TRANSDIGEST

Transportation & Logistics Council, Inc.

George Carl Pezold, Executive Director
Diane Smid, Executive Secretary

Raymond A. Selvaggio, General Counsel
Stephen W. Beyer, Editor

VOLUME XXIV, ISSUE NO. 254, APRIL 2019

TLC's 45th Annual Conference – Full Report!

- **Driver Classification Update**
- **FMCSA Drug & Alcohol Clearinghouse**
- **Automated Trucking Report**
- **Ocean Carrier Low-Sulfur Mandate**
- **STB to Hold Hearing on Rail Accessorial & Demurrage Charges**
- **Court Decisions on Carmack Preemption & Forum Selection**
- **More Q&A's**

NEW! IN A SOFT COVER EDITION!

FREIGHT CLAIMS IN PLAIN ENGLISH (4TH ED.)

Published by the TRANSPORTATION & LOGISTICS COUNCIL, INC.
120 Main Street ● Huntington, NY 11743-8001 ● Phone (631) 549-8984 ● Fax (631) 549-8962
Website: www.TLCouncil.org ● email: tlc@transportlaw.com

Table of Contents

GUEST EDITORIAL

T&LC'S ANNUAL CONFERENCE

Brandon Arnold, T&LC President
Intelligent Logistics, LLC

The Council's 45th Annual Conference, "Education for Transportation Professionals", was one of our largest ever attended and took place in the historic city of Memphis, home of Elvis and B.B. King and famous for its BBQ and Beale Street.

Our goal each year is to provide the most relevant and usable educational information for all in the transportation and logistics community. I believe we met this goal again this year, and in historic fashion.

Both new and seasoned professionals from shippers, carriers, legal experts along with non-asset based logistics experts attended. Updates and pertinent information affecting the transportation industry were among the topics discussed. Topics included; the economy, regulation, contracts, cargo claims, insurance, cross border trade and compliance, and logistics outsourcing.

In addition to these great workshops and sessions, pre-conference seminars kicked off the event on Sunday. Many employers feel that sending their employees to these pre-conference seminar events is imperative to the success of their business. These four seminars included Contracting for Transportation & Logistics Services, Freight Claims in Plain English, and Transportation Logistics and the Law. Sunday's pre-conference seminar ended with the CCP Primer Class for all members preparing for the nationally accredited Certified Claims Professional Accreditation Council (CCPAC) test. This course concluded at the end of the Conference with an exam. [Note: Results of that exam are included below beginning page 16.] Thank you for all that participated in this challenging course. T&LC is a proud supporter of this program and looks forward to the continued partnership and success of the CCPAC program.

Monday's Conference began with a Transportation Industry Updates and Trends. TIA President & CEO, Bob Voltmann moderated a group of panelists that included Senior Editor of the JOC, William B. Cassidy, Attorney Henry Seaton and Jack Van Steenburg, Chief Safety Officer and Assistant Administrator for the FMCSA. Amongst many of the topics included were impending regulations, consolidations and mergers, ELD's, and policies of the new administration affecting international trade.

The luncheon guest speaker, Judy McReynolds, President & CEO for ArcBest Corp., provided us with an overview of her company, and how they operate in a fluctuating economy, including the growth and successes and challenges that her company has endured to become an industry leader.

Following the luncheon, we all had the opportunity to witness the ever popular and spirited "Law of the Land, Law of the Jungle" session, spearheaded by Gerry Smith. If you have never been to this session, I suggest you make it a point next year to catch this. It is a fun and lively session with lots of bantering back and forth, and tons of valuable information.

On Tuesday morning we welcomed back Cynthia Hetherington, CEO of the Hetherington Group, for a full General Session, this time to discuss "knowing whom you are dealing with in business". As is expected with Cynthia, we learned about how vulnerable we can be in business if we do not do our due diligence in making sure we know where our data is being used, and how we can protect ourselves from cyber criminals. I always leave her presentations with so many ideas and questions wondering if we are doing enough to protect our companies and our own personal data.

Lunch on Tuesday was special for all of us on the board and many of the members of T&LC. Ron Williams, past President of the Board and current Chairman of the Conference, is retiring. We may have convinced him to stay on as Chairman of the Conference, but we are extremely happy he is going to get to spend more time fishing and enjoying his family. We hope to see him in Orlando next year at the conference.

Tuesday afternoon began with the Transportation Attorney Panel headed up by our Executive Director George Pezold, with Steve Block, Marc Blubaugh, and David Maloof providing great commentary and responses to the attendees in the Q & A session.

Meet the Experts, our final session for the day, was a chance for all attendees to get a chance to meet with panelists and moderators they had the chance to see during the workshops and sessions for a one on one. This has always been well requested and attended. This year was no exception.

Tuesday finished with our highly attended President's Reception and was a chance for everyone to enjoy some music and eat a little taste of Memphis BBQ, and meet and network with all our attendees.

Wednesday finished out our conference with two great panels and both General Sessions had great attendance. Many first time attendees hung around for the final morning to take in listening to our panelists discuss loss prevention and freight claims.

Additional thanks for another successful conference goes out to Diane Smid, Ron Williams and Rob Strouse. Also thank you to all the board members for all the work they put in throughout the year to make sure that we continue to have well attended events, and great panelists and moderators for all the sessions and workshops. As my last full year as President of the board, I am grateful to have the leadership of Ray Selvaggio and our Executive Director George Pezold. There are also staffers that rarely get the credit they deserve: Katie Woerner, Judy Selvaggio, and a special thanks to Stephen Beyer for editing the TRANSDIGEST all these years, and to Michael Bange for cleaning up my writing to make me sound intelligent.

One last but not least special thanks for Trans Audit. They once again stepped up this year to help make our conference better by providing, sponsoring, and managing our new conference Microsite App. We plan more improvements next year thanks to very valuable feedback provided by attendees.

As a final note, we look forward to seeing everyone back in Orlando, FL for our 46th Annual Conference, more details to come in the next few months!

ASSOCIATION NEWS

NEW MEMBERS

Regular Member

Joseph A. Catanzaro
CDS
1821 Walden Office SQ, Suite 400
Schaumburg, IL 60173
joec@freightclaim.com

MOTOR

DRIVER CLASSIFICATION UPDATE

On March 22, 2019 the Federal Motor Carrier Safety Administration's ("FMCSA") issued an interpretation clarifying the agency's position on "whether a preemption decision it issued under Section 31141 applies to litigation that was pending at the time the decision was issued."

This legal opinion was in response to questions that arose after the FMCSA issued its 12/21/18 determination that the State of California's meal and rest break rules are preempted under Section 31141 as applied to property-carrying commercial motor vehicle drivers covered by FMCSA's hours of service regulations. After the December determination, the question of retroactivity was brought up and how it would apply to pending cases. With this opinion, the FMCSA has made clear its position.

According to the Opinion:

> FMCSA' s view is that once the agency issues a preemption decision under Section 31141, the preempted State law or regulation may not thereafter be enforced as to the activity or persons covered by the preemption determination. Among other things, an FMCSA preemption decision precludes courts from granting relief pursuant to the preempted State law or regulation with regard to the activity or persons in question at any time following issuance of the decision. An FMCSA preemption decision has this effect regardless of whether the conduct at issue in the lawsuit occurred before or after the decision was issued, and regardless of whether the lawsuit was filed before or after the decision was issued.
>
> . . .
>
> In any event, the presumption against retroactivity is just a presumption: When Congress has made its intent clear, "the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope." Landgraf, 511 U.S. at 267. Thus, the intent of Congress always controls. Here, Congress has expressed its intent by its specific command in Section 31141 that "a State may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary decides under this section may not be enforced." Thus, even if giving an FMCSA decision effect in pending and future cases could be considered retroactive, the presumption against retroactivity would not apply because Congress has already addressed the reach of FMCSA decisions under Section 31141.

Conclusion

> For all of the reasons discussed herein, FMCSA's legal opinion is that an FMCSA preemption decision under Section 31141 precludes courts from granting relief pursuant to the preempted State law or regulation at any time following issuance of the decision, regardless of whether the conduct underlying the lawsuit occurred before or after the decision was issued, and regardless of whether the lawsuit was filed before or after the decision was issued.

For a copy of the FMCSA chief counsel office's opinion, visit https://www.fmcsa.dot.gov/safety/fmcsa-legal-opinion-applicability-preemption-determinations-pending-lawsuits.

FMCSA DRUG & ALCOHOL CLEARINGHOUSE

The Federal Motor Carrier Safety Administration ("FMCSA") will be rolling out its Drug & Alcohol Clearinghouse for holders of commercial driver's licenses ("CDLs"), employers and service agents that will become operational January 6, 2020. According to the FMCSA website:

> The Clearinghouse will improve highway safety by helping employers, FMCSA, State Driver Licensing Agencies, and State law enforcement to quickly and efficiently identify drivers who are not legally permitted to operate commercial motor vehicles (CMVs) due to drug and alcohol program violations. This secure online database will provide access to real-time information, ensuring that drivers committing these violations complete the necessary steps before getting back behind the wheel, or performing any other safety-sensitive function.

The Clearinghouse final rule was published December 5, 2016, implementing the Congressional mandate to establish a drug & alcohol clearinghouse. Beginning in the Fall of 2019, users can establish an account that will allow access to the Clearinghouse once it becomes operational.

The Clearinghouse will become operational January 6, 2020, at which time mandatory use of the Clearinghouse to report and query information about driver drug and alcohol program violations goes into effect. Employers must conduct both electronic queries within the Clearinghouse and manual inquiries with previous employers to cover the preceding three years.

Once three years of violation data are stored in the Clearinghouse (January 6, 2023), employers are no longer required to also request information from the driver's previous FMCSA-regulated employers under 391.23(e); an employer's query of the Clearinghouse will satisfy that requirement.

The Clearinghouse will contain information on "All CDL drivers who operate CMVs on public roads" and will affect them, their employers and service agents. The list of those affected includes, but is not limited to:

- Interstate and intrastate motor carriers, including passenger carriers
- School bus drivers
- Construction equipment operators
- Limousine drivers
- Municipal vehicle drivers (e.g., waste management vehicles)
- Federal and State agencies that employ drivers subject to FMCSA drug and alcohol use testing regulations (e.g., Department of Defense, public transit)

It is important to note that the Clearinghouse will only contain drug and alcohol program violation information for employees subject to the testing requirements under the FMCSA regulations in 49 CFR part 382. It specifically will not contain results from drug and alcohol testing that are outside the scope of Department of Transportation ("DOT") testing requirements and positive test results or refusals for such non-

DOT testing may not be reported to the Clearinghouse. The only drug testing regimen currently accepted by the federal government is the conventional urine test. This procedure only measures recent drug use, making it relatively easy to game. And while there has been a push to recognize hair follicle testing, which measures drug usage over a much longer timeline and makes it much more difficult to evade, as it is not currently accepted by the FMCSA, the Clearinghouse specifically will not include those results or refusals.

The goal of the Clearinghouse is to enhance safety on our nation's roadways, but it may also impact the current driver shortage. A national repository, like the Clearinghouse, will provide hiring carriers the ability to identify which drivers have received infractions or failed drug tests while employed by another carrier and the information will become part of a driver's permanent record, accessible to any prospective employer.

In addition to the obvious safety benefits, the database will also have the inescapable side effect of reducing the eligible driver pool even further by making it more difficult for carriers to find and hire qualified drivers. Because insurance companies covering truck carriers will not allow the hiring of drivers with a drug history, these drivers will essentially become unemployable overnight, which in turn, will have a restrictive effect on fleet capacity. The database won't affect driver productivity, but existing drivers may be forced out of their trucks, and finding drug-free drivers to replace them will be more challenging than it is today.

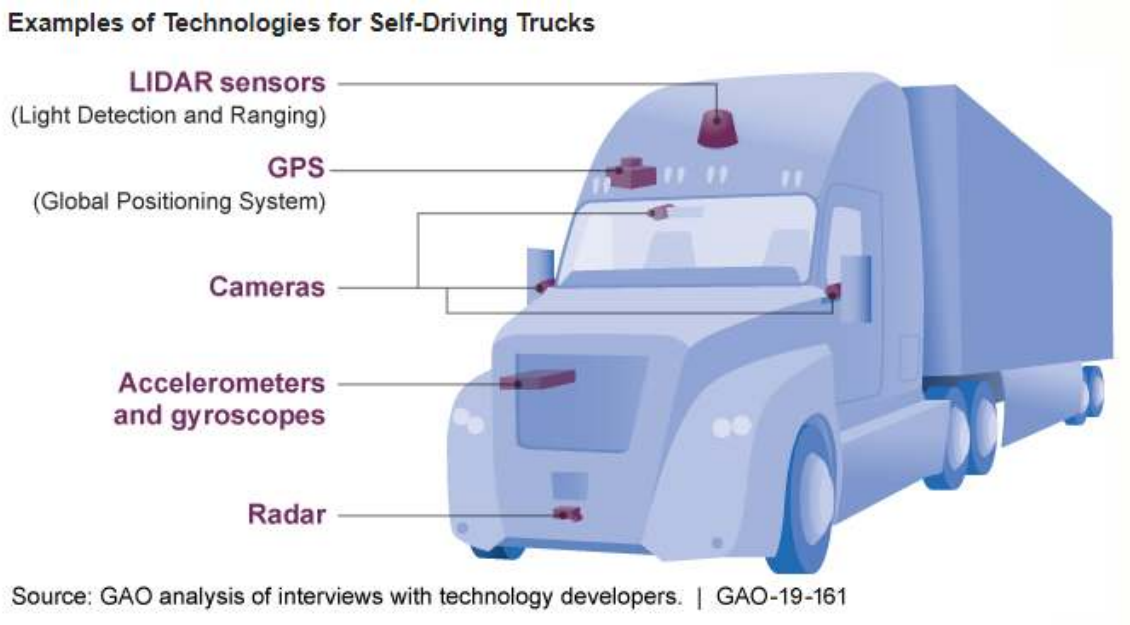
Visit https://clearinghouse.fmcsa.dot.gov/Documents/Clearinghouse_Factsheet.pdf to view the FMCSA Clearinghouse factsheet and visit https://clearinghouse.fmcsa.dot.gov/ to view the FMCSA's website.

GAO REPORT ON AUTOMATED TRUCKING

On March 7, 2019 the U.S. Government Accountability Office ("GAO") released its report "Automated Trucking: Federal Agencies Should Take Additional Steps to Prepare for Potential Workforce Effects".

According to the GAO report:

> Automated trucks, including self-driving trucks, are being developed for long-haul trucking operations, but widespread commercial deployment is likely years or decades away, according to stakeholders. Most technology developers said they were developing trucks that can travel without drivers for part of a route, and some stakeholders said such trucks may become available within 5 to 10 years. Various technologies, including sensors and cameras, could help guide a



> truck capable of driving itself (see figure). However, the adoption of this technology depends on factors such as technological limitations and public acceptance.
>
> Stakeholders GAO interviewed predicted two main scenarios for how the adoption of automated trucks could affect the trucking workforce, which varied depending on the future role of drivers or operators. Technology developers, among others, described one scenario in which self-driving trucks are used on highway portions of long-haul trips. Stakeholders noted this scenario would likely reduce the number of long-haul truck drivers needed and could decrease wages because of lower demand for such drivers. In contrast, groups representing truck drivers, among others, predicted a scenario in which a truck would have an operator at all times for complex driving and other non-driving tasks, and the number of drivers or operators would not change as significantly. However, stakeholders lacked consensus on the potential effect this scenario might have on wages and driver retention. Most stakeholders said automated trucking could create new jobs, and that any workforce effects would take time—providing an opportunity for a federal response, such as any needed policy changes.

Potentially at stake are hundreds of thousands of jobs, but no one can say whether jobs will be lost or simply shifted. What does seem clear is that vehicle automation is coming and its introduction will be gradual, starting with the segments easiest to automate, such as the long-haul highway segment.

Visit https://www.gao.gov/products/GAO-19-161 to read the complete report.

ENTRY LEVEL DRIVER TRAINING RULE

On March 6, 2019, the Federal Motor Carrier Safety Administration ("FMCSA") published its final rule regarding "new minimum training standards for certain individuals applying for a Class A or Class B commercial driver's license ("CDL") for the first time; an upgrade of their CDL (e.g., a Class B CDL holder seeking a Class A CDL); or a hazardous materials (H), passenger (P), or school bus (S) endorsement on their CDL for the first time."

According to the summary:

> FMCSA amends the entry-level driver training ("ELDT") regulations published on December 8, 2016, titled "Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators" (ELDT final rule), by adopting a new Class A CDL theory instruction upgrade curriculum to reduce the training time and costs incurred by Class B commercial driver's license ("CDL") holders upgrading to a Class A CDL. This final rule does not change the regulatory text proposed in the Notice of Proposed Rulemaking ("NPRM"). The Agency believes that this modest change in the Class A theory training requirements for Class B CDL holders upgrading to a Class A CDL maintains the same level of safety established by the ELDT final rule, and the regulatory burden reduction will result in annualized cost savings of $18 million.
>
> **DATES:**
>
> This final rule is effective May 6, 2019. The compliance date for this final rule is February 7, 2020.

Visit https://www.federalregister.gov/documents/2019/03/06/2019-04044/commercial-drivers-license-upgrade-from-class-b-to-class-a to read the Federal Register notice.

OCEAN

LOW SULFUR FUEL MANDATE

Beginning January 1, 2020 the International Maritime Organization ("IMO") mandate for ocean carriers to use low-sulfur will be enforced. Carriers will start making the transition from heavy fuel oil to 0.5% low-sulfur fuel in the fourth-quarter of 2019. As with Y2K and the container weight verification requirements, there has been a lot of hand-wringing and wild speculation about the transition. Fortunately, other than some minor scattered hiccoughs, the transition is likely to go smoothly.

The decision to implement a reduced global sulfur limit was taken by the IMO as part of the IMO's commitment to ensure shipping meets its environmental obligations beginning in 2008. A review was undertaken in 2016 which concluded that sufficient compliant fuel oil would be available to meet the fuel oil requirements by the 2020 date.

According to the IMO:

> Under the new global limit, ships will have to use fuel oil on board with a sulfur content of no more than 0.50%, against the current limit of 3.50%, which has been in effect since January 1, 2012. The interpretation of "fuel oil used on board" includes use in main and auxiliary engines and boilers. Exemptions are provided for situations involving the safety of the ship or saving life at sea, or if a ship or its equipment is damaged.
>
> Ships can meet the requirement by using low-sulfur compliant fuel oil. An increasing number of ships are also using gas as a fuel as when ignited it leads to negligible sulfur oxide emissions. This has been recognized in the development by IMO of the International Code for Ships using Gases and other Low Flashpoint Fuels (the IGF Code), which was adopted in 2015. Another alternative fuel is methanol which is being used on some short sea services.
>
> Ships may also meet the SOx emission requirements by using approved equivalent methods, such as exhaust gas cleaning systems or "scrubbers", which "clean" the emissions before they are released into the atmosphere. In this case, the equivalent arrangement must be approved by the ship's Administration (the flag State).

Stakeholders have had years to prepare and it appears that adequate supplies of compliant fuel will be available, albeit at an as yet undetermined additional cost. As carriers start making the transition from heavy fuel oil to the 0.5 percent low-sulfur variant in the fourth quarter, the bunker adjustment factors (BAFs) will start to kick in.

ExxonMobil, BP, Shell, and Chevron all have made assurances via statements or in media reports that low-sulfur fuel will be available later this year in container shipping ports around the world, and they have expressed confidence that supply will be sufficient. However, the demand will be enormous, with BP expecting over 90 percent of the global bunker market to comply with the 2020 sulfur cap.

Therein lies the rub. The actual costs have yet to be determined. As noted above, carriers have alternative means to comply with the mandate, such as using other fuels or installing scrubbers. The carriers' choice will be affected by the vessel itself and the trade lane, though it appears that the majority of vessels will use the low-sulfur fuel.

Current estimates are that compliance with this mandate will increase the cost of compliant fuel about 30%, resulting in carriers incurring additional costs of as much as $265 per FEU [forty-foot equivalent unit] from Asia to the West Coast and $700 to the East Coast as compared to traditional bunker fuel. While we

don't know what the actual costs will be, they will be passed on by carriers to beneficial cargo owners ("BCOs") through the use of BAFs.

Unfortunately, there is no agreed upon standard BAF formula, which is essentially a fuel surcharge,

A boilerplate example for calculating the low-sulfur BAF on an FEU basis is the number of days the vessel is at sea, multiplied by the fuel utilization per sea day and the fuel cost per metric ton, divided by the total loaded containers carried on a round-trip voyage. Individual carriers and industry analysts have posted examples of boilerplate formulas.

There is a problem with the approach of this formula in that there is, for example, an imbalance in cargo volume and value between imports and exports in the east-west trade lanes between the U.S. and Asia. U.S. imports from Asia are predominantly higher-value consumer merchandise goods, while exports to Asia are mostly low-cost grains, scrap paper and metals, and plastics. With westbound spot rates at about 1/3 of eastbound rates, the above BAF formula would add the same amount to either leg, potentially making shipping some low-value exports cost prohibitive.

In order to help smooth the transition, parties will have to remain flexible and adapt to the changing situation.

QUESTIONS & ANSWERS

By George Carl Pezold

BROKERS – REPORTING NON-COMPLIANCE

Question: My question regards illegal brokering. I own a brokerage and have several "competitors" that do not have MC/DOT numbers nor the required $75k surety bond, according to the Federal Motor Carrier Safety Administration ("FMCSA") website.

I am aware of the regulation where the FMCSA can fine them $10k. How can I report them to the FMCSA?

Answer: According to Stephanie Mann, FMCSA Tennessee Division Administrator, you can file a complaint on a broker with FMCSA by calling 1-888-DOT-SAFT (368-7238) from 8am–8pm, Mon–Fri EST or submit the information online at: https://nccdb.fmcsa.dot.gov/nccdb/home.aspx.

She further states "Feel free to contact the FMCSA Tennessee Division office at 615-781-5781 X0 if we can ever be of assistance. Thank you in advance for reporting these issues to FMCSA. Safe travels!"

CARRIERS – HIRING MILITARY DRIVERS UNDER AGE 21

Question: Regarding the under 21 military program. How many A+ rated insurance companies will insure them? I own a small fleet of 40 trucks and the company we use does not support this.

Answer: Answer provided by Mark Yunker, CIC, CRM; Risk & Insurance Consultant | Associated Benefits & Risk Consulting

I'm pleased to offer answers to questions from both the Council and its members. Quite a few insurers are encouraging motor carriers to hire military veterans. There are three programs that I know of. One assists military personnel in obtaining a civilian commercial driver's license ("CDL") so they can transition quickly to driving jobs. Another assists veterans after discharge in converting a license into a CDL when the person's

experience warrants it. Another is less formal, but a few insurers (Northland is one that I am certain of) will now accept documented military experience toward their requirement for 2 years' experience operating similar commercial vehicles. For example, a veteran that operated tractor trailers in the military gets credit much the same as a civilian driver would get. The same would hold true for straight trucks, passenger buses, etc.

But I am not aware of any program that would have any effect on drivers under age 21. I believe Jack Van Steenburg addressed that at the conference. I believe he said that at present, a person must be at least 21 years old to get a CDL. They have considered reducing the age, but I believe he said it is still in effect. So it seems to me that the issue is not whether an insurer will accept them, but that they can't get a CDL.

FREIGHT CHARGES – STATUTE OF LIMITATIONS FOR REBILLING

Question: What is the statute of limitations on when a less-than-truckload ("LTL") carrier can bill for a revision class of freight?

Answer: There are two separate federal statutes that could be applicable to the carrier's claims for freight charges.

The so-called "180-day rule" set forth in 49 U.S.C. §13710 would apply to claims for "charges in addition to those originally billed" (typically undercharges) and provides "A carrier must issue any bill for charges in addition to those originally billed within 180 days of the receipt of the original bill in order to have the right to collect such charges."

Note that this section does not establish a time limit for the carrier to submit original invoices.

However, there is also an 18-month statute of limitations that applies to suits by carriers to collect freight charges that is set forth in 49 U.S.C. §14705:

Sec. 14705. Limitation on actions by and against carriers

> (a) IN GENERAL- A carrier providing transportation or service subject to jurisdiction under chapter 135 must begin a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues. [The claim accrues on delivery or tender of delivery by the carrier.]

These statutory provisions do not prevent a carrier from sending a freight bill (or a balance due bill) but they do provide a statutory defense if the carrier attempts collection beyond the time limits.

BROKERS – 4PL VS 3PL

Question: My question regards logistics providers ("PLs"), particularly, what are the roles of a 4PL vs a 3PL.

What is the legal definition of a 4PL vs a 3PL and how should that difference be noted in our service contract?

If our 4PL hires a 3PL who hires a carrier to move our freight and the carrier is involved in an accident, what insurance and contract language should we require to best protect our company from a lawsuit?

Answer: There is really no definition of a "4PL" or a "3PL" although the "4PL" usually provides broader freight management functions, including arrangements with brokers and other intermediaries.

As far as your contracts, I would probably need to see them in order to determine whether they adequately protect you against third party claims, such as vicarious liability in the event of a highway accident, etc.

FREIGHT CLAIMS – CARRIER FAILS TO DELIVER AND DEMANDS MORE MONEY

Question: I contracted with a broker to transport a collection of autos when I moved to my new home in another state. The cars were to be delivered to our new home by the last day of October 2018. Payment was due on delivery of the last car by cashier's check or money order (guaranteed funds). To date, the driver still has not completed delivery of the cars.

In February, he informed us that he would be delivering the last 5 cars. When I told him I would have a cashier's check waiting and confirmed the total amount with him, he insisted on cash only and refused to deliver the cars unless I paid him in cash. At that time, he informed me that he would be adding on storage fees, loading and unloading fees, etc. and these would accrue until I sent him cash.

I contacted the Federal Motor Carrier Safety Administration ("FMCSA") and they told me that this driver does not have authorization. I believe they are investigating him, but I am not sure where to go from here. I have tried to report the cars as stolen in the State where he picked them up (Nevada) and in the state where he has them stored (Idaho). I cannot seem to get law enforcement to do anything to get my cars released from this driver's control. The driver damaged a couple of cars in shipping and refused to give us any insurance information so that we can make a claim for the damages.

It is now April 1st and we still do not have all of our cars delivered. I do not know what to do at this point.

What are my rights in this situation? I had his cashier's check ready for him the day he was to deliver the last cars, but he refused to accept it and is basically holding my cars hostage. This driver was to have the cars delivered by end of October, he refused to give me insurance info for the cars that were damaged in shipping, and now refused to deliver the last cars without a cash payment ($10,700). It appears that he is not even legal to be transporting, according to the FMCSA.

Answer: While a motor carrier is said to have a "lien" on a shipment for its freight charges, if the agreed amount is tendered to pay the freight charges, it must give up the lien and deliver the shipment. If it fails or refuses to do so it is illegal, technically the tort of conversion, and the carrier is liable for damages. The only suggestion I can give you is to hire an attorney and bring a lawsuit if he continues to hold your cars hostage.

FREIGHT CLAIMS – GOODS LOST, CLAIM PAID, GOODS FOUND MUCH LATER

Question: Freight is lost and the claim is paid to the consignee, who also paid the supplier for the original lost parts. As a result, these parties basically broke even in the transaction. The parts are then found a year later. Who gets the parts and does the claim need to be repaid?

Answer: The claim does not need to be repaid.

If neither the shipper (seller) nor the consignee (buyer) wants or has any use for the parts the carrier should be authorized to sell or salvage them and keep the net proceeds.

If either the shipper or the consignee does want the parts, they can negotiate with the carrier for some reasonable amount for their return.

FREIGHT CLAIMS – SETTING OFF CLAIMS

Question: We are a car carrier company and we have two dealers that tried to claim damages on cars we transported for them. Each dealer is now refusing to pay our invoices after we denied their claims for damage. Is there a law to protect us, so we can get paid? Neither one is suing us, they just won't pay their invoices.

Answer: There is no "law" that prohibits a shipper from withholding or "setting off" freight claims against your freight charges, and it is frequently done. Unfortunately, your only remedy is to bring a lawsuit to recover your money. If the shipper is local, you may be able to do this in small claims court. Otherwise you probably would need to retain counsel where the defendant is located or has a place of business.

FREIGHT CHARGES – BILLING AT PROPER CLASS

Question: For the past 5 years I worked for a reclaimed wood company. Earlier this year, I disagreed with the owner's shipping policies. He instructed my department to charge class 70 for all items except one product line which was to charge class 100. (My department was responsible for setting the systems to default to these charges.)

I confirmed with the shipping department that the actual class used to ship all items was class 50. We ran the numbers on several addresses throughout the US to show the overcharge to customers. The owner ignored this information and instructed us to set the shipping systems to charge as he had directed. Is this practice illegal?

Answer: It is not uncommon for vendors that ship "prepay and add" to show freight charges on their invoices that do not reflect the actual charges that are paid to the motor carriers (typically volume discounts or "FAK" [freight all kinds] rates.) Some companies actually consider this an extra "profit center".

However, you may want to consider this: while the practice may technically not be "illegal", if the vendor does represent that the charges reflect its actual transportation charges, and does not disclose this to the purchaser, it could be considered a misrepresentation and possibly even a commercial fraud, for which the vendor would be liable for damages.

RAIL

STB TO HOLD HEARING ON RAIL DEMURRAGE AND ACCESSORIAL CHARGES

On April 8, 2019 the Surface Transportation Board ("STB") announced that it will hold a public hearing on railroad demurrage and accessorial charges on May 22. According to the announcement:

> The Board will receive information from railroads, shippers, receivers, third-party logistics providers, and other interested parties about their recent experiences with demurrage and accessorial charges, including matters such as reciprocity, commercial fairness, the impact of operational changes on such charges, capacity issues, and effects on network fluidity.

In addition, the STB announcement provides:

- Class I carriers will be directed to appear at the hearing through company officials, and will be required to file certain information with the Board by May 1, 2019, including:
- A list of all material changes to their demurrage and accessorial tariffs since January 1, 2016;
- Total dollar amounts of charges billed and charges collected for all their demurrage and accessorial tariffs for each of the past three calendar years;
- A detailed explanation of the current process by which shippers, receivers, and other parties may dispute demurrage and accessorial charges; and

- A detailed explanation of any system or practice under which credits or debits have been issued in connection with the assessment of demurrage or accessorial changes since January 1, 2016.

All hearing participants are required to submit written testimony by May 8, 2019, and interested persons who will not appear at the hearing may file written submissions by May 8, 2019. All participants and interested persons are encouraged to address the following topics at the hearing, and in their written testimony or submissions:

- Recent experience with demurrage and accessorial charges;
- Impacts on shippers, receivers, third-party logistics providers, and shortline railroads flowing from recent changes in Class I carrier demurrage and accessorial tariffs; changes in Class I carrier enforcement policies; and operational changes implemented by Class I carriers; and
- Perspectives on whether demurrage and accessorial tariffs in effect during the past three years have created balanced and appropriate incentives for both customers and railroads, including views on the extent to which reciprocity should be incorporated.

To view the STB announcement, visit: https://www.stb.gov/__85256593004F576F.nsf/0/D5140B0E18672178852583D6006FCC53?OpenDocument.

To view the STB's Notice regarding the hearing, visit: https://www.stb.gov/decisions/readingroom.nsf/UNID/8891D951E256B36E852583D6006D168C/$file/46951.pdf.

RECENT COURT CASES

CARMACK PREEMPTION

The preemptive scope of the Carmack Amendment (49 U.S.C. §14706) has been litigated many times, with the results that Carmack preempts state law claims usually prevailing, no matter how egregious the carrier's behavior. The results in this case were no different.

Plaintiff Security USA Services, Inc. ("Security") engaged defendant United Parcel Service, Inc. ("UPS") to transport two boxes for Security from Albuquerque, NM to Dallas, TX. The boxes contained material for a security convention that was to begin in eight days. Security opted for three-day delivery and also insured the packages, which had a combined value of $13,500.

Only one of the packages arrived in Dallas in a timely manner, and it was damaged. Security contacted UPS about the missing package and ultimately, two days prior to the convention, found out the package never left Albuquerque. According to Security, the UPS Albuquerque office was uncooperative, and with the convention only 24 hours away, Security made last minute efforts to replace and deliver the missing materials, at a cost of $11,800 plus time and labor.

According to Security, on the day before the convention,

> UPS showed up at Plaintiff's office, tossed the missing box on the lobby floor, and left without apology or an explanation. The box was torn apart and the smaller boxes within it were ripped open, the contents vandalized. According to Plaintiff, UPS employees purposefully did not scan the box, because their plan all along was to steal the contents within. Once employees realized

> the items had little commercial use, the employees vandalized the contents. To make matters worse, Plaintiff's van that it dispatched to Dallas was broken into and $3,000 worth of tools were stolen.

As a result, Security filed an action in New Mexico state court asserting one claim for breach of contract and another for bad faith refusal to pay on its claim. The action was removed to federal district court and ultimately UPS moved to dismiss Security's state claim for bad faith based upon Carmack preemption.

In its analysis and determination to dismiss Security's state law claims, the district court pointed out:

> The Carmack Amendment struck a compromise between shippers and carriers. In exchange for making carriers strictly liable for damage to or loss of goods, carriers obtained a uniform, nationwide scheme of liability, with damages limited to actual loss—or less if the shipper and carrier could agree to a lower declared value of the shipment. See *N.Y., New Haven, & Hartford R.R. v. Nothnagle*, 346 U.S. 128, 131, 73 S.Ct. 986, 97 L.Ed. 1500 (1953); accord Wesley S. Chused, The Evolution of Motor Carrier Liability Under the Carmack Amendment into the 21st Century, 36 Transp. L.J. 177, 210 (2009). Making carriers strictly liable relieved a shipper of the burden of having to determine which carrier damaged or lost its goods (if the shipper's goods were carried by multiple carriers along a route). It also eliminated the shipper's potentially difficult task of proving negligence. See *Sec'y of Agric. v. United States*, 350 U.S. 162, 173, 76 S.Ct. 244, 100 L.Ed. 173 (1956) (Frankfurter, J., concurring). In return, carriers could more easily predict their potential liability without closely studying the tort law of each state through which a shipment might pass. Carriers' liability was limited to the actual value of the goods shipped—punitive damages were not available. See, e.g., *Penn. R.R. v. Int'l Coal Mining Co.*, 230 U.S. 184, 200, 33 S.Ct. 893, 57 L.Ed. 1446 (1913) (noting that 'the act provided for compensation, not punishment').
>
> For over one hundred years, the Supreme Court has consistently held that the Carmack Amendment has completely occupied the field of interstate shipping. 'Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it.' *Adams Express*, 226 U.S. at 505–06, 33 S.Ct. 148. The Court has consistently described the Amendment's preemptive force as exceedingly broad—broad enough to embrace 'all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation.' *Ga., Fla. & Ala. Ry. v. Blish Milling Co*., 241 U.S. 190, 196, 36 S.Ct. 541, 60 L.Ed. 948 (1916), *Certain Underwriters at Interest at Lloyds of London*, 762 F.3d at 335-36.

Security USA Services v. UPS, 2019 WL 1051017

TEXAS COURT OF APPEALS DENIES APPLICATION OF FORUM SELECTION CLAUSE

This case involves an attempt by a broker to incorporate its terms and conditions through a blue hyperlink on its website. The issue was "whether a bill of lading incorporated a forum-selection clause Freightquote maintains is available on Freightquote's website and was included in the initial enrollment agreement between Freightquote and real party in interest Amcad Enterprises ("Amcad")."

The background of this case was that:

> Amcad enrolled online as a Freightquote customer on May 27, 2014. Amcad received an e-mail from Freightquote customer service confirming the creation of Amcad's account. A hyperlink to Freightquote's terms and conditions was listed at the bottom of the confirmation e-mail below Freightquote's contact information. The enrollment e-mail received by Amcad did not, however,

> include a statement directing Amcad to view the terms and conditions or stating that Amcad agreed to the terms and conditions.
>
> Amcad utilized Freightquote's brokerage services for 134 shipments between Amcad's initial enrollment in 2014 and the December 23, 2016 shipment at issue in this case. Amcad booked six of the 134 shipments "externally" through Freightquote's website. Amcad booked the other 128 orders "internally" by calling Freightquote and speaking with a sales representative.
>
> Following each phone call or website order, Amcad received a confirmation e-mail acknowledging the shipment. Each confirmation e-mail included a blue hyperlink to Freightquote's terms and conditions. Like the enrollment e-mail, the hyperlink was located under Freightquote's contact information and did not instruct Amcad to view or agree to the terms and conditions. When booking externally through the website, however, Amcad could not complete the order without checking the box next to the text "[t]he customer has read and agreed to the terms & conditions" and then selecting "book this shipment." In contrast, internal orders placed on the telephone did not require Amcad's agreement to Freightquote's terms and conditions before booking.

The order that was the subject of this action was booked "internally" by telephone and thus did not specifically require Amcad's agreement to Freightquote's terms and conditions prior to booking. In particular, there was a forum selection clause which designated specific Missouri courts as the chosen forum for certain disputes.

After suffering a loss, Amcad sued Freightquote when they were unable to resolve the dispute and Freghtquote moved to dismiss the underlying action based upon its forum selection clause. The trial court denied Freightquote's motion and the appeals court agreed.

The positions of the parties were as follows:

> Freightquote maintains that Amcad agreed to the forum-selection and choice-of-law provision by accepting Freightquote's terms and conditions when it placed the six orders booked online, and by signing prior bills of lading that included the language above the signature lines that "Customer agrees to the organization's terms and conditions, which can be found at www.freightpaycenter.com." Freightquote also argues that the general placement of hyperlinks to the terms and conditions in its confirmation e-mails to Amcad establish a course of dealing showing Amcad's agreement to Freightquote's terms and conditions. Freightquote asserts that the trial court should have granted its motion to dismiss because of Amcad's alleged agreement to the terms and conditions and, therefore, the forum-selection clause.
>
> Amcad maintains, however, that the forum-selection clause was not part of the agreement for this shipment because the bill of lading did not specifically show an intent to incorporate the terms and conditions by reference. Amcad asserts that the language above the signature lines did not reference or incorporate Freightquote's terms and conditions and did not state that Amcad, the shipper, agreed to the terms and conditions. Rather, Amcad argues that the statement above the Shipper's signature line references "the Organization's" terms and conditions and directs the "Customer" to a website that is not Freightquote.com. Neither "Organization" nor "Customer" are defined in the bill of lading, and Amcad is designated as the "Shipper." As such, Amcad maintains that the bill of lading is ambiguous as to whose terms and conditions are referenced and what entity agreed to those terms and conditions.

In coming to its conclusion that this particular shipment failed to incorporate Freightquote's terms and conditions, the appeals court noted that

> the four corners of the bill of lading do not include a forum-selection clause, and the statement on the bill of lading regarding terms and conditions on the website does not state that any forum-selection clause, let alone Freightquote's purported terms and conditions, are incorporated by reference into the agreement for the December 23 shipment. The language in the bill of lading does not specifically define who the Customer and Organization are and, as such, the bill of lading does not show an agreement by Amcad to the referenced terms and conditions. Furthermore, the language cites to a website, www.freightpaycenter.com, that does not plainly refer to Freightquote or its website.
>
> . . .
>
> We conclude the referring language is ambiguous as to who agreed to which Organization's terms and conditions and does not unambiguously incorporate by reference Freightquote's terms and conditions. Freightquote cites no binding authority or uncontroverted evidence that would require the trial court to find that the forum-selection clause was incorporated into the contract here, either by reference or course of dealing. Authorities cited by Amcad, the record evidence, and the bill of lading itself, however, support Amcad's contention that the forum-selection clause was not part of this contract.

As more and more business is conducted online, there is a lesson here regarding how important it is that things are made clear. That simply including a hyperlink may not be adequate to accomplish your goals, particularly if a business seeks to limit its liability or incorporate other terms that could have a significant impact on the outcome of any possible litigation.

In re Freightquote, 2019 WL 995791

CCPAC NEWS

CCPAC TEST RESULTS - 14 SUCCESSFULLY PASS THE CCP EXAM IN MEMPHIS

The Certified Claims Professional Accreditation Council ("CCPAC"), its Officers and Board of Directors are pleased to announce the newest Certified Claim Professionals ("CCPs"). Congratulations to the 14 who met all of the prerequisite qualifications, attested to the CCP's Code of Professional Responsibility, completed the CCP Primer Class, and successfully passed the CCP Exam in Memphis, TN March 24 and 27, 2019.

Bruce M. Ashbaugh, CCP	HP, Inc.	Boise, ID
Brian Brueggeman, CCP	HUB Group	St. Louis, MO
Paul Diaz, CCP	Burris Logistics	Elkton, MD
Joe Ketterman, CCP **	H&M Bay, Inc.	Federalsburg, MD
Christine Kurtz, CCP	Genpact	Chicago, IL
Adam Littrell, CCP	Mars Petcare	Franklin, TN
Tessy Merrick, CCP	LinQ Transport	Bedford, TX
Sandy Prieto, CCP	ABF Freight Systems, Inc.	Fort Smith, AR
Madison N. Rapp, CCP **	Diversified Transfer & Storage	Billings, MT
Jessica A. Renner, CCP	Jarrett Logistics Systems	Orrville, OH
Nancy Ritter, CCP	Odyssey Logistics	Charlotte, NC
Rebecca Savino, CCP	Trinity Logistics	Seaford, DE
Rebecca Shores, CCP	ABF Freight Systems, Inc.	Fort Smith, AR

Joel D. Spence, CCP Glen Raven Logistics Altamahaw, NC

** Designates Tie For Highest Score on This Exam

Established in 1981, CCPAC is a nonprofit organization comprised of transportation professionals with manufacturers, shippers, freight forwarders, brokers, logistics, insurance, law firms and transportation carriers including air, ocean, truck and rail. CCPAC seeks to raise the professional standards of individuals who specialize in the administration and negotiation of cargo claims. Specifically, CCPAC gives recognition to those who have acquired the necessary degree of experience, education, expertise and have successfully passed the CCP Certification Exam covering domestic and international cargo liability and to warrant acknowledgment of their professional stature.

The next CCP Exam will be given Saturday morning, November 2, 2019, in most major cities nationwide in the USA and Canada. Exact locations will be determined based on applications submitted. Prior application, registration and approval are required to sit for the exam. On-line registration for the November exam will be open on the website www.ccpac.com on May 15th.

The 2020 CCP Exam Primer Class will be April 26, 2020, in Orlando, FL. The CCP Exam will also be given in Orlando on Wednesday, April 29, 2020

For more information about CCPAC visit www.ccpac.com for general information and membership in CCPAC.

CLASSIFICATION

FUTURE COMMODITY CLASSIFICATION STANDARDS BOARD ("CCSB") DOCKETS

	Docket 2019-2	Docket 2019-3
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.

ADVERTISE IN THE TRANSDIGEST

TRANSDIGEST ADVERTISING

Full page and one-half page ads are now being accepted for the TRANSDIGEST. Reach a highly selective audience with information on your products and/or services at a reasonable cost. Rates are available for 3, 6, 12 monthly issues, and include both print and electronic issues. For information contact Diane Smid or Stephen Beyer at (631) 549-8984.

The Transportation & Logistics Council, Inc.

Phone: (631) 549-8984 **120 Main Street, Huntington, NY 11743** **Fax: (631) 549-8962**
E-Mail: 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);
- **Multiple Subscriber** (non-voting additional representatives of a **Regular Member** firm); and
- **Associate Member** (non-voting members – carriers and freight forwarders).

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.*****
- **Reduced rates** for **ALL** educational programs, texts and materials.

New Members also receive:

- A complimentary copy of "**Shipping & Receiving in Plain English, A Best Practices Guide"**
- A complimentary copy of "**Transportation Insurance in Plain English**"
- A complimentary copy of **"Transportation & Logistics – Q&A in Plain English Books 4, 5 & 6 on CD Disk"**

If you are not presently interested in becoming a member, but would like to subscribe to the **TRANSDIGEST**, you can opt for a 1-Year/Non-member subscription to the newsletter by making the appropriate choice below.

How did you hear about TLC?

☐ **Internet** ☐ **Email**
☐ Seminar/Meeting. Please specify location_____
☐ Referred by_____
☐ Other _____

Please return completed Membership Application Form along with your payment to:
TLC, 120 Main Street, Huntington, NY 11743

Membership Application Form

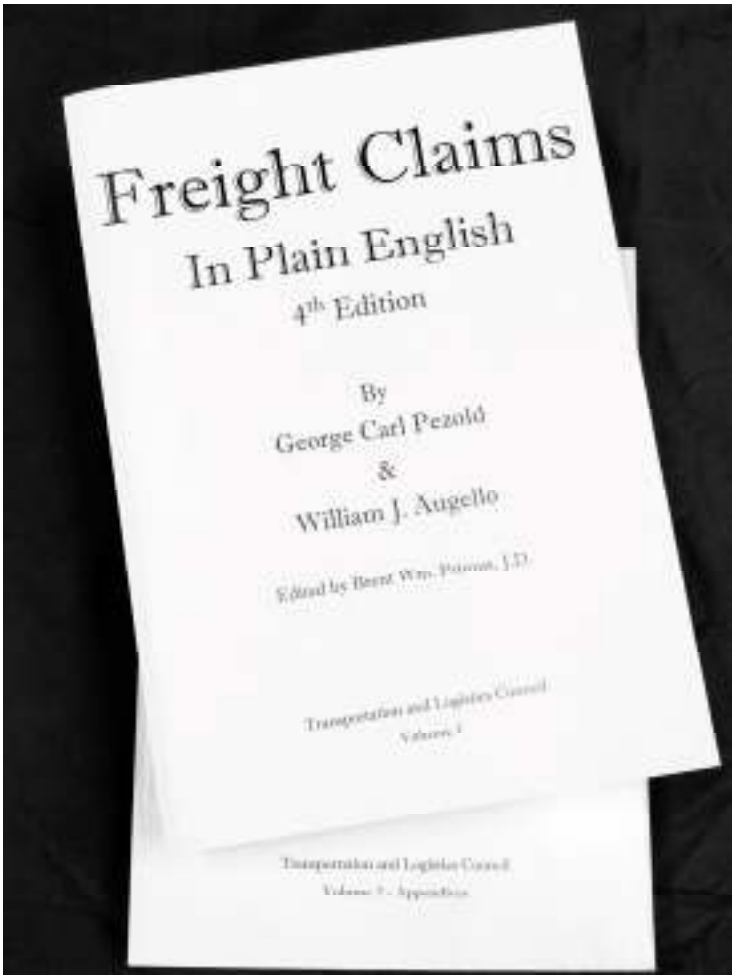
Name:		Title:
Company Name:		
Address: (STREET ADDRESS ONLY - UPS DOES NOT SHIP TO P.O. BOXES)		
City:	State:	Zip: -
Phone: ( )	Fax: ( )	Email:

Description / Type of Membership		Quantity	Fee	Total
Regular Member	[includes email subscription to ***TransDigest***]		$395.00	$
Multiple Subscriber	[includes email subscription to ***TransDigest***]		$200.00	$
Associate Member	[includes email subscription to ***TransDigest***]		$345.00	$
Non-Member Introductory Subscriber	[email subscription to ***TRANSDIGEST*** only]		$150.00	$
* *Optional:* Printed version of *TRANSDIGEST* by USPS	[added to membership fee]		$50.00	$
		TOTAL PAID (Make Checks Payable to "TLC"):		$

Credit Card Information

• MasterCard • VISA • AmEx	Credit Card No.	Exp:	(____/____)
Name on CC :	Address (if different than mailing address) :	CVV:	

It's Back Again! Now in Soft Cover



Freight Claims in Plain English (4th Ed.)

The hard-cover edition of Freight Claims in Plain English (4th Ed.) was out of stock, so the Council has arranged to have it reprinted in a soft-cover edition.

Often referred to as "the Bible" on freight claims, as the title suggests it remains the most readable and useful reference on this subject for students, claims professionals and transportation attorneys.

The new soft-cover edition comes in two volumes in a handy 7" x 10" format. Volume 1 consists of 592 pages including full text, a detailed table of contents, topical index and table of authorities. Volume 2 consists of 705 pages with 161 useful appendices – statutes, regulations, forms and other valuable reference materials.

Best of all, the soft-cover edition is reasonably priced – formerly $289 but now only $149 for T&LC members and $159 for non-members. Free shipping in the contiguous U.S. New York State residents sales tax applies.

Order Form

Fill out the information below, detach and send with your payment to: **TLC, 120 Main St., Huntington, NY 11743**
Or email diane@transportlaw.com

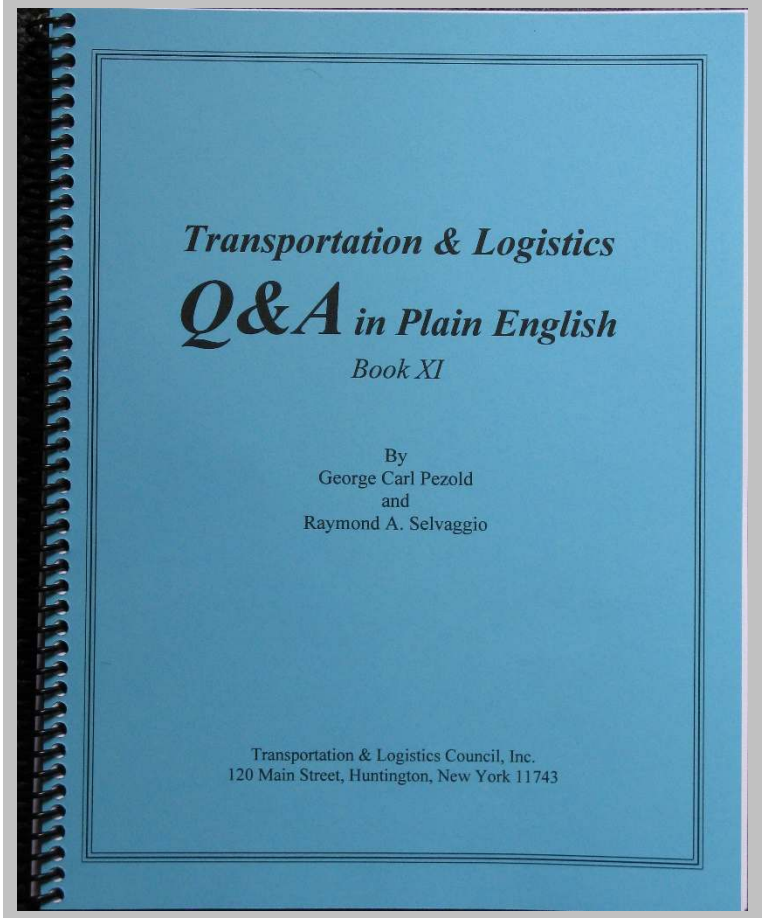
Name:		Position:
Company Name:		
Address: (STREET ADDRESS ONLY – UPS DOES NOT SHIP TO P.O.BOXES)		
City:	State:	Zip:
Phone: ( )	Email:	

Item #	Description	Qty	Price	Total
597	Freight Claims in Plain English 4th Ed. Soft Cover		**$149.00** NYS + tax = 12.85	$
597 – NM	Freight Claims in Plain English 4th Ed. Soft Cover		**$159.00** NYS + tax =13.71	
			TOTAL ENCLOSED	**$**

Credit Card Information

[MC] [VISA] [AE]	Credit Card Number :	Exp (/)
	Billing Zip Code :	CVV:

BRAND NEW!



NOW AVAILABLE IN PRINT OR ON CD!

Transportation & Logistics Q&A in Plain English – Book XI

"Transportation & Logistics - Q&A in Plain English - Book XI", by George Carl Pezold and Raymond A. Selvaggio, is the eleventh in this series of the Transportation & Logistics Council's popular texts, and is a compilation of 275 of the most recent questions submitted to the Council's "Q&A" forum and published in the TransDigest,

What is unique about this compilation of questions and answers is that the questions reflect the real problems that actually come up every day, and that the people actually doing the work - shippers, carriers, brokers, intermediaries and even truck drivers - need help with.

The answers range from simple advice to thorough explanations of the legal principles based on the authors' extensive experience in transportation law.

Transportation & Logistics - Q&A in Plain English is excellent resource of advice and knowledge about everyday problems in transportation and logistics, and a great training tool for anyone starting out in the transportation and logistics profession.

Between this new eleventh edition and the previous ones, the authors have created a virtual encyclopedia of almost every conceivable question that can come up. You can't find this kind of information anywhere else.

AVAILABLE NOW in soft cover (175 pages, with Table of Contents), or on searchable CD (with instructions on "How to Use this CD"). Price: Members $60; Non-Members $70 This includes FREE shipping in the 48 Contiguous United States! To order, log on to www.TLCouncil.org or call (631) 549-8964.

Order Form

Fill out the information below, detach and send with your payment to: **TLC, 120 Main St., Huntington, NY 11743**

Name:		Position:
Company Name:		
Address: (STREET ADDRESS ONLY – UPS DOES NOT SHIP TO P.O.BOXES)		
City:	State:	Zip:
Phone: ( )	Email:	

Item #	Description	Qty	Price	Total
595	Q & A in Plain English – Book XI (T&LC Member)		$ 60.00	$
595-NM	Q & A in Plain English – Book XI (Non-Member)		$ 70.00	$
596	Q & A in Plain English – Book XI on CD (T&LC Member)		$ 60.00	$
596-NM	Q & A in Plain English – Book XI on CD (Non-Member)		$ 70.00	$

CREDIT CARD INFORMATION

Credit Card #		MC ☐ VISA ☐ AE ☐	
Name on Card		CVV:	Exp. Month/Year:
Billing Address (if different)			