TRANSDIGEST

Transportation & Logistics Council, Inc.

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Stephen W. Beyer, Editor

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TLC's 45th Annual Conference – A Great Success!

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120 Main Street • Huntington, NY 11743-8001 • Phone (631) 549-8984 • Fax (631) 549-8962
Website: www.TLCouncil.org • email: tlc@transportlaw.com

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ASSOCIATION NEWS

45TH ANNUAL CONFERENCE –A GREAT SUCCESS!

By all reports the Transportation & Logistics Council's 45th Annual Conference, "Education for Transportation Professionals" in Memphis was one of the best ever! More than 250 attendees were treated to an outstanding program of general sessions and workshops featuring leading experts and experienced professionals in the wide range of educational subjects.

George Carl Pezold & Judy McReynolds

Highlighting the program was the luncheon guest speaker, Judy McReynolds, Chairman, President and CEO of ArcBest Corporation, whose achievements in transforming a major less-than-truckload carrier, ABF Freight System, into a diverse logistics company were a model for how to succeed in the competitive world of transportation and logistics.

Special thanks go to the sponsors and exhibitors at the Conference, and to the officers, board of directors and staff of the Council for making this a most successful event.

Note that the PowerPoint and other presentations from the Annual Conference will be available on the TLC website shortly.

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7PSolutions PO Box 1274 136 N Van Buren St. Nashville, IN 47448 Dereck Middleton Marcos Silva msilva@7Pgps.com dmiddleton@7Pgps.com www.7pgps.com Tel (812) 988-4430 Cell (317) 654-4401	**American Truck & Rail Audits** PO Box 278 North Little Rock, AR 72115 John Via jvia@amtr.com www.amtr.com Tel (501) 771-1944	**Cargo Net** 545 Washington Blvd Jersey City, NJ 07310 Sal Marino Steve Lang smarino@cargonet.com slong@cargonet.com www.cargonet.com Tel (201) 699-9243
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NEW MEMBERS

Regular Members

Katy Esquivel
Esquivel Law, Chartered
2335 Tamiami Trail North, Suite 301-B
Naples, FL 34103
kke@esquivel-law.com

Dori Bare
Pilot Chemical
2744 E Kemper Rd.
Cincinnati, OH 45241
dlbare@pilotchemical.com

Jennifer Hochstrasser
P&G
1 P&G Plaza, GO-C9-237
Cincinnati, OH 45202
hochstrasser.ja@pg.com

Heidi Calamusa
Freight Management Inc.
2900 E. LaPalma
Anaheim, CA 92806
hcalamusa@freightmgmt.com

Fred Sigman
BlueGrace Logistics
2846 S Falkenburg Rd
Riverview, FL 33578
fsigman@bluegracegroup.com

Juliana Duerr
HVH / FTI / Bill Thompson Trucking
10522 Santa Fe St.
Northglenn, CO 80234
Jrosed58@gmail.com

Joel Zarazua
BFS Services, Inc
500 Airline Dr., Suite 40
Coppell, TX 75019
jzarazua@bfsservices.com

Chris Olson
Uber
225 W. Randolph St. Floor 24
Chicago, IL 60606
olson@uber.com

Kenneth Pehanick
Saas Transportation Inc
3551 Scenic Hwy, 98, Unit 19A
Destin, FL 32541
ken@saastransportation.com

Tish Tuzes
Trans International, LLC
N93W16288 Megal Drive
Menomonee Falls, WI 53051
Tish.tuzes@ticominc.com

Associate Member

Beth Carroll
Prosperio Group
901 Kris Dr
New Lenox, IL 60451
Beth.carroll@prosperiogroup.com

HAZMAT

DO IT RIGHT OR PAY THE PRICE

A trucking company operating in California was fined $3 million for failing to transport hazardous materials in a proper manner. Wiley Sanders Truck Lines, Inc. is a private company based out of Troy, Alabama, which operates throughout the U.S. lower 48 states, Canada and Mexico.

The company entered a plea agreement February 25, 2019 in which they admitted to three felony counts, which included "recklessly" and "knowingly" transporting the byproduct of a battery recycling process. The three shipments took place in 2013 and 2014 and involved transportation from a battery recycling facility in Vernon, CA to another facility in Bakersfield, CA.

The 15 acre facility where this battery recycling operation took place at times received 40,000 batteries a day, and generated such hazardous waste as corrosive fluids and waste containing metals such as lead, cadmium, arsenic, antimony, zinc and chromium. These highly toxic end products were said to present a serious danger to public health for residents residing in communities near the battery facility.

The process involved a hammer mill that crushed and broke apart the batteries, which were then separated into three component streams: acid, lead and plastic. The process was designed to produce materials that could be used to manufacture new lead-acid batteries. The resulting battery fragments were rinsed with water and then loaded into the Wiley Sanders semi-trailers parked at the facility.

This is where Wiley Sanders' problems began. According to prosecutors, the trucking company knew that the semi-trailers did not contain any lining or inner packaging material to prevent liquids and semi-solids from escaping through cracks and other openings in the trailers while they were traveling on public roads. On at least two occasions authorities spotted liquid dripping from the trailers and called hazmat responders to the scene.

Wiley Sanders apparently transported more than 128,000 pounds of these highly contaminated materials in an unsafe manner. As a result of the plea, Wiley Sanders will pay the federal government a $1.5 million criminal penalty and an additional $1.5 million to an environmental fund established by the Los Angeles County Department of Public Health to support residents in the communities affected by the motor carrier's shipments.

The money paid to the environmental fund is to be used for verification testing, analysis and assessment of soils for residential properties, assistance to residents in abating lead and lead-paint hazards, educational and learning disability assessment and intervention for children living in communities impacted by the motor carrier, and for public health outreach.

How or why Wiley Sanders failed to provide trailers that were properly equipped for the job was not addressed in the materials presented, but the lesson should be clear: whatever you do, do it right or pay the price!

It should be noted that the battery recycling facility in Vernon itself was shut down and the owners were required to pay $50 million to clean-up the site and surrounding neighborhoods, which had been affected by environmental toxins for close to a century.

INTERNATIONAL

IMPACTS OF CHINESE RECYCLABLE MATERIALS POLICY

Last year we reported on the policy change being made by the Chinese government with regard to the importation of various recyclable materials. The Chinese, in an effort to reduce local pollution, determined that they no longer wanted certain materials and severely restricted other materials that could enter the country.

Much of what we recycle at the consumer level is paper, plastic, glass, cardboard and metal, often single use packaging of food, beverages and other household products. Across the U.S. many communities established recycling programs, with some even mandating recycling programs. The recycled goods became part of a vast ecosystem that spans the globe as part of a $200 billion dollar industry. And China, until last year, was the largest importer of recycled materials, especially for the U.S.

Beginning January 2018, China banned the import of most plastics and papers. It also tightened its restrictions on accepting other materials, like scrap metal. As a result, hundreds of local recycling programs in American cities and towns are collapsing as the industry scrambles to find replacement markets. As a result, now in many areas, items collected for recycling are being sent to landfills or being incinerated. According to researchers at the University of Georgia, in a June 2018 article published in *Science Advances*, an "estimated 111 million metric tons of plastic waste will be displaced with the new Chinese policy by 2030."

The Chinese ban has made the problem of what to do with our waste more acute and companies should be reviewing their operations to determine how they can best make changes so as to help alleviate the situation. Already, this ban has forced some of the world's biggest companies to rethink plastic. Corporations including Procter & Gamble, Unilever, Nestlé, and PepsiCo have started using reusable packaging. The European Union plans on placing a tax for plastic bags and packaging as a response to the Chinese ban, and grocery chains like Trader Joe's are trying to minimize plastic usage.

There is even an impact on shipping as transporting recyclable waste to China was a way to generate some revenue on moving otherwise empty containers back to China.

This is a problem that we are all going to have to live with and the sooner it is addressed, the better.

Visit https://www.wastedive.com/news/what-chinese-import-policies-mean-for-all-50-states/510751/ for a state by state breakdown of local impacts of the ban.

Visit http://advances.sciencemag.org/content/4/6/eaat0131 and https://www.ft.com/content/360e2524-d71a-11e8-a854-33d6f82e62f8 for analysis of the waste stream and impacts of the Chinese ban.

MOTOR

DRIVER CLASSIFICATION UPDATE

US Supreme Court Declines to Hear California Trucking Association Appeal

On March 18, 2019 the U.S. Supreme Court denied certiorari of the appeal by the California Trucking Association ("CTA") over the employment classification of truck drivers contracted by motor carriers. The case is, *California Trucking Association v. Julie A. Su*.

The case involves the CTA's challenge to the California Labor Commissioner of the Department of Industrial Relations' use of the common law "Borello" standard to determine whether a driver is an employee or independent contractor. The CTA's position was that the 1994 Federal Aviation Administration Authorization Act ("F4A") preempted California's use of Borello because driver classification is "related to" motor carriers' prices, routes, or services and that drivers and carriers should be free to enter into contracts as they chose. The District Court did not agree and ruled in favor of the state, and the U.S. Court of Appeals for the Ninth Circuit affirmed that decision, leaving California able to use the Borello standard to make its classification determinations.

Visit https://www.scribd.com/document/402421170/CTA-17-55133#from_embed to view the 9th Circuit decision.

The significance of this issue is exemplified by the California Labor Commission's statement in January that its office had received more than 1,000 port trucking wage claims and issued 448 decisions in favor of the truck drivers with more than $50 million in wages owed since 2011.

At some point this matter may be taken up by the U.S. Supreme Court as other circuit court decisions had created a conflict. The 1st Circuit (*Schwann v. FedEx Ground Package Systems Inc. 1st Cir. 15-1214. Feb. 22, 2016*) found a pre-emption provision of the F4A pre-empted application of one of the necessary requirements under the Massachusetts Independent Contractor Statute, while the 3rd Circuit *(Bedoya v. Amercan Eagle Express, Inc.* 3rd Cir. No. 18-1641. Jan. 29, 2019) said, "The F4A does not pre-empt the New Jersey law for determining employment status."

Knight-Swift Driver Classification Settlement

In another situation that highlights the cost of "improper" driver classification, Knight-Swift Transportation Holdings Inc. (created when Knight and Swift merged in 2017) recently agreed to a significant settlement to resolve a class-action suit initiated at the end of 2009.

Pursuant to the agreement Knight-Swift has agreed to pay a $100 million settlement to an estimated 20,000 owner-operator truck drivers who alleged that they were misclassified as independent contractors and not paid the legally required minimum hourly wage.

While the settlement will finally resolve this dispute, it was essentially a business decision to bring the matter to a close after more than nine years. According to the settlement agreement:

> Although this case has been in litigation for over nine years, has generated three appeals, three mandamus petitions and a petition for certiorari and has resulted in four separate opinions from the Ninth Circuit, it is no exaggeration to say that the case is still at its very inception. Absent a settlement, litigating the case from now to a final judgment could consume many additional years given the class allegations and the extraordinary number of other contested issues.

The settlement agreement, filed with the federal court on March 12, must still be approved by the federal judge overseeing the case.

REEFER MADNESS

Marijuana Use

While the use and possession of marijuana remains a federal crime under the Controlled Substances Act of 1970 ("CSA"), state laws have been changing with some 33 states having legalized marijuana for medical use and 10 states and the District of Columbia legalizing recreational use of the drug.

This conflict is creating many issues around the country as company drug policies, state laws, federal rules and the CSA intersect. However, despite the conflicting legal status of the drug among states and the federal government, the use of marijuana by truck and bus drivers remains illegal, a violation of Federal Motor Carrier Safety Administration ("FMCSA") regulations.

In response to these concerns, the American Transportation Research Institute ("ATRI") recently published research detailing issues and solutions related to marijuana-impaired driving. According to the ATRI press release:

> ATRI's research sought to document the most promising methods to identify and deter marijuana-impaired driving. The study recommends: increased data collection on the frequency and impacts of marijuana-impaired driving; public education and information on the risks of impaired driving; better equipping law enforcement and the court system to intercept and ultimately prosecute impaired drivers; and targeting tax revenue generated from marijuana sales to fund these activities.

The report points out that it is not just an issue of truck drivers operating under the influence, but the increased frequency of marijuana-positive automobile drivers operating on the same roadways as trucks, making marijuana-impaired driving a critical safety issue for the trucking industry.

When addressing the issue of marijuana use, it is important to remember that current testing technology is limited to only showing past exposure to the drug, and cannot determine whether a person is under the influence at any particular time. This problem is exacerbated because, as the ATRI report points out, driving under the influence ("DUI") laws vary from state to state. The report provides the example of Georgia, which has:

> per se laws where there is "zero tolerance" for illegal substances in the body of a driver. Georgia law states "a person is guilty of a DUI if that person drives a vehicle and that person has any amount of controlled substance present in the person's blood or urine, including the metabolites and derivatives of each or both." Thus a positive test for non-intoxicating metabolites, which indicate past use, are per se evidence of DUI. **This could apply to a person who has not been intoxicated for several weeks.** (emphasis added)

As there are currently no chemical tests that that can determine actual impairment, the report discusses different field testing protocols and both their physical and legal limitations, with the conclusion that more data is needed to determine their efficacy. One of the problems with obtaining more data is that many states do not differentiate between drug-impaired driving and alcohol-impaired driving when documenting DUI citations. A similar lack of distinction is present in the court system for recording DUI offenses in many locations.

The issue of marijuana use is significant due to its widespread availability and is likely to get worse before it gets better.

For ATRI's press release, visit https://truckingresearch.org/2019/03/13/new-atri-research-identifies-key-actions-for-keeping-roadways-safe-from-marijuana-impaired-car-drivers/ and follow the instructions to receive the full report.

Transporting Hemp

Another area of conflict with regard to marijuana laws concerns the transportation of industrial hemp. Industrial hemp is a member of the cannabis plant family that lacks the high levels of tetrahydrocannabinol ("THC") responsible for the psychoactive effects of marijuana.

Hemp fibers are long and strong and have been used extensively throughout history. It was one of the first plants to be spun into usable fiber 10,000 years ago and for centuries, items ranging from rope, to fabrics, to industrial materials were made from hemp fiber. Hemp was also commonly used to make sail canvas and the word "canvas" is derived from the word *cannabis*.

The development and use of synthetic fibers, along with the outlawing of cannabis, led to a significant decline in the use of hemp. However, as times change, the use of hemp is seeing a resurgence and laws need to be modified to accommodate the trade in industrial hemp.

Toward that end, the Farm Bill of 2014 included a provision that defined industrial hemp "the plant *Cannabis sativa* L. and any part or derivative of such plant, including seeds of such plant, whether growing or not, that is used exclusively for industrial purposes (fiber and seed) with a tetrahydrocannabinols concentration of not more than 0.3 percent on a dry weight basis."

The 2014 bill also allowed colleges and state agencies to grow and conduct research on hemp in states where it is legal. Hemp production in Kentucky, formerly the United States' leading producer, resumed in 2014. Hemp production followed in other states and currently forty-one states allow the cultivation of hemp for commercial, research or pilot programs.

The Hemp Farming Act of 2018, part of the 2018 Farm Bill signed by President Donald Trump December 20, 2018, changed hemp from a controlled substance to an agricultural commodity. While it legalized hemp federally, making it easier for farmers to get production licenses, get loans to grow hemp, and allows them to get federal crop insurance, it has yet to be codified in federal agriculture regulations. Officials expect to complete a rulemaking for the farm bill by the end of 2019.

The problem is that industrial hemp is visually indistinguishable from the psychoactive variety of marijuana, and test kits available for field use only test for the presence of THC, not its concentration. This makes the transportation of industrial hemp a risky activity. Conflicts between existing state laws and the new federal law legalizing the transport of industrial hemp make it difficult for law enforcement officers to enforce the new law, as some state laws do not differentiate between industrial hemp and marijuana.

One of the results has been that truck drivers in at least three states have been arrested on trafficking charges for transporting hemp. In a sort of reversal of the discussion above regarding states legalizing recreational use of marijuana while it remains illegal federally, a recent case pits the federal law allowing production and transport of hemp against an Idaho statute that defines hemp as an illegal substance.

The Idaho case involved a routine roadside inspection near Boise where the Idaho State Police detected a strong smell coming from a box van trailer. Believing the load to be marijuana, police arrested the driver on felony marijuana trafficking charges and confiscated the 6,700 pound load of hemp.

Despite subsequent lab tests of the substance showing it to be legal industrial hemp as defined in the 2018 Federal Farm Bill, the state of Idaho deems both hemp and marijuana illegal substances.

The outcome of this case is still to be determined, as the 9th Circuit agreed in February to hear oral arguments in the case, which may be held in April.

In any event, this is a legal area that needs clarification in order to avoid uneven application of laws on a state-by-state basis.

Truck Driver Fired for Use of CBD

Distinct from medical marijuana, cannabidiol ("CBD" oil) is an extract from industrial hemp that is not psychoactive. While there are many claims regarding the medical efficacy of CBD for a wide variety of indications, because it supposedly contains no tetrahydrocannabinol ("THC"), it is not illegal and is widely available.

The problem for a New York truck driver arose after he purchased and used CBD oil from a Denver distributor in 2012, seeking relief from pain and inflammation. The product was supposed to be THC free. Unfortunately, when he was called for a random drug check, he tested positive for a "marijuana metabolite" and lost his job. The positive drug test also caused him to be denied in subsequent job applications.

This outcome shows the risk for truck drivers (and others subject to drug testing) who choose to use marijuana related products, even if they are allegedly THC free.

TECHNOLOGY COUNCIL

Speaking at South by Southwest on March 12, 2019, U.S. Secretary of Transportation Elaine Chao said the Non-Traditional and Emerging Transportation Technology Council would meet for the first time later that week. Possible topics for the council were to include tunneling, hyperloops and self-driving cars.

Eleven distinct administrations oversee different areas of the Transportation Department, including highways, air travel, and pipelines and hazardous materials. Emerging technologies often fall under the jurisdictions of several agencies. The council will centralize the discussion of emerging transportation technologies, streamlining the review processes.

HIGHWAY FUNDING

Utilizing Road User Charges

On March 11, 2019 the National League of Cities ("NLC") published its report "Fixing Funding by the Mile: A Primer and Analysis of Road User Charge Systems". The NLC bills itself as "the nation's oldest and largest organization devoted to strengthening and promoting cities as centers of opportunity, leadership, and governance. NLC is a resource and advocate for our 49 state municipal leagues, representing 19,000 cities and towns and more than 218 million Americans."

In the executive summary to the report, the NLC points out that federal funding from the Highway Trust Fund ("HTF"), which is based upon a flat gas tax, has fallen short of meeting the nation's repair and maintenance needs. It goes on to note that it is the cities and states that have to deal with much of the consequences of the HTF shortfall as the infrastructure deteriorates.

The NLC estimates that the HTF will be insolvent by 2021 as it relies heavily on the federal fuel tax — stagnant at 24.4 cents a gallon for diesel and 18.4 cents a gallon for gasoline since 1993 — even as there have been improvements to vehicles that make them more fuel efficient. As driving habits shift and vehicle efficiency improves, the NLC says gas tax revenue will continue to drop. This will be even worse as electric vehicles become more prevalent, with the NLC estimating that by 2025 some 14% of vehicles could be electric.

As an alternative to flat gas tax used to fund the HTF, the NLC report discusses the feasibility of road user charge ("RUC") programs:

> A RUC system, also commonly referred to as a Vehicle Miles Traveled (VMT) tax or a Mileage Based User Fee (MBUF) system, would charge a driver for their use of a roadway. This system

> is often touted as a potential sustainable funding solution for America's transportation infrastructure deficit and an answer to the inadequate HTF.

The report maintains that cities with heavy congestion would serve as good testing grounds for RUC programs. It also mentions that state and local government agencies can switch to RUC systems faster than the federal government can develop broad policies for such programs.

Visit https://www.scribd.com/document/401695874/Fixing-Funding-by-the-Mile#from_embed for more details and to view the NLC report.

INFRASTRUCTURE STUDY SHOWS IMPROVEMENTS SAVE FUEL

The American Transportation Research Institute ("ATRI") recently published two reports related to infrastructure and congestion. The first is essentially a list, the "2019 Top 100 Truck Bottlenecks" and includes a brochure with a map and the following statistics:

- $74.5 billion - Annual cost to the trucking industry as a result of congestion on the nation's highways.
- 1.2 billion - Lost hours of trucking industry productivity due to congestion.
- 425,533 - Equivalent number of truck drivers sitting idle for an entire year.

In addition, according to ATRI, congestion is getting worse and year-over-year average truck speeds at the top 10 locations dropped by nearly 9%.

Visit https://truckingresearch.org/2019/02/06/atri-2019-truck-bottlenecks/ to access the list and brochure.

The second ATRI report is a case study that "quantifies how improvements to our nation's highway infrastructure can help conserve fuel and reduce emissions." ATRI research indicated that 89% of the trucking industry's congestion costs were generated from just 12% of interstate highway miles, with the conclusion that improving that 12% could positively impact the flow of people and goods.

From the press release:

> In this newly released analysis, ATRI estimated the fuel consumption and emissions impacts of congestion at one of the worst traffic bottlenecks in the country, the interchange of I-285 and I-85 in Atlanta, Georgia; known locally as Spaghetti Junction. The research combined ATRI's unique truck GPS database to determine vehicle speeds by time of day, daily trip counts collected by the Georgia Department of Transportation, and emissions factors derived from the U.S. EPA's state-of-the-science emissions model.
>
> The study found that increasing average vehicle speeds to 55 mph, which currently are as low as 14 mph during the weekday evening commute, is projected to save 4.5 million gallons of fuel annually – savings which benefit both local commuters and trucking companies. Beyond fuel savings, reductions in emissions were estimated to be 17 percent for fine particulate matter, 5.5 percent for smog-forming NOx emissions and 8 percent for carbon dioxide emissions.

Visit https://truckingresearch.org/2019/03/01/new-atri-research-quantifies-impacts-of-congestion-on-fuel-consumption-and-emissions/ for the ATRI press release and a link to the report.

CARGO THEFT

According to an article at Trucks.com, most cargo theft fell in 2018, but small-scale pilferage grew. According to the article:

> The trucking industry logged 592 incidents of cargo theft nationwide last year, a 19 percent decline compared with the prior year, according to SensiGuard Supply Chain Intelligence Center. That's an average of about 50 cargo thefts per month. The average value of stolen property per incident was $142,342.
>
> Half of all cargo theft occurred in three states: California, Texas and Florida. That share is driven by their large sea ports and heavy truck-cargo movement.

Visit https://www.trucks.com/2019/02/15/cargo-theft-fell-2018-pilferage-grew/ to view the article.

QUESTIONS & ANSWERS

By George Carl Pezold

FREIGHT CHARGES – FREIGHT PAYMENT TERMS SET BY BROKER (IN THREE PARTS)

Question 1: As a factor, we are questioning whether a freight broker is allowed to set payment terms to a motor carrier for freight bills that extends beyond 30 days?

Answer: If the parties agree to the payment terms I don't see why not.

Question 2: In accordance with 49 CFR §377.203; Extension of credit to shippers. The length of credit period a carrier is allowed to offer is 15 days. By tariff rule they may extend credit for an additional time period, not to exceed 30 days. Is a broker acting on behalf of the carrier or the shipper bound by the same regulations set forth by the Federal Motor Carrier Safety Administration ("FMCSA") as the carrier?

Answer: I am familiar with the credit regulations in 49 CFR §377.203, and it is an interesting point.

I would respectfully disagree for the following reasons.

1. This section is headed "Extension of credit to shippers" and does not mention brokers.

2. It also presumes that the carrier's credit terms would be published in a tariff, and typically this would only apply to less-than-truckload ("LTL") carriers since most (smaller) truckload ("TL") carriers don't publish tariffs.

3. To the extent it would apply, the regulation is binding only on carriers, not shippers (or a broker acting on behalf of its shipper-customer).

4. Since carriers can enter into contracts with shippers to "provide specified services under specified terms and conditions" under 49 USC §14101(b), the carrier could contract for different credit terms than provided by the regulations.

5. I doubt whether the FMCSA or a court would find that a broker-carrier contract that provides a period longer that that specified in Section 377.203 would be unlawful or unenforceable.

Question 3: I don't want to seem like I am disagreeing with you but this is an important issue for us to understand completely and I have questions about your analysis and your reasons for disagreeing.

Reason 1. You point out that this section does not mention brokers, but why would it? The subject is credit extension and in transportation that has always been the responsibility of the carrier.

Reason 2. I can't see where this section presumes a carrier's terms would be published in a tariff. It clearly states that a carrier can only extend 15 day terms unless they file a tariff which would then only allow

credit extensions up to 30 days. So, unless a carrier does file the necessary tariff they are only allowed to extend credit for 15 days.

Reason 3. The fact that the regulation is only binding on the carrier is exactly the point that makes it the sole responsibility of the carrier to set credit terms. Not the shipper and not the broker.

Reason 4. This reason I think is presuming something that is not actually stated in the section you referred to. Anyway, when I read that section I did not see where it mentions terms. Only rates and conditions are mentioned.

Reason 5. You might be correct about your speculation on how a court would treat a broker/carrier contract that exceeds the credit term limit but we are more interested in facts. Have you ever seen a broker/carrier agreement that violates 49 CFR §377.203?

We are always aware that both the courts and the regulatory agencies may fail to enforce the rules, but we always want to be factually correct when we state a position to the people we deal with and that is what we rely on you to help us with.

Answer: You raise some good questions, but I still believe that a "broker-carrier" or "carrier-broker" contract could provide for credit terms other than those prescribed in the motor carrier credit regulations at 49 CFR §377.203.

Under 49 USC §14101(b) a carrier and a shipper can enter into contracts for "specified rates and conditions" and I think that language is broad enough to include credit terms. In fact, many contracts between shippers and carriers do include credit terms that are more than those prescribed by the regulations - often 45 days or more, and the payment period can run from either the date of the invoice, the date of delivery, or the date the shipper receives the invoice.

When a broker is involved, the broker is usually the "bill to" party and the contractual relationship between those parties is essentially the same as if the carrier billed the shipper or consignee directly, i.e. the broker is the shipper's agent for billing purposes.

As noted before, the credit regulations at section 377.203 would presumably be binding on a carrier in the absence of a contract providing different terms. However, notwithstanding the language in CFR §371.10 – "Duties and obligations of brokers", I don't think it would prevent a carrier and a broker, standing in the shoes of its shipper-customer, from contractually agreeing to other terms.

Lastly, as you can appreciate, the motor carrier industry has been substantially de-regulated during the last 30 years, reflecting a Congressional intent to allow the parties freedom to negotiate and contract freely for transportation services.

FREIGHT CLAIMS – REJECTION OF REFRIGERATED LOAD DUE TO EQUIPMENT SET

Question: A carrier is to transport a load of chicken parts for pet food at minus 10 degrees. It originates in Virginia on a Friday and delivers to the receiver in Arkansas Sunday afternoon. The receiver accepts all product and makes a notation on the bill of lading that the carrier's refrigeration equipment was set to 10 degrees, not minus 10 degrees. The receiver also notates that the "box" temperature of the refrigerated van was 6 degrees ambient.

On the following Friday, the carrier was advised that the entire load had been rejected and a claim was being filed for $24,000 for the product plus a $500 "processing fee". The reason given is that there's a mandatory rejection of freight that does not arrive with the equipment's setpoint at 0 degrees.

There was no salvage opportunity given to carrier and no advisement at delivery that there would be a rejection. There is no evidence that the product is unusable. That is, no evidence that it did not arrive within

normal temperature parameters despite the setpoint, i.e. the product, loaded at -10, may never have warmed up any more than it would have in a unit that had been set at 0 anyway.

The only basis for the rejection is a "rule" that the carrier's equipment must arrive at 0 degrees. A carrier thus could have set the unit to 10 degrees, and changed it in the last mile of transport, and had the product received with no issues. So if the product is fine in that scenario, and rejection is on a basis external to the product integrity, can the carrier really be liable?

Answer: Questions about "temperature abuse" come up quite often. It is important to note that transportation of food and food-related products is subject to a very high standard of care. Products requiring refrigeration can be damaged in many ways - quality, flavor, consistency, shelf life, etc. - if transported at the wrong temperature.

It is quite common for shippers of food products to prohibit salvage or sale of goods that have been exposed to "temperature abuse" 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, and they consider failure to maintain proper temperatures as a material breach of the contract of carriage.

Carriers typically will argue that the claimant did not prove that there was any actual damage to the shipment at the time of delivery, and that the claimant failed to mitigate the loss by salvaging the goods.

Courts tend to side with the shipper in cases involving perishables and food products if there is any doubt at all, and particularly if the shipper provides a reasonable justification as to the perishable nature of the product, shortened shelf life, texture or flavor change, etc.

Now, that said, I do think your situation is different. First, the chicken parts were not for "human consumption", only as an ingredient in pet food. Second, even at +10 degrees, I would think that the temperature was well below the level of any thawing or change in quality during such a short trip. Third, it would appear that there was no independent inspection or testing to determine if there was any damage or degradation of the product. Fourth, there is no indication that there was either actual notice (or a transportation contract) that a shipment would be rejected if the "setpoint" was not at 0 degrees. (I would also note that the carrier's cargo insurer probably would not cover this claim based on the facts that you have described.)

Under the "Carmack Amendment", 49 USC §14706, and the court decisions, the claimant has a relatively easy burden of proof, but it must establish that the shipment was in good order and condition when received by the carrier, and in damaged condition at the time of delivery. The carrier has only specified defenses, as well as the burden to prove that it was negligent. Notwithstanding, if this claim were to go into suit, I doubt that the claimant would be able to convince the court that rejection of this shipment, without any attempt to mitigate damages, was adequately justified.

FREIGHT CHARGES – BROKER HOLDING SUBSEQUENT PAYMENTS AGAINST CLAIM

Question: We hauled a load for Coca-Cola that was brokered thru Coyote. Part of the load (5%) was damaged, but delivery was not accepted and Coke directed us to a disposal facility. We filed a claim with our cargo insurer. Now Coyote has filed a claim for Coca-Cola and threatened to hold payment on all our subsequent loads. Our insurance company is handling the claim. Can Coyote, the broker, legally withhold payment of loads for other shippers based on this claim by Coke?

Answer: Unfortunately it is a common practice and it is not "illegal". Your only real remedy is to bring suit against the broker for the agreed and unpaid freight charges – UNLESS you have a carrier-broker

transportation agreement that prohibits setoff of freight charges against loss and damage claims. I would also note that if you do bring suit against the broker, it would probably assert a counterclaim for the loss and damage claim, which your cargo insurer would probably be required to defend.

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.

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.

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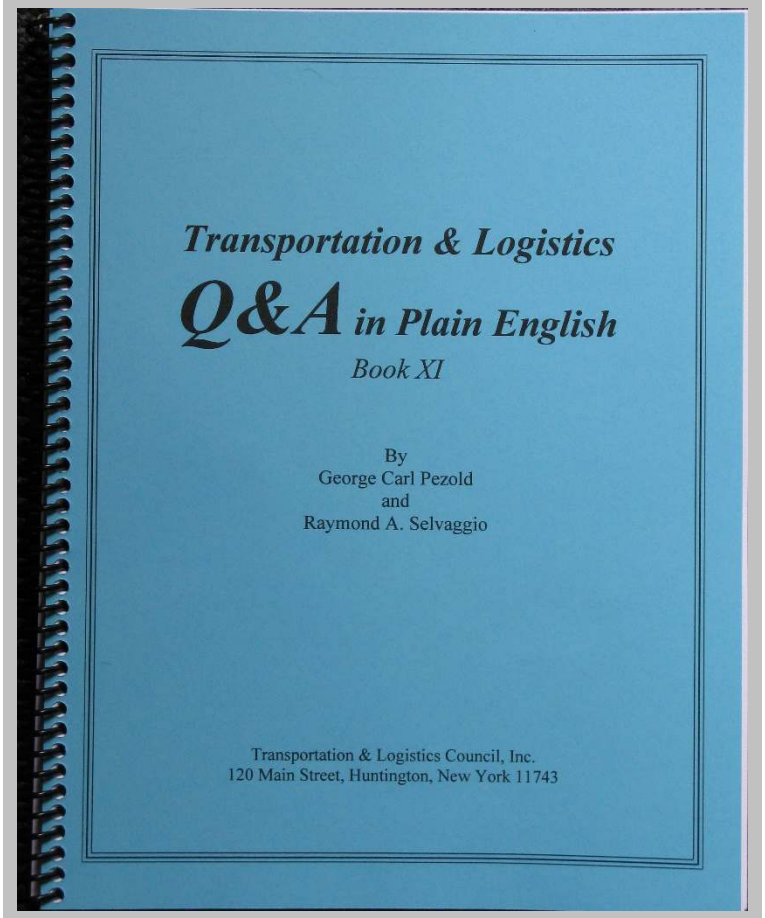

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