental to some companies, but many are being creative about how they are adjusting to this new way of competing. Basically, the Amazon Effect is just another reason the retail environment is always in flux.

Of course, this challenge doesn’t just affect “ecommerce” providers; however, “ecommerce” providers are the ones who are affected the most and need to do everything possible to maintain their customer base. Through higher market trend monitoring and staying on the creative forefront, “ecommerce” providers have a winning chance at surviving the Amazon Effect.

Whether good or bad, the U.S economy and the global economy are knee deep into the world of the Amazon Effect. In an ever increasing world of faster and cheaper, consumers will continue to expect everything to deliver “right now” or as soon as possible. As long as “ecommerce” providers are able to continue to be creative in their approach, there may be room for everyone to participate.

## ASSOCIATION NEWS

### STILL TIME TO REGISTER FOR TLC’S 45<sup>TH</sup> ANNUAL CONFERENCE

**Get away from that desk!** Come and join other transportation and logistics professionals at the Transportation & Logistics Council’s 45<sup>th</sup> Annual Conference in Memphis on March 25<sup>th</sup> through 27<sup>th</sup>. Not only is it the best educational conference in the industry, but a great opportunity for networking at our Hospitality Suites and President’s Reception.

The Council has assembled an impressive list of speakers and presenters for the educational sessions, including top experts and experienced practitioners who will give attendees practical information and advice that they can use in their everyday business.

Starting with the “kickoff” on Monday morning, “The Transportation Industry - Updates and Trends”, attendees will enjoy general sessions and workshops on a variety of hot topics, such as “The Amazon Effect”, “Impact of the ELD Mandate”, “Dealing with the Capacity Crunch”, as well as TLC’s usual complement of sessions covering contracting, freight charges, insurance and freight claims, including the ever popular “Law of The Land, Law of The Jungle”. Click here to view the full [Conference Program](#).

And, for those that want an in-depth educational experience, before the Conference on Sunday, March 24<sup>th</sup>, the Council also offers three optional full-day seminars - **Contracting for Transportation & Logistics Services, Freight Claims in Plain English**, and **Transportation, Logistics and the Law**, all presented by leading transportation attorneys.

Visit TLC’s Website at [www.TLCouncil.org](http://www.TLCouncil.org) for info on the [Full-Day Seminars, On-Line Registration](#) and [Hotel Accommodations](#), or contact TLC by phone at (631) 549-8984.

### **What to do: Memphis Attractions**

Memphis has a diverse offering of attractions with over 60 unique choices including museums, parks and zoo. However, perhaps the most unique cultural aspect of Memphis is its history in music, Memphis Blues, Soul music, Elvis’ Graceland and the incomparable Beal Street.

Visit <https://www.memphistravel.com/> for more details.

In addition, Southern Living just named Memphis World’s Best Destination of 2019. Visit <http://www.msn.com/en-us/travel/tripideas/this-southern-city-was-just-named-the-worlds-best-destination-to-visit-for-2019/ar-BBSEfSS?li=BBnb7Kz> for more information.

## **SUPPORT THE CONFERENCE**

In addition to the benefits of great educational sessions and networking opportunities, we thought that you might want to get your company’s services and/or products out to others in the industry. There are three ways you can do this:

### **Be a Sponsor:**

Among the traditional amenities of the Transportation & Logistics Council's Annual Conferences are the Hospitality Suites on Sunday and Monday night of the Conference. Complimentary hors d'oeuvres and cocktails help create a welcoming atmosphere for attendees, an opportunity to meet both old and new friends, and to network with other transportation professionals.

These Hospitality Suites are funded entirely by contributions from our sponsors, and we would like to ask you make a contribution. We have three sponsorship levels:

- Bronze \$300
- Silver \$500
- Gold \$1000

Your company name will be prominently displayed at the entrance to the Hospitality Suite area, and will be published in the conference program, the TransDigest and on the website. See Sponsorship form attached.

### **Be an Exhibitor:**

Each year we invite companies that may be interested in exhibiting their products and services to our attendees. This is an excellent opportunity for companies to show off their products and services to a select group of attendees representing shippers, carriers, intermediaries and related transportation service providers. See Exhibitor information attached.

### **Donate Door Prizes:**

A door prize can be anything with your company logo on it or something that represents your company. Door Prizes can be sent directly to the hotel. Please have them arrive no sooner than March 21<sup>st</sup>. Examples: company products, pens, mugs, T-Shirts, keychains, etc.

Hilton Memphis – Attn: TLC/Diane Smid  
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Please call Diane or Katie in the office if you are sending an item so you can be properly acknowledged or if you have any questions: 631-549-8984 or email at [diane@transportlaw.com](mailto:diane@transportlaw.com).

### **TLC RECOGNIZES AND THANKS THOSE WHO HAVE ALREADY STEPPED UP:**

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<b>HAZMAT</b>
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**THE PROBLEM OF MISDECLARATION**

Cargo misdeclaration is a significant and ongoing problem, and can take various forms. The recently implemented (July 2016) requirements that container weights be verified prior to being loaded on a ship have helped to resolve the issue of misdeclared weights. However, misdeclared contents can be just as, or even more dangerous.

This problem becomes acute when hazardous materials are misdeclared. Serious fires are reported on containerships roughly every 60 days. In an opinion article published in Lloyd's Loading List, TT Club's risk management director Peregrine Storrs-Fox said serious fires occur far too frequently on modern containerships, with dangerous goods that are "not always declared or packed correctly" often implicated and "ignite to cause mayhem".

The ocean carrier needs to know the actual contents of the container in order to stow it properly, and if there is a problem, such as a fire, how to properly deal with it. Some fires can be extinguished with water, others become more dangerous when water is applied.

Storrs-Fox said a lack of knowledge about the hazardous nature of the commodities being packed into a container may be the case in a minority of circumstances, or poorly packed material not correctly treated given its dangerous characteristics. But he added: "Rather more sinisterly, there is too much evidence that dangerous cargoes are misdeclared due to a premeditated attempt to avoid the added costs and complexity that accrue from transporting such consignments by land or sea in compliance with regulations.

Even if not a premeditated attempt at obfuscation, this problem can be a result of the myriad of different cargo classifications and codes that can hamper shippers' efforts to properly declare dangerous cargoes to

ocean carriers. Storrs-Fox said some dangerous goods suffer from the sheer number of ways they can be described. Gard, the Norwegian headquartered protection and indemnity club, has, for example, identified 14 alternative descriptions of calcium hypochlorite used in shipping documents, including bleaching powder, Caporit, CCH, chlorinated lime, and lime chloride.

Calcium hypochlorite is suspected as the cause of the fire on board the 6,350-TEU container ship *APL Austria* off the coast of South Africa in February 2017.

Applying complex and mismatching coding regimes for differing purposes, such as customs and transport, let alone diverse regional and national requirements, can potentially lead to incorrect descriptions of materials, Storrs-Fox added.

Recent onboard fires (*APL Vancouver* on Jan. 31 and the *Yantian Express* on Jan. 3) have caused a renewed focus on misdeclaration and improper packing of dangerous goods and stakeholders are taking action or enhancing programs already in place.

Hapag-Lloyd has teamed up with IBM to promote and further develop the Cargo Patrol software, which scans bookings for suspicious descriptions, including synonyms or brand names, instead of correct designations, across the industry. According to Hapag-Lloyd:

Cargo Patrol scans the entire Hapag-Lloyd booking environment to detect undeclared dangerous or suspicious items. Today, we detect close to 1,200 potential hits per day of shipments that require a deeper investigation. With nearly 7,000 search terms in our system, we can now pinpoint at-risk commodities quickly. In 2014 and 2015, Hapag-Lloyd shut out close to 7,000 shipments from being transported due to improperly declared dangerous goods or other sensitive commodities.

More recently, on January 10, 2019 Maersk announced the implementation of its “Physical Container Inspection Pilot” in North America:

Maersk and other carriers in the industry are working to improve safety and reliability in the Containerized Maritime Supply Chain, by verifying that cargo descriptions match actual contents of the container, and that the contents of the container are correctly stuffed, lashed and secured.

As part of this work, we have recently implemented a Physical Container Inspection Pilot within North America. We are currently performing inspections for Import and Export cargo into the ports of Newark Berth 88, Houston Bayport, Miami Pomtocol and New Orleans Ceres terminals.

The data collected through this pilot may be used to develop procedures that better ensure the accuracy of cargo descriptions provided to Maersk, as well as improve the use of the Code of Practice for Packing of Cargo Transport Units (CTU Code). If you would like more information on the CTU code, please see the following International Maritime Organization (IMO) website: <http://www.imo.org/en/ourwork/safety/cargoes/cargosecuring/pages/ctu-code.aspx>.

The randomly selected containers are being inspected by NCB (National Cargo Bureau), and the cost for this inspection will be paid for by Maersk. We will endeavour to have the inspections completed as quickly as possible to reduce the delay in the intended transport of the container, however if a container is discovered to be inadequately stuffed, lashed, and secured, or found to contain mismatching cargo compared to the given declaration, it may be necessary to take corrective actions for onward transportation. Such corrective actions may involve reworking the container to ensure it is compliant with given regulations. The cost for such reworking actions to resume transport of the container will be charged to the Shipper / Consignee (depending on direction of the container). Since the inspections are being performed in the United States, a

container that has already made sea transit may be selected for inspection. Containers that have already undergone inspections at the loading port may also be selected, as selections are being made at random.

By performing these container inspections, we hope to remove some of the risk from misdeclared or incorrectly stuffed containers for all parties involved in handling and transporting cargo, as well as work towards an overall industry improvement of safety and reliability in the Containerized Maritime Supply Chain.

Unfortunately, when there are these types of misdeclaration problems, the impacts can be far reaching; with lives lost, other cargo and even the vessel itself being destroyed. Every effort must be made to keep the supply chain safe.

Visit <https://www.maersk.com/news/2019/01/10/physical-container-inspection-pilot> for the Maersk announcement and visit the following for further reading:

<https://www.lloydsloadinglist.com/freight-directory/adviceandinsight/Ocean-freight-must-tackle-%E2%80%98the-criminality-of-cargo-misdeclaration%E2%80%99/71731.htm>

<https://shippingandfreightresource.com/maersk-line-clamps-down-on-container-misdeclaration/>

<https://www.lloydsloadinglist.com/freight-directory/letters/Fire-in-the-hold/71666.htm#.WsdTC9PwYkg>

## MOTOR

### DRIVER CLASSIFICATION UPDATE

#### NLRB

Continuing with the saga of how drivers are to be classified, the National Labor Relations Board (“NLRB”) issued a decision January 25, 2019 revising its test to determine whether workers are employees or independent contractors. This decision reversed a 2014 decision in the *FedEx Home Delivery* case and reinstituted its longstanding policy on determining whether a worker is an independent contractor. In a 3-1 decision, the NLRB ruled the board in the FedEx decision had “impermissibly altered the common-law test and longstanding precedent” and reinstituted a longstanding policy on determining whether a worker is an independent contractor.

The case under consideration is related to an effort to unionize drivers for SuperShuttle, a shared-ride service, in Dallas. Prior to 2005, SuperShuttle classified workers as employees, including regular hourly wages and other benefits. In 2005, the company changed its business model and required all drivers to sign 1-year Unit Franchise Agreements (UFAs) that expressly characterize the drivers as non-employee franchisees operating independent businesses. These franchisees are required to supply their own vans and to pay SuperShuttle DFW a franchise fee and a flat fee for the right to utilize the brand and dispatch/payment processing software. Franchisees work no set schedule or number of hours per week. These franchisees then operate under the terms of a shared-ride contract signed between the Dallas-Fort Worth International Airport Board and SuperShuttle DFW.

The board concluded that franchisees are not statutory employees under the National Labor Relations Act (“NLRA”) but rather independent contractors excluded from the law’s coverage. It ruled that the franchisees’ leasing or ownership of their work vans, their method of compensation, and their nearly unfettered control over their daily work schedules and working conditions provided the franchisees with significant



entrepreneurial opportunity for economic gain. The FedEx decision had modified the applicable test for determining independent-contractor status by severely limiting the significance of a worker's entrepreneurial opportunity for economic gain, the NLRB said.

In its ruling the NLRB determined that the workers were independent contractors, and thus could not join in union organization efforts, because:

1. The drivers were free from control by SuperShuttle for most aspects of their work (such as scheduling or setting up dedicated routes with hotels and customers);
2. The drivers retained all fares and tips earned from customers, and only compensate SuperShuttle DFW for their work by paying the flat fees specified in the UFA;
3. The drivers made significant investments in their respective businesses by providing the shuttle vans;
4. SuperShuttle did not perform meaningful general oversight as to how the drivers conducted their daily work; and
5. The UFA agreement was clear and explicit about the expectation that the drivers and SuperShuttle DFW were entering into an independent contractor relationship.

Although the case specifically involved the shared-ride industry and not freight transportation, the analysis largely would be expected to apply to trucking – especially considering that the board's action explicitly overrules the standard adopted in FedEx Home Delivery. For the NLRB's ruling in and other materials related to *SuperShuttle DFW, Inc.*, visit <https://www.nlr.gov/case/16-RC-010963>.

### **California**

In California, on February 6 the International Brotherhood of Teamsters (“IBT”) filed a petition with the U.S. Court of Appeals for the 9<sup>th</sup> Circuit for review of FMCSA's decision to preempt California's meal and rest break guarantees for workers. Also participating in the lawsuit are Teamsters Local 848 in Long Beach, California, and drivers for Sysco Corporation, NFI Industries, XPO Logistics and Pac 9 Transportation. The Teamsters Local 2785 in San Francisco had previously filed a petition for review with the 9th Circuit in late December.

The Teamsters petition for review is basically a pro forma step to start the process of appeal. The document outlines in three pages the union's position as to why the petitioners are harmed by FMCSA's determination. The rest of the 47-page filing is just a copy of the agency's preemption determination. For a copy of the Teamsters petition, visit [http://bit.ly/Teamsters\\_Preempt](http://bit.ly/Teamsters_Preempt). For FMCSA's preemption determination in the Federal Register, visit <https://www.federalregister.gov/d/2018-28325>.

### **Indiana**

The Indiana Supreme Court found a firm's drive-away drivers are independent contractors. On January 23, 2019 the Court ruled that a company that matches drivers with customers that need large vehicles driven to them properly classified those drivers as independent contractors.

The Indiana Department of Workforce Development had determined that the company, Q.D.-A., Inc., had misclassified the drivers and should have paid unemployment taxes for them. The court ruled that Q.D.-A., Inc. had established that the drivers met a three-part test under the Indiana Unemployment Compensation Act for treating the drivers as independent contractors. The act presumes a worker is an employee unless the employer can establish that the worker: (1) is free from the employer's control and direction, (2) performs a service outside the usual course of the employer's business, and (3) receives a commission or operates an independently established trade, occupation, or profession.

For a copy of the court's decision, visit <https://www.in.gov/judiciary/opinions/pdf/01231901msm.pdf>.

NOTE: Thanks to Henry Seaton's "Regulatory Update" for the above.

## **IPS WORLDWIDE FREIGHT PAYMENT SERVICE FILES FOR BANKRUPTCY**

It has been a while since we have had to report on a third party freight payment and audit service filing for bankruptcy. Unfortunately, on January 25, 2019, IPS Worldwide of Ormond Beach, FL filed for Chapter 11 in the U.S. Bankruptcy Court for the Middle District of Florida leaving many shippers in the lurch for significant sums of money.

The failure of a freight payment and audit service provider is particularly painful for shippers, who can get caught owing millions due to the nature of the business. A shipper advances funds to the payment company, who is supposed to hold those funds in escrow to pay the shipper's freight bills to the carriers, once the freight bills have been audited for accuracy. The problems arise when the shipper's funds are not segregated and end up being used for matters other than paying the carriers. These problems can range from the funds being used to cover the payment company's operating costs, to poor management resulting in a Ponzi scheme type situation where new funds are being used to pay prior obligations, to outright theft and fraud.

For the shipper it doesn't really matter why the funds were not used to make payments to the carriers. The shipper is on the hook to the carriers for the services that were provided, leaving the shipper in the position of having to pay for the transportation service a second time.

According to IPS' Chapter 11 filing, more than \$121 million is owed to IPS' 20 largest customers, including \$41.64 million to Stanley, \$28.78 million to Alcoa and \$16.96 million to Arconic, with its total liabilities listed as being between \$100 million and \$500 million. It also listed its assets as being less than \$50,000. All the companies that advanced money to IPS to pay their freight transportation bills will now face collection efforts from the carriers that got stiffed for the services provided.

IPS was started in 1998 by William Davies, who serves as president. According to the company's website, IPS processes more than 35 million freight invoices valued at more than \$8 billion a year.

The last significant filing of this type was in 2013 when TransVantage and Trendset went under, also leaving shippers in the lurch for tens of millions of dollars when the funds advanced were not used to pay carrier bills.

The bankruptcy case is 6:19-00511.

## **NEMF FILES CHAPTER 11**

On February 11, 2019 New England Motor Freight ("NEMF") filed for Chapter 11 bankruptcy liquidation and shutdown. NEMF is part of the larger Shevell Group of Companies, and the Chapter 11 filing involves ten related businesses, including truckload carrier Eastern Freightways, Apex Logistics, and Carrier Industries, a warehousing and dedicated trucking business. The trucking company's origins go back to 1918. Chairman and CEO Myron P. "Mike" Shevell acquired NEMF in 1977.

Shevell Group ranked No. 70 on the Transport Topics Top 100 list of largest for-hire carriers in North America with consolidated revenue of \$439.5 million in 2017 and NEMF was the 19<sup>th</sup> largest less-than-truckload ("LTL") carrier in the U.S.

NEMF was the second largest regional LTL carrier in New England with over \$400 million in revenue in 2017. Based in the Port of Elizabeth, New Jersey, NEMF had more than 35 terminals in a network stretching from Bangor, Maine, to Chicago to Roanoke, Virginia. Altogether, it employed 3,745 people and operated 1,500 company-owned tractors, 247 owner-operator tractors and 5,596 trailers.

It is not clear just what caused the NEMF bankruptcy, but a severe driver shortage and refusal of banks to extend credit have been suggested as potential causes.

The loss of NEMF is likely to have an immediate impact on capacity for northeastern shippers and result in an increase in pricing, at least for the short term.

Vincent Colistra, a senior managing director with Phoenix Management Services and chief restructuring officer for NEMF promised an “orderly wind down” of NEMF operations.

NEMF reportedly listed assets, in its filing in the U.S. Bankruptcy Court in Newark, N.J., of \$100 million to \$500 million and debts between \$50 million and \$100 million and \$59 million owed to four banks as the company’s largest unsecured creditors.

Visit <http://www.nemf.com/new-england-motor-freight-files-voluntary-chapter-11-petition/> for NEMF’s announcement

## **COST OF TRUCK PARKING SHORTAGE**

According to American Transportation Research Institute (“ATRI”) Vice President of Research Dan Murray, his organization’s research shows the average driver spends 56 minutes a day looking for parking and the shortage of truck parking costs drivers \$4,600 a year.

This is a problem that creates frustration for drivers in addition to the direct loss of compensation for time spent looking for truck parking.

One of the issues, according to NATSO’s (an organization representing travel plaza and truckstop owners and operators formerly called the National Association of Truck Stop Operators) CEO Lisa Mullings is that incentives are needed to encourage the truck stop industry to make more parking available. She suggests that it would be a better option for drivers to pay to reserve a spot rather than spending nearly an hour a day looking for free spots or parking unsafely on ramps or other locations.

To view ATRI’s 2018 truck parking survey analysis, visit [https://trucksparkhere.com/wp-content/uploads/2018/09/Phase-2-MAASTO-Truck-Parking-Survey-Report\\_OnlineVersion.pdf](https://trucksparkhere.com/wp-content/uploads/2018/09/Phase-2-MAASTO-Truck-Parking-Survey-Report_OnlineVersion.pdf).

## **ELECTRONIC LOGGING DEVICES**

On January 4, 2019 researchers published a study reviewing driver inspections and federally reported crashes between January 1, 2017 and September 1, 2018 focusing on the impacts of the implementation of the electronic logging device (“ELD”) rules and to assess their effectiveness.

According to the study abstract:

ELDs are harder to manipulate than traditional handwritten paper logbooks, and thus make it more difficult for drivers to violate restrictions on their working hours without getting caught by government inspectors. Because the work-hour restrictions (known as “hours-of-service” (HOS) regulations) are designed to reduce driver fatigue, the ultimate goal of the mandate was to reduce accidents on roads and highways. We combine detailed data from millions of driver inspections and all federally-recordable crashes from January 1<sup>st</sup>, 2017 through September 1<sup>st</sup>, 2018 to assess the effectiveness of the mandate. Using a difference-in-differences strategy, we show the mandate clearly achieved its first-order effect: drivers increased their compliance with HOS regulations, with drivers for small carriers most affected because many large carriers had already adopted ELDs and violated HOS regulations infrequently prior to the mandate. However, there is no evidence to suggest that the number of accidents decreased. Our results show that accident counts for small carriers did not fall relative to large carriers, and may have increased. Further,

drivers for small carriers appear to have increased their frequency of unsafe driving (e.g., speeding) in response to the productivity losses caused by the mandate, which could explain why accidents did not decrease. We discuss implications for policymakers.

More specifically, in their discussion the researchers noted that they failed to observe significant accident reductions from smaller firms as the gains from fatigue reduction were offset by increases in unsafe driving behavior. “Hardening the HOS constraint reduces per-worker hours and workers may compensate for this lost income by driving more intensively, namely, covering more miles per hour.” They found that after the HOS mandate, unsafe driving violations by owner operators increased by 23.4% to 33.3% while speeding violations specifically increased 23% to 31%.

Visit [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3314308](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3314308) for access to the study.

## **NTSB’S MOST WANTED LIST OF TRANSPORTATION SAFETY IMPROVEMENTS**

The National Transportation Safety Board (“NTSB”) on February 4, 2019 announced its 2019-2020 “Most Wanted List of Transportation Safety Improvements”. First issued in 1990, the NTSB Most Wanted List serves as the agency’s primary advocacy tool to help save lives, prevent injuries, and reduce property damage resulting from transportation accidents (the list covers all modes of transportation).

According to the news release:

The 10 items on the NTSB’s 2019 – 2020 Most Wanted List of Transportation Safety Improvements are:

- Eliminate Distractions
- End Alcohol and Other Drug Impairment
- Ensure the Safe Shipment of Hazardous Materials
- Fully Implement Positive Train Control
- Implement a Comprehensive Strategy to Reduce Speeding-Related Crashes
- Improve the Safety of Part 135 Aircraft Flight Operations
- Increase Implementation of Collision Avoidance Systems in All New Highway Vehicles
- Reduce Fatigue-Related Accidents
- Require Medical Fitness – Screen for and Treat Obstructive Sleep Apnea
- Strengthen Occupant Protection

“The 2019 – 2020 Most Wanted List advocates for 46 specific safety recommendations that can and should be implemented during these next two years,” said NTSB Chairman Robert Sumwalt. “It also features broad, longstanding safety issues that still threaten the traveling public.”

One of the perennial NTSB concerns is operator fatigue, and several “most wanted” recommendations to Federal Motor Carrier Safety Administration (“FMCSA”) address the issue, including:

- Incorporate scientifically based fatigue mitigation strategies into the hours-of-service regulations for passenger-carrying drivers who operate during the nighttime window of circadian low.
- Require motor carriers to adopt fatigue management programs based on the North American Fatigue Management Program.
- Develop and implement a plan to deploy in-vehicle technologies that reduce fatigue-related crashes.
- Implement a program to identify commercial drivers at high risk for obstructive sleep apnea (OSA) and require that those drivers show evidence that they’ve been appropriately evaluated and treated

before granting them unrestricted medical certification. Disseminate guidance for commercial drivers, employers, and physicians about identifying and treating OSA.

- Provide certified medical examiners easy access to FMCSA’s 2016 Medical Review Board guidance on OSA.

NTSB has long favored use of technology to address common safety hazards. The agency reiterated its longstanding support for speed limiters. It called on regulators to develop performance standards for advanced speed limiting technology – such as variable speed limiters and intelligent speed adaptation devices – for heavy vehicles. All newly manufactured heavy vehicles should be equipped with such devices, NTSB said. To reduce collisions, NTSB also advocates the development of federal standards for collision warnings systems and automatic emergency braking in commercial vehicles, and it recommended that both technologies be required for all highway vehicles.

Visit <https://www.nts.gov/news/press-releases/Pages/mr20190204.aspx> to view the NTSB’s press release and visit <https://www.nts.gov/safety/mwl/Documents/2019-20/2019-20-MWL-SafetyRecs.pdf> to read the NTSB’s most wanted list in full.

## OAKLAND POSTS TRUCK “TURN TIMES”

The Port of Oakland’s online shipping portal, which was launched last May, now provides trucker turn times in a near real-time environment, including transaction times for picking up and dropping off containers at its four marine terminals. From the January 29, 2019 press release:

An online portal at the Port of Oakland today expanded to include transaction times for harbor truckers. The Port said its digital enhancement tells drivers how long it takes to pick up or drop off cargo. The feature addresses industry demand for timely supply chain performance data at U.S. ports.

“This is a big step forward on our digital platform,” said Port of Oakland Maritime Director John Driscoll. “It helps take the guesswork out of scheduling for truckers, dispatchers and the owners of cargo that moves through Oakland.”

Known as a turn time, the measurement tracks how long it takes drivers to transact business at marine terminals. The terminals are where container ships load and unload. Trucker transactions at the terminals include everything from delivering exports to collecting imports or empty containers.

The Port’s online gateway – called the [Oakland Portal](#) – provides [average turn times](#) for the most recent 30-minute period. The Portal calculates turn times for each of Oakland’s four terminals. The Port said its turn times don’t include trucker waiting periods outside terminal gates.

The Port said turn times would improve cargo flow by:

- Signaling to truck drivers or dispatchers if terminals are backed up;
- Providing cargo owners a better sense of when to expect deliveries; and
- Highlighting potential bottlenecks at marine terminals.

Turn times are the newest addition to the Oakland Portal, which went live last May. The Portal is Oakland’s digital collaboration platform, aggregating shipping information from every marine terminal in the harbor.

Dispatchers can now use the portal to signal to drivers if terminals are backed up, and if so, warn drivers about where potential bottlenecks at the terminals exist. Beneficial cargo owners (“BCOs”) can access the portal to get a better sense of when to expect delivery of their shipments.

Ports around the country are increasingly taking advantage of information technology to make this sort of information available to stakeholders.

Visit <https://www.portofoakland.com/press-releases/port-oakland-adds-harbor-trucker-turn-times-online-portal/> to view the press release.

## OCEAN

### FMC WELCOMES NEW COMMISSIONERS

From a January 28, 2019 Federal Maritime Commission (“FMC”) press release:

Mr. Louis E. Sola of Florida and Mr. Daniel B. Maffei of New York were sworn-in as Commissioners of the Federal Maritime Commission on January 23, 2019. Commissioner Sola will serve for a term expiring on June 30, 2023, and Commissioner Maffei will serve for a term expiring on June 30, 2022. Commissioners Sola and Maffei were both nominated by President Trump on November 15, 2018, confirmed by the United States Senate on January 2, 2019, and appointed to the Commission by the President on January 15, 2019.

Commissioner Sola served on the Florida Board of Pilots Commissioners and presided on the probable cause panel for maritime incidents. Previously, he was a Senior Sales Executive with Campers & Nicholson International and is a licensed international Ship Broker. He served as a consultant with Arden & Price authoring studies for the Inter-American Development Bank during the United States handover of the Panama Canal. Additionally, he served as an Adjunct Professor at Florida State University-Republic of Panama. Commissioner Sola is tri-lingual and a two-time graduate of the Defense Language Institute, Presidio of Monterey. He served as a Strategic Debriefing for the United States Army Intelligence and Security Command and subsequently in Counter Intelligence with the United States Southern Command. Commissioner Sola earned his B.S. in Management from the Nova Southeastern University and M.S. in International Finance from the University of Illinois.

Commissioner Maffei most recently served as Professor of Practice at the George Washington University Graduate School of Political Management. Previously, he served two years on the Federal Maritime Commission and two terms in the United States Congress representing portions of upstate New York. During his time in the House of Representatives, he served on the Armed Services, Science & Technology, Financial Services, and Judiciary Committee and was the Ranking Democrat on the Science and Technology Oversight Subcommittee. He has taught at the New York State College of Environmental Science and Forestry and was a Senior Fellow at Third Way and the Center for the Study of the Presidency & Congress. Prior to his service as a Member of Congress, Commissioner Maffei served in senior staff positions for Senator Bill Bradley, Senator Daniel Patrick Moynihan, and the House Ways and Means Committee. Commissioner Maffei earned his B.A. in History from Brown University, M.S. in Journalism from Columbia University, and M.P.P. from Harvard University.

Visit [https://www.fmc.gov/fmc\\_welcomes\\_commissioners\\_sola\\_and\\_maffei/](https://www.fmc.gov/fmc_welcomes_commissioners_sola_and_maffei/) for the press release.

## QUESTIONS & ANSWERS

By George Carl Pezold

### FREIGHT CLAIMS – SALVAGE OF FOOD GRADE PRODUCTS

**Question:** We have a cargo claim where the truck rolled over in a ditch, it held food grade product and the customer deemed it a total loss. The insurance company is asking for approval to salvage or to get a salvage allowance in exchange for disposal. The customer will not allow salvage as the product was private label packaging.

The problem is the insurance company wants a salvage allowance. Is there an obligation that the claimant provide a salvage allowance if the product is disposed of rather than being sold for salvage?

**Answer:** The transportation of food and food related products is subject to a very high standard of care. It is quite common for shippers of food or related to prohibit salvage or sale of goods that have been exposed to temperature abuse, unexplained break in the chain of custody, missing seals, etc. because of concerns about quality degradation, product liability claims, warranty problems, or potential injury to their trademark or brand name. Shippers often take the position that it would be an unacceptable risk to allow the product to enter the market for human consumption, or that it would be impossible to adequately sample and test all of the product to ensure that the quality had not been compromised.

Carriers (and their insurers) typically will argue that the claimant did not prove that there was any actual damage to the shipment, and that the claimant failed to mitigate the loss by salvaging the goods.

I would note that in cases that are actually litigated, the courts tend to side with the shipper when food or food-related products are involved if there is any doubt at all - and particularly if the shipper provides some reasonable justification as to the perishable nature of the product, shortened shelf life, texture or flavor change, possibility of contamination or adulteration, etc. This is especially true in your case where there has been an accident with the truck.

Unless the claimant is willing to let the insurance company salvage the goods, it can refuse to allow them to do so. And if there is no salvage, there is no law or rule that requires the claimant to give a salvage allowance.

Of course, the insurer can unilaterally deduct something from its settlement offer (or refuse to pay the claim).

If this is not acceptable to the claimant its only option would be to bring legal action against the responsible carrier. (The claimant usually does not have any cause of action against the insurer since it is not the “insured” under the carrier’s cargo liability policy.)

### FREIGHT CHARGES – BROKER REFUSES TO PAY CARRIER ALLEGING OPEN CLAIM

**Question:** I am currently dealing with a messy situation. Broker will not pay me (the carrier) the money that is owed to me after delivering a load for them. The broker is telling me there is another company, similar in name, which is related to us and has an open claim and they are therefore not going to pay us. However, we are a completely different and separate company in a different state.

My company is from North Carolina, and the company that they say we have likeness to is from South Carolina. Broker is stating that other carrier had a claim on their file and never responded or took necessary steps to handle that claim. Now, because we look like the same company they are withholding the money owed to us. What can we do?



Also, the broker never notified us about the money being withheld due to a claim, they notified our factoring company. Are there any rules or regulations to notify the carrier before anything is processed with our factoring company?

**Answer:** I would suggest that you file a claim against the broker's surety bond or trust fund. You can find out information about the bond or trust fund on the FMCSA website: [http://li-public.fmcsa.dot.gov/LIVIEW/pkg\\_html.prc\\_limain](http://li-public.fmcsa.dot.gov/LIVIEW/pkg_html.prc_limain)

Click on the drop-down box called "Choose Menu Option", then select "Carrier Search" and enter the USDOT number or MC number (or the name and state) for the broker. You should be able to file a claim for your unpaid freight charges directly with the bonding or trust fund company listed on the page with the broker's information.

If that does not work, most likely your only remedy is to file a lawsuit to collect your freight charges from the broker that owes you the money. You may be able to do this in your local small claims court, but you will need to check with them since procedures are different in each state.

## **BROKERS – EGREGIOUS ALLEGATIONS**

**Question:** Can you offer any guidance regarding WHAT to do if Baxter & Bailey continues to slander your company?

**Answer:** I assume that you are referring to the "New Broker Alerts" that Aaron Andrada or Stuart Anderson of Baxter Bailey send out almost every week to their mailing lists.

Suggestions:

1. Ask your attorney to send them a letter demanding that they cease and desist.
2. Report it to the Better Business Bureau (I think they are located in Southaven, MS)
3. Report it to the Transportation Intermediaries Association ("TIA") and ask their advice.

## **CARRIERS – RETURNING EMPTY OCEAN CONTAINERS**

**Question:** Can a retailer use their own power units to return empty Ocean containers to the rail, or can only the drayman that delivered said unit return it?

**Answer:** I would suggest that you contact the freight forwarder that arranged for the shipment.

If you should return the container yourself, make sure that you get a signed receipt with the date, time and container number so you can prove that you did return it.

## **RECENT COURT CASE**

### **THE NEED TO PROPERLY PLEAD A CASE**

An Ohio Appeals Court affirmed the lower court's decision in denying a broker recovery for a cargo loss from a motor carrier when the broker had first settled with the customer.

In a typical scenario, the broker, Total Quality Logistics, LLC ("TQL") arranged for transportation of their customer's products with motor carrier JK & R Express, LLC ("JK & R"). In January 2016, TQL and JK & R entered into a broker-carrier agreement that provided terms for the transportation of TQL's customers.



According to the decision, the facts of the case were that:

A shipper, Contel Fresh contacted TQL and requested transportation of a load of organic apples from Washington to locations in Missouri and New Jersey. TQL and JK & R reached an agreement for JK & R to transport the apples for \$5,900. TQL faxed JK & R a confirmation sheet indicating the price and locations where the apples were to be picked up and delivered. On June 28, 2016 JK & R picked up the apples. However, while enroute to Missouri, JK & R's trailer caught fire, resulting in a complete loss of the apples.

TQL reimbursed Contel Fresh \$86,240 for the loss of the apples by offsetting open invoices that Contel Fresh owed TQL. Contel Fresh then assigned all claims and causes of action it had against JK & R to TQL for the loss of the apples.

On December 7, 2016, TQL filed the instant action against JK & R seeking damages for breach of contract and breach of account, or, in the alternative, unjust enrichment and promissory estoppel.

This last is important. TQL is a broker, not a shipper. It has no interest in the product to sue the carrier and absent a specific agreement, it has no obligation to pay claims to the shipper. It voluntarily chose to pay Contel's claim and received a release and assignment from its customer, Contel Fresh. There is nothing in the decision that indicates why TQL pursued this claim solely on the basis of the broker-carrier agreement and in its reply brief before the trial court, TQL specifically stated "that it was not suing under the Carmack Amendment or under the Release and Assignment that TQL's customer provided it."

As a result of this choice, the trial court found that the claim must comply with the principles of indemnity under Ohio law. Under Ohio law, "when an indemnitee settles a claim, instead of litigating it, the indemnitee is entitled to indemnification if the indemnitee shows (1) that the indemnitee has given proper and timely notice to the party from whom indemnity is sought, (2) that the indemnitee was legally liable to respond to the settled claim, and (3) that the settlement was fair and reasonable."

The trial court found that TQL failed to establish (2) above, that it was legally obligated to pay Contel Fresh. There was no contract between the broker, TQL, and its customer, Contel Fresh, requiring that TQL pay damage claims to Contel Fresh.

In affirming the trial court's decision, the appeals court noted in a footnote that:

During oral argument, the parties addressed the issue of potential unfairness that may arise since TQL made payment to Contel Fresh for a claim that JK & R may otherwise have been responsible for under the Carmack Amendment had Contel Fresh made the claim directly against JK & R. Though JK & R ultimately received a benefit from this arrangement, this court cannot construe the contract to provide for the relief requested by TQL. There is no other theory of recovery currently before this court.

This result seems to be a prime example of how to not to proceed. We have no information as to why they chose not to include claims pursuant to Carmack. In modern litigation, it is permissible to include multiple claims and plead in the alternative. This choice cost TQL \$86,240 plus legal fees.

Perhaps this was a result of counsel not being familiar with transportation law?

*Total Quality Logistics, LLC v. JK&R Express, LLC*, 2019 WL 115204 (1/7/2019)

## CCPAC NEWS

### CCPAC

Established in 1981, the Certified Claims Professional Accreditation Council (“CCPAC”) is a transportation cargo claim accrediting organization with a global membership and is comprised of shippers, manufacturers, freight forwarders, brokers, logistics companies, insurance companies, law firms and transportation carriers including air, ocean, truck and rail and various related transportation organizations. CCPAC seeks to raise the professional standards of individuals who specialize in the administration and negotiation of cargo claims. Specifically, it seeks to give recognition to those who have acquired the necessary degree of experience, education, expertise and who have successfully passed the CCP Certification Exam covering domestic and international cargo liability, warranting acknowledgment of their professional stature.

The next CCP Primer Class will be held at the Memphis Hilton Hotel in Memphis, TN on Sunday, March 24, 2019 and the CCP Exam will be conducted at the same location on Wednesday March 27, 2019. Prior application, registration and approval are required to sit for the CCP Primer Class and/or the CCP Exam. Visit <https://www.ccpac.com/2018-ccp-primer-ccp-exam/> for more information about the exam and visit [www.ccpac.com](http://www.ccpac.com) for general information and membership in CCPAC.

## CLASSIFICATION

### FUTURE COMMODITY CLASSIFICATION STANDARDS BOARD (“CCSB”) DOCKETS

	<b>Docket 2019-2</b>	<b>Docket 2019-3</b>
Docket Closing Date	April 11, 2019	August 22, 2019
Docket Issue Date	May 9, 2019	September 19, 2019
Deadline for Written Submissions and to Become a Party of Record	May 31, 2019	October 10, 2019
CCSB Meeting Date	June 11, 2019	October 22, 2019

Dates are as currently scheduled and subject to change. For up-to-date information, go to <http://www.nmfta.org>.

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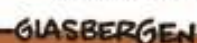
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# **Transportation & Logistics Council**

## **45th Annual Conference**

### **Memphis, TN**

### **Exhibitor Information**

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If interested in exhibiting at the Transportation & Logistics Council's 45th Annual Conference, please contact Diane Smid for further information at (631) 549-8984 or by email to [diane@transportlaw.com](mailto:diane@transportlaw.com). The conference will be held from **March 25, 2019 to March 27, 2019** at the Hilton Hotel, Memphis, Tennessee. The following is a summary of information about the exhibit program at TLC's conference.

#### **Preliminary Schedule**

The exhibit floor is open on Sunday, March 24, 2019 5:30 pm through Wednesday March 27, 2019 12:00 pm

#### **Move In/Set up**

Sunday	March 24th	9:00 am – 5:00 pm
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#### **Exhibit Hours**

Sunday	March 24th	5:30 pm – 7:30 pm	
Monday	March 25th	7:30 am – 5:00 pm	6:00 pm – 8:00 pm
Tuesday	March 26th	7:30 am – 5:00 pm	
Wednesday	March 27th	7:30 am – 12:00 pm	

#### **Move Out**

Wednesday	March 27th	12:00 pm – 4:00 pm
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#### **Costs of Exhibiting**

**\$1,400 per booth for TLC members**

**\$1,600 per booth for non-members**

10' by 8' booth display with a six (6') foot draped table and two (2) chairs

**One** complimentary full conference registration per booth rental. Includes all sessions, handouts, continental breakfasts and coffee breaks Monday, Tuesday and Wednesday and lunch on Monday and Tuesday.

The Cost of Exhibiting is for one booth worker. A charge of \$300.00 will be incurred for each additional booth worker.

Registration list will be provided to exhibitors.



# The Transportation & Logistics Council, Inc.

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Fax: (631) 549-8962

E-Mail: [diane@transportlaw.com](mailto:diane@transportlaw.com)

## APPLICATION FOR ANNUAL MEMBERSHIP

Membership in the Council is open to anyone having a role in transportation, distribution or logistics. Membership categories include:

- **Regular Member** (shippers, brokers, third party logistics and their representatives);
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All members receive:

- An email subscription to **TRANSDIGEST** (TLC's monthly newsletter). NOTE: To receive the printed version of the **TRANSDIGEST** by First Class Mail a fee of \$50, in addition to applicable membership fee, will apply.\*
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