TRANSDIGEST

Transportation & Logistics Council, Inc.

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So, You Think Your Shipment is Insured?

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GUEST EDITORIAL

SO, YOU THINK YOUR SHIPMENT IS INSURED?

Tony Nuzio, Founder & CEO
ICC Logistics Services, Inc.

Most shippers believe that if they tender a shipment to a domestic freight carrier and that shipment is lost or totally damaged in transit, they would receive full compensation from the freight carrier for that loss. In fact, many years ago domestic freight carriers were required to compensate shippers for the "full actual loss" for a shipment that was either lost or totally destroyed while in the carrier's possession and carrier liability had been proven. Well, that was then and this is now.

Domestic freight carriers for years now have been limiting their liability by publishing various limits of liability within their rules publications. These liability limits vary from carrier to carrier and it is incumbent on all shippers to have a complete understanding of their carrier's liability limitations so they can avoid the loss of significant dollars should a loss or damage occur to their freight while in transit.

One such example is a limit of liability for "used machinery." One shipper we know shipped a large computerized fabric cutting machine back to the manufacturer for minor repairs. The carrier unfortunately significantly damaged the machine while in transit. When the shipper filed their claim for the damage it was for several hundred thousands of dollars. They were completely caught off guard when the carrier sent them a check for $120.00 claiming that shipments of "used machinery" were subject to a limited liability of $0.10 per pound. The shipment weighed 1200 pounds so that's how the carrier calculated the "whopping" claim payment.

That shipper certainly used poor judgment in tendering the shipment to a carrier who published the liability limitation, without seeking additional cargo "insurance" or excess valuation coverage from the carrier. In today's fast-paced business climate, shippers are constantly seeking out the least cost carrier. And while that makes perfect sense, how diligent are those same shippers in researching the various carriers' liability limits, just in case there is a loss or damage to their shipments. Not very often we believe.

Of course shippers can obtain additional coverage from the freight carriers for an additional fee, but knowing when to purchase that additional coverage is an important key to the carrier selection process.

On the other side of the coin, there are shippers that insure virtually all of their shipments with their freight carriers at great additional expense. Well, if that shipper has limited claims for loss and damage, perhaps they should have opted to "self-insure" instead of paying a premium on every shipment they make.

Also, for the most part, paying freight carriers directly for additional insurance is typically the most expensive insurance costs a shipper will experience. It may very well make sense for the shipper to obtain a separate cargo insurance policy from their business insurance company to cover them for any losses they may incur. Companies must perform an insurance "sanity check" to make sure they make the most logical decision on what insurance provides the most comprehensive coverage for the least possible cost.

In addition to carriers limiting their liability, all carriers publish a list of items they will not pick up for transport. These items are usually referred to as **Prohibited or Restricted Articles** and each and every freight carrier publishes their own distinct list of such restricted items.

These items almost always include, US currency, precious metals, original works of art, live animals, hazardous materials, fireworks, household goods, etc. - you get the picture. It is incumbent on all shippers to know in advance if their carrier prohibits transporting particular products they intend to ship with that carrier.

To put this into perspective here is a real life example to chew on: Recently a shipper of lighting fixtures advised us that they made a shipment to a customer by a certain freight carrier. The carrier picked up the shipment on the date specified, but then lost the entire shipment, (not sure how that happens, but apparently it did.) The shipper immediately filed a claim for the loss of the shipment and the claim amount was in excess of $6,000.00.

The carrier replied to the claim by sending a letter of declination to the shipper claiming the shipper did not have **"Prior Authorization"** to make the shipment in the first place. The carrier referred the shipper to a rule it published which states **"the following items can be picked up but REQUIRE written approval by carrier prior to pick up."** The rule is very specific and states that written approval can only be given on a form authorized and signed by a member of the carrier's regional operations management team.

The carrier then proceeded to tell the shipper the lighting fixture covers it shipped to its customer for the fixtures the customer ordered were a **"custom item, not typically maintained in inventory and with no other practical use or market value beyond the immediate intended use."** Since the shipper did not obtain prior authorization to ship these goods, the carrier refused to pay the claim and the shipper was out $6,000.00.

The real concern here for any shipper thinking of using this specific carrier, is the carrier's own definition of **"custom Items."** In our opinion, any item that is in any way customized, such as wearing apparel with company or team logos, any advertising material created for specific purposes, any food product which is labeled for a specific customer, any item that is cut to a specific size for a specific customer, (and the list goes on and on), can be considered a custom item and the carrier merely wipes its hands of any liability whatsoever and that should be a major concern for all shippers.

How well does your company vet its carriers to see if there are any similar liability restrictions that may come back to haunt them? This should be a wake-up call for all shippers. Shippers must make sure they understand all liability limitations published by the carriers they utilize. Shippers that utilize freight brokers and Third Party Logistics providers need to understand that each different carrier they utilize will have its own unique liability rules and regulations. This is truly a **"Caveat Emptor"** scenario….translation, **"Buyer Beware!"**

Editor's Note: Thank you Tony for a timely article reminding us of a matter that has long been a recurring topic for the Transportation & Logistics Council. In fact, way back in 1985, TLC's predecessor published a book by William J. Augello titled *Transportation Insurance in Plain English, or, "So You Think Your Freight Is Insured!"*

Over the years we have reiterated the importance for shippers to be aware of carrier rules tariffs that are incorporated by reference in the bill of lading. As the saying goes, "the large print giveth and the small print taketh away." Not only do carrier rules tariffs include liability limitations, but they will also include accessorial charges and other possible pitfalls. In addition, when dealing with carriers that are members of the National Motor Freight Classification ("NMFC"), it is important to also understand the application of the NMFC to their traffic, as it also includes liability limitations and fees.

Shippers either need to review and understand the implications of these tariffs and the NMFC to their traffic prior to shipping, hire experts with that ability, and/or enter into contracts with transportation partners that address those issues.

ASSOCIATION NEWS

NEW MEMBERS

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INTERNATIONAL

TARIFFS

The subject of tariffs is a moving target. In what appears to be an escalating trade war with China, on May 10, 2019 the administration announced that tariffs on the import of $200 billion worth of Chinese made goods would increase from 10 percent to 25 percent. On May 17, 2019 an agreement with Canada and Mexico to remove tariffs for steel and aluminum imports and the removal of retaliatory tariffs imposed on American goods was announced and as this is being written, the President is attempting to negotiate new trade terms with Japan.

U.S. importers dealing with China can attempt to mitigate the impact of higher tariffs on Chinese made goods by a number of means: move production or final assembly to another country; delay purchases hoping for a resolution to the dispute; apply for Section 301 exclusions; or attempt some creative "tariff engineering".

Each approach has its risks and limitations: shifting sourcing or production can be capital intensive and require significant lead time; holding back on purchases is making a bet that the tariff situation will improve before it's too late to make some other accommodation; seeking a Section 301 exclusion is time consuming with no guarantee of success; and the efficacy of tariff engineering, which is when an importer makes his product in such a way so that the lowest possible duty rate applies at time of importation, depends on the product and a comprehensive understanding of the Harmonized Tariff Schedule ("HTS") and how it works.

The fluidity of the situation makes planning difficult for businesses.

MOTOR

DRIVER CLASSIFICATION UPDATE

The latest news on the driver classification issue comes in the form of an opinion letter posted by the U.S. Department of Labor ("DOL") Wage and Hour Division ("WHD") on its website April 29, 2019. The letter discusses whether a company's service providers are employees or independent contractors under the Fair Labor Standards Act ("FLSA"). The ramifications of whether a party is an employee or independent contractor are extensive, and determine whether certain state and federal labor laws apply (including, amongst other things, hour and pay requirements, benefits, and ability to unionize).

While the letter was written in response to an inquiry regarding an unidentified "virtual marketplace company" ("VMC") that operates in the "on-demand" or "sharing" economy, its implications are much broader. The arguments outlined by the DOL opinion letter are potentially useful guide for motor carriers seeking to structure their owner-operator agreements and defend their treatment of owner-operators as independent contractors.

Generally, a VMC is an online and/or smartphone-based referral service that connects service providers to end-market consumers to provide a wide variety of services, such as transportation, delivery, shopping, moving, cleaning, plumbing, painting, and household services (think Uber, Lyft, or Takl).

According to the letter:

> The FLSA applies to those workers whom the FLSA defines as "employees." An "employee" is any individual whom an employer suffers, permits, or otherwise employs to work. This definition is very broad, but it was "obviously not intended to stamp all persons as employees." For example, independent contractors are not "employees (recognizing that workers may be independent contractors when their work does not "in its essence … follow the usual path of an employee").
>
> Over its history, WHD has consistently applied an interpretation of "employee" that adheres to the text of the FLSA and judicial precedent interpreting it:
>
>> An employee, as distinguished from a person who is engaged in business for himself or herself, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent upon the business to which he or she renders service. The employer-employee relationship under the FLSA is tested by economic reality rather than technical concepts. It is not determined by common law standards relating to master and servant.
>
> WHD Opinion Letter, 2002 WL 32406602, at *2 (quotation marks omitted).

> As reflected by this longstanding interpretation, the touchstone of employee versus independent contractor status has long been "economic dependence." The Supreme Court has instructed that a worker's "dependence" should be assessed "in light of the purposes of the Act.". Thus, for example, as "broad" as the definitions of "employ" and "employee" are, "they cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction."
>
> Whether a worker is economically dependent on a potential employer is a fact-specific inquiry that is individualized to each worker. The inability of the worker to work on his or her own terms often suggests dependence. Accordingly, independent contractors are often characterized by their ability to, for example, regularly negotiate working conditions or simultaneously work for another business. When determining economic dependence, WHD considers six factors derived from Supreme Court precedent:
>
> (1) The nature and degree of the potential employer's control;
> (2) The permanency of the worker's relationship with the potential employer;
> (3) The amount of the worker's investment in facilities, equipment, or helpers;
> (4) The amount of skill, initiative, judgment, or foresight required for the worker's services;
> (5) The worker's opportunities for profit or loss; and
> (6) The extent of integration of the worker's services into the potential employer's business.
>
> [citations omitted].

The letter goes on to provide an in-depth analysis of these factors that are worth reviewing for those involved in any business that included independent contractors, particularly motor carriers and van operators.

Visit https://www.dol.gov/whd/opinion/FLSA/2019/2019_04_29_06_FLSA.pdf to view the Opinion Letter.

HOURS OF SERVICE

In its April, 2019 report on significant rulemakings the U.S. Department of Transportation's Federal Motor Carrier Safety Administration ("FMCSA") indicated that it expects to release a notice of proposed rulemaking ("NPRM") regarding hours of service on June 6, 2019 with the comment period ending July 26, 2019.

From the abstract:

> The introduction of electronic logging devices and their ability to accurately record hours-of-service (HOS) regulations for drivers of commercial motor vehicles (CMVs) have prompted numerous requests from Congress and the public for FMCSA to consider revising certain HOS provisions. On August 23, 2018, FMCSA published an Advance Notice of Proposed Rulemaking (ANPRM) and convened five listening sessions to obtain information on how HOS provisions could be improved. In consideration of the available data, comments to the docket and the remarks of the participants at the listening sessions, FMCSA proposes revisions to certain HOS provisions to provide greater flexibility for drivers subject to the HOS rules without adversely affecting safety.

Stay tuned.

NYC CONGESTION TOLLS

Driving in New York City ("NYC") can be a nightmare due to massive congestion and failing infrastructure, and solutions have been elusive. In an effort to resolve these problems, the New York State legislature adopted a congestion pricing plan as part of the FY 2020 budget.

In the broad sense, congestion pricing asks drivers to pay a surcharge to enter certain heavily-trafficked zones (typically a central business district ("CBD")) during a particular period of time. In the case of NYC, that would mean a one-time surcharge in Manhattan south of 60th Street and north of Battery Park between 6 a.m. and 8 p.m. The goal is to both reduce congestion and to provide a revenue stream that could be put toward infrastructure repairs, including the broken subway system.

Following are some of the specifics from the bill:

- The new tolling program will be established and administered by the Triborough Bridge and Tunnel Authority (TBTA), in collaboration with the city's DOT; that includes signage notifying drivers of the tolls, the infrastructure to collect fares, and more.
- Of the funds collected, 80 percent will go towards capital projects (including improving accessibility and upgrading outdated signals) on subways and buses; 20 percent will be split evenly between Metro-North and the Long Island Rail Road.
- The area where the new toll will apply includes all of Manhattan below 60th Street—*with the exception* of the West Side Highway, FDR Drive, and the Battery tunnel including "any surface roadway portion of the Hugh L. Carey Tunnel connecting 14 to West St."
- Drivers will only be tolled once on any given day.
- The plan includes some carve-outs—for emergency vehicles, and for drivers with disabilities—and will offer credits for some New Yorkers, including those who live below 60th Street and people making $60,000 or less per year. The Traffic Mobility Review Board will be responsible for recommending any other carve-outs or exemptions.
- The TBTA and the DOT will issue regular reports on the effects of congestion pricing, including how it impacts traffic and air quality.

For truckers who already pay an $18 per axle toll to cross the George Washington Bridge into NYC the estimated additional cost of $25 per truck entering the CBD will be passed on in the freight charges.

It should be noted that the plan is not expected to be fully implemented until the end of 2020.

YRC STRIKE AVERTED

On May 3, 2019 unionized workers at YRC Worldwide, Inc. voted to approve a five-year collective bargaining agreement, thus avoiding a potential strike. The new contract will give YRC drivers and dockworkers an 18% raise over five years. There is only one minor hitch in that one of the 27 supplemental agreements failed to pass and the new contract can't take effect until the differences are resolved.

YRC is the fourth largest stand-alone less-than-truckload ("LTL") carrier in the U.S. and the largest Teamster employer in the LTL trucking sector. Shippers should be relieved they won't have to face a possible loss of LTL capacity resulting from a strike or slowdown.

OCEAN

PANAMA CANAL DRAFT LIMITATIONS

Unlike the Suez Canal, which is a sea-level canal, the Panama Canal uses locks to raise and lowers ships 85 feet in order to cross the Continental Divide. The lock system relies entirely on gravity to move the water (the new locks included water saving basins that facilitate a 60 percent reuse of water) as vessels are raised and lowered.

Needless to say, it takes a lot of water to move vessels through the locks, with an average of 52 million gallons of fresh water used in each transit. Despite losing this much water with each transit, the heavy rainfall in the Panama Canal watershed generally allows operations to proceed without limitations. In fiscal year 2017 a total of 13,548 vessels, carrying 403.8 million Panama Canal tons[1] of cargo transited the canal and in FY 2018 it went up to 442.1 million Panama Canal tons.

In order to keep operating efficiently, if there is a deficit of rainfall, the Panama Canal Authority ("ACP") reduces the allowable draft of vessels transiting the canal from its maximum of 50 feet "Tropical Fresh Water" ("TFW")[2] in Gatun Lake. Due to precipitation in the watershed that was approximately 90 percent below the historical average in December 2018, the ACP began draft limitations in increments of one foot.

In its latest (the 6th so far this year) announcement the ACP reduced the maximum draft to 43 feet for vessels arriving after May 28, 2019. While vessels over the maximum draft arriving after that date may be allowed to transit, depending upon the actual water levels, they will otherwise be required to trim or off-load cargo prior to transit.

These draft reductions represent more than just an inconvenience and have a direct impact on rates, with the cost of moving a 40-foot equivalent unit from Asia to the East Coast already up 14 percent year over year, at $2,711. Further draft reductions will put more pressure on rates.

Visit https://www.pancanal.com/common/maritime/advisories/index.html for the latest Advisories to Shipping from the ACP.

QUESTIONS & ANSWERS

By George Carl Pezold

SHIPPERS – CONSIGNEE UNAVAILABLE FOR DELIVERY

Question: I am in Hawaii and sell on E-Bay. I recently sold a giant clam shell for $5500 to a gentleman in Florida. I built a box on a pallet and hired a freight forwarding company to ship it to the buyer. The boxed shell measured 52" x 42" x 35" and had a total weight of 362 pounds.

The shell was shipped from Hawaii to California by the freight forwarder who then hired a company to transport the box from California to Florida by ground. When the company brought the box to Florida, the

[1] A net Panama Canal ton is equivalent to 100 cubic feet of volumetric capacity.

[2] It should be noted that fresh water is less dense than salt and therefore vessels sit lower; water density of Gatun Lake is 0.9954 at 29.4°C (85°F)

buyer did not and is currently still not answering his phone. The company who drove the box to Florida said that they will not deliver the box to his residence without having verbal contact with the buyer.

So now the shell is being stored at the transportation company's warehouse and they are charging me $80.10 a day to have the shell stored at their facility. The freight forwarder that I hired is now asking me what I want to do, either have it stored there or shipped back here to Hawaii.

Should I be held liable for storage charges because the buyer is not answering his phone so he can receive the shipment? Could I file an insurance claim for shipping charges to have the box shipped back to Hawaii? Please help me, thank you.

Answer: Assuming that you provided the correct information as to the name, address, etc. for the buyer, and the carrier made diligent effort to deliver the clam shell, I don't see how either of them are responsible. Unless there was some negligence on the part of the forwarder or the carrier, your problem is with the buyer.

As to the storage charges, since the delivering carrier becomes a "warehouseman" when freight cannot be delivered, it is generally allowed to charge reasonable storage charges (typically set forth in its tariff) and has a "lien" on the property for its charges that must be paid before the property is released to the owner.

If you have already been paid for the clam shell (and freight charges), then the buyer is the owner of the property and would be responsible for storage charges. If not, then you still own it and it would probably be better to cut your losses, pay the storage charges, and have the clam shell sent back to you.

Regarding insurance, I don't know what kind of insurance you might have, but you would have to ask the insurer if there is any coverage for this kind of problem.

SHIPPERS – CARRIER REFUSES TO DELIVER BECAUSE TRUCK TOO BIG FOR FERRY

Question: I purchased a piece of furniture on E-Bay. The seller put the delivery out for bid and a New Jersey carrier won the bid to deliver it for $500. On the day or evening of the day by which delivery was promised, the carrier called me and said they were unable to deliver (to Martha's Vineyard) because the ferry would not accommodate their truck, stating that it didn't allow vehicles over 17'. This is untrue. What is true is that there's a surcharge. I recommended that they rent a smaller vehicle, such as a van.

Instead they took my furniture to their NJ warehouse, and have refused to either a) deliver as agreed or b) deliver it to my mainland address and refund the delivery fee. They have stated they will only hold the item or return it to its origin in Illinois.

They have been resistant to dealing with me, the purchaser, insisting that they have business only with the seller.

It seems to me that they have an obligation to honor their contract, and that I have a vested interest in the matter, since it's my furniture that they're holding. What should I do?

Answer: If the seller included the delivery cost in the price of the furniture (delivered price) I believe that under the E-Bay rules it would be responsible for any additional freight charges that might be incurred, so you should tell the seller that they must deal with the carrier and pay what is necessary to have the goods delivered.

If not, and it was "freight collect", your options are limited since a motor carrier is said to have a "lien" on the goods and does not have to deliver them without being paid. In your case, the issue is whether the carrier is legally bound to deliver the goods for the "agreed" bid price, and whether its failure to do so is a breach of the "contract of carriage". In that regard, a "non-delivery" (as well as loss or damage in transit) is subject to federal law, the "Carmack Amendment", 49 USC 14706, and you would could bring a lawsuit for the value of the goods and freight charges (if paid). You may be able to do this "pro se", without a lawyer, in your local small claims court. You may wish to threaten a lawsuit and see how the carrier responds.

FREIGHT CLAIMS – CONSIGNEE REFUSES LOAD THAT WAS FROZEN

Question: I have a situation where a customer sent in their carrier for a CPU [customer pick-up] load that was ultimately refused for being frozen when it was a refrigerated product. The trailer number on the download does not match what the driver provided to my loading facility. The carrier is trying to claim that the return air temps being lower than the discharge temps on the download are proof that we loaded the product frozen. Is that enough for them to refuse a claim? Wouldn't they need to provide pulp temps while in transit?

The carrier was allowed to inspect freight prior to loading. Our warehouse has documentation that the product was pulled from a cooler and stored on a cooler dock. The customer is not paying the invoice for the product claiming that this is our issue even though it was their carrier. My understanding is that the terms on the invoice are FOB Origin. The customer also gave disposition to their carrier to donate or destroy the product. Does that in any way indicate they were the "owners" of the freight?

Answer: Some general observations:

1. If the terms of sale were "FOB origin" or equivalent, under the Uniform Commercial Code, unless there is some contractual agreement to the contrary, the buyer has risk of loss in transit, i.e. once the goods are tendered to the carrier at origin. Thus the buyer/consignee should normally be the party to file the claim with the carrier.

2. This shipment apparently moved under a contract between the carrier and the buyer/consignee. However, even though you are not a party to that contract, as the shipper you are a party to the "contract of carriage" (bill of lading) and can file and pursue a claim against the carrier.

3. I assume that you have records of the cooler and product temperatures while the product was in your facility, and that the consignee can provide proof of the freezing at the time of delivery. This should be sufficient to establish a prima facie case that the damage occurred during transit.

4. The discrepancy as to the trailer number on the download, as well as the carrier's statement about the discharge and return temperatures raise obvious questions indicating a "cover up".

I would suggest that you file a claim against the carrier and, if necessary, retain counsel to commence a lawsuit if the matter is not resolved.

RAIL

STB REVIEWING RAIL DEMURRAGE

On May 22-23, 2019 the U.S. Surface Transportation Board ("STB") heard testimony from rail executives and stakeholders regarding demurrage and accessorial charges. This has been a contentious issue as shippers believe the fees are used as a revenue generator while the railroads consider them vital to smooth network operations, by encouraging timely pickup of cargo.

Prior to the hearing, the STB requested rail carriers to provide specific data on their demurrage and other accessorial charges for the last 3 years. This was to include a list of tariff changes, total amounts billed and charged for demurrage and accessorials, an explanation of their dispute process, and an explanation of their credit and debit practice.

RSI Logistics published a summary of some of this information online, including the following chart:

Total Demurrage and Accessorial Charges				
	2016	2017	2018	2018 vs. 2017
BNSF	$ 238,550,000	$ 224,228,000	$ 279,058,000	24%
UP	$ 202,828,000	$ 201,601,000	$ 232,360,000	15%
NS	$ 145,454,536	$ 146,372,010	$ 146,733,728	0%
CSX	$ 187,500,000	$ 187,000,000	$ 327,100,000	75%
GTC (CN)	$ 43,204,612	$ 41,949,253	$ 46,811,864	12%
CP	$ 94,506,499	$ 91,073,445	$ 130,954,468	44%
KCS	$ 37,993,000	$ 36,632,000	$ 39,493,000	8%
	$ 950,036,647	$ 928,855,708	$ 1,202,511,060	

The article then pointed out that these revenue increases were not the result of railroads handling more railcars:

Carloads Carried by Railroad - Percent Change 2018 vs. 2017	
BNSF	5.3%
UP	0.9%
NS	0.2%
CSX	1.0%
CN	3.4%
CP	4.5%
KCS	-4.0%

Another factor to note, according to the RSI Logistics article, is that:

> Many of the rules governing demurrage and accessorial charges were developed when the railroads provided the majority of the railcars. Since then, the railroads have pushed the cost of railcar ownership on to shippers. Private cars now make up an estimated 73% of the national railcar fleet.
>
> This has created an imbalance. While demurrage, storage, and accessorial charges are used to incentivize rail customers to minimize the use of railroad assets, there are no incentives or penalties for railroads to maximize the efficient use of the private railcars in their possession. The costs from the inefficient use of private railcars by railroads is being borne by the shippers that have had to invest in those assets. Furthermore, there is little relief when demurrage charges are driven by railroad service issues.

It is important to note the distinction between non-containerized cargo, known as "merchandise", and containerized "intermodal" services. Although both types of traffic are subject to many of the same issues, the STB does not have the purview to regulate intermodal rail operations, nor does the top maritime regulator, the Federal Maritime Commission ("FMC"). This leaves the containerized intermodal rail shippers in a virtual regulatory limbo.

Visit https://www.rsilogistics.com/blog/may-stb-hearing-on-demurrage/ to view the entire RSI Logistics article.

RECENT COURT CASES

BROKER HELD LIABLE FOR DAMAGES

In an unreported decision the 3rd Circuit Court of Appeals affirmed a District Court decision holding freight broker C.H. Robinson Worldwide ("CHRW") liable for damages to a shipment.

Toms Confectionary Group ("Toms") hired CHRW to transport a shipment of miniature chocolate liqueur bottles from Pennsylvania to New Jersey. Unbeknownst to Toms, CHRW subcontracted to National Refrigerated Trucking, LLC ("NRT") to transport the load. When NRT's refrigeration system malfunctioned, the load was damaged in the amount of $124,034.31 and Toms submitted a claim. CHRW would not accept the claim or pay the loss, which was later paid by Tyrg Insurance. Tyrg subsequently brought a successful subrogation action against CHRW in federal District Court, which CHRW appealed.[3]

Upon appeal, the 3rd Circuit noted that the central issue was whether CHRW was a carrier or a broker. Under the Carmack Amendment to the Interstate Commerce Act (49 U.S.C. §14706), a carrier is liable for damages incurred during a shipment of goods, whereas a broker—someone who merely arranges for transportation—is not liable. Although the District Court found that CHRW possessed a broker's license and not a motor carrier's license, and did not own trucks or other equipment to transport cargo, it found that CHRW held itself out as a carrier and was therefore liable for the damages.

The appeals court reiterated the District Court's analysis as follows:

> The statutory text makes clear that being a carrier entails more than just physically picking up shipments and transferring them to a different location. The definition of "carrier" includes "motor carriers," which are defined as "person[s] providing motor vehicle transportation for compensation." The term "transportation" is then defined to include "services related to" (including "arranging for") the movement of property. Thus, the definition of "carrier" encompasses entities that perform services other than physical transportation.
>
> As the District Court correctly stated, in determining whether a party is a carrier or a broker, the crucial question is whether the party has legally bound itself to transport goods by accepting responsibility for ensuring the delivery of the goods. If an entity accepts responsibility for ensuring the delivery of goods, then that entity qualifies as a carrier regardless of whether it conducted the physical transportation. Conversely, if an entity merely agrees to locate and hire a third party to transport the goods, then it is acting as a broker. This distinction "tracks longstanding common-law rules" and derives from the "commonsense proposition that when a party holds itself out as the party responsible for the care and delivery of another's property, it cannot outsource its contractual responsibility by outsourcing the care and delivery it agreed to provide." The Department of Transportation, which is responsible for interpreting the Interstate Commerce Act (of which the Carmack Amendment is a part), has similarly instructed that motor carriers are not brokers just because they "arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally

[3] Plaintiffs also named NRT as codefendants, but NRT failed to appear. The District Court entered a default judgment against NRT and found NRT and CHRW jointly and severally liable. Only CHRW appealed, and so the 3rd Circuit decision only pertains to CHRW.

> bound themselves to transport." In sum, if a party has accepted responsibility for transporting a shipment, it is a carrier. [citations omitted]

The 3rd Circuit also discussed the documents that had been submitted in the District Court trial, in particular that the bill of lading listed CHRW as "carrier"; CHRW's invoice to Toms contained line items for "line haul" and a "fuel surcharge", consistent with an entity acting as a carrier; and that the invoice contained no notice of NRT's involvement or that CHRW was acting as a broker.

The court did not accept CHRW's arguments that it did not give its consent to be listed as a carrier on the bill of lading, it never took physical possession of the cargo, it entered into an independent contractor relationship with NRT, and the shipper was at fault for failing to investigate the broker's services.

The lesson here is that it is important to be clear in how you present yourself in a business relationship and to do so accurately.

Tryg Insurance v. C.H. Robinson, 201 WL 1766995 (4/19/19) available online at http://www2.ca3.uscourts.gov/opinarch/173768np.pdf

COURT HOLDS BROKER HAS STANDING TO RECOVER LOSSES FROM CARRIER

In another unreported 3rd Circuit Court of Appeals decision, the Appeals Court agreed with the District Court and held that a broker had standing to recover damages under the Carmack Amendment 49 U.S.C. § 14706.

The facts in this case involved a dispute over a load of cheese that was rejected by Trader Joe's due to high temperature readings during transit. The entire load, consisting of seventeen pallets of private label cheese, was destroyed due to safety concerns. The shipper, Singleton, had retained Mecca & Sons Trucking Corp. ("Mecca") to handle the shipment, who in turn then retained White Arrow, LLC to move the cheese from New Jersey to California.

As a result of the loss, Mecca paid the shipper damages in the amount of $73,581.16 and then sought that amount plus $7,600.00 in additional costs from White Arrow.

After a number of procedural back-and-forths, amongst other things, the District Court granted summary judgment to Mecca on its Carmack claim and damages. White Arrow appealed, arguing that Mecca lacked standing to pursue the Carmack claim.

In discussing the standing issue, the Appeals Court stated:

> As a threshold matter, we first address White Arrow's argument that Mecca, a broker, lacks standing to recover its losses under the Carmack Amendment. While White Arrow is correct in noting that the Carmack Amendment does not grant brokers a right to sue, Mecca may still avail itself of the provision granting a right of action to a "person entitled to recover under the receipt or bill of lading." 49 U.S.C. § 14706(a)(1). White Arrow has failed to demonstrate that Mecca is not a person entitled to recover its losses under this provision. Further, as the District Court noted, Mecca's claim reasonably could be considered under a theory of equitable subrogation or as an action for apportionment under 49 U.S.C. § 14706(b), and White Arrow has made no attempt to rebut either of these findings. Therefore, absent a persuasive argument to the contrary, we determine that Mecca has standing to assert a claim under the Carmack Amendment.

In ruling on this matter for Mecca, the Court in a footnote pointed out that:

> White Arrow relies heavily on the Sixth Circuit's decision in *Exel, Inc. v. Southern Refrigerated Transport, Inc.*, 807 F.3d 140 (6th Cir. 2015), which rejected a broker's attempt to recover losses from a carrier under the Carmack Amendment. However, that case is easily distinguished from

> the issue before us, as the broker in that case sought to recover two types of losses not represented here. First, the broker had not reimbursed the shipper for its losses; it was only attempting to recover from the carrier on the shipper's behalf. Second, the broker was also seeking its own recovery for the carrier's alleged violation of their separate transportation agreement. Mecca does not fit either of these scenarios—instead, it is standing in Singletons' shoes after suffering Singletons' loss.

It should be noted that the shipper here could have assigned its claim to Mecca as part of their settlement, thereby allowing Mecca to stand in the shoes of the shipper. For reasons that are not discussed here, it appears that Mecca and the shipper never took that simple step.

Mecca & Sons Trucking Corp. v. White Arrow, LLC, 2019 WL 1338518 available online at: http://www2.ca3.uscourts.gov/opinarch/173121np.pdf .

TECHNOLOGY

AUTONOMOUS VEHICLES

On May 21, 2019 the U.S. Postal Service ("USPS") initiated a two-week pilot program using self-driving trucks to haul mail between USPS facilities in Phoenix and Dallas. The pilot program will involve five round trips, each totaling more than 2,100 miles for a total of around 45 hours of driving. The trucks, operated by a San Diego based company, TuSimple, will have a safety driver behind the wheel to intervene if necessary and an engineer will ride in the passenger seat.

The trucks will operate on major interstates and pass through Arizona, New Mexico and Texas. According to TuSimple Chief Product Officer Chuck Price "This run is really in the sweet spot of how we believe autonomous trucks will be used. These long runs are beyond the range of a single human driver, which means today if they do this run they have to figure out how to cover it with multiple drivers in the vehicle."

It is easier to introduce self-driving trucks rather than self-driving passenger cars because of their advantages. These include the relative ease of operating on interstate highways as opposed to city streets, which reduces mapping requirements, along with safety challenges involving the dynamics of greater traffic density and variety, such as pedestrians and bicyclists.

CCPAC NEWS

CCPAC

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

NEW CCSB DOCKET 2019-2

The Commodity Classification Standards Board ("CCSB") will conduct its next public meeting to consider proposals for amending the National Motor Freight Classification ("NMFC") in Docket 2019-2 on Tuesday, June 11, 2019 at the Hilton Alexandria Old Town, 1767 King Street, Alexandria, Virginia 22314, commencing at 10:30 am Eastern Time.

Anyone having an interest in a proposal listed in this docket may attend the meeting on June 11, 2019 and/or communicate that interest in writing by mail, email or fax prior to the meeting. Such Interested Persons will be notified of the CCSB's disposition of the proposal.

Following is the subject index for Section I of the docket:

COMMODITY CLASSIFICATION STANDARDS BOARD DOCKET 2019-2
INDEX OF SUBJECTS (PROPOSALS) - DESCRIPTION and SUBJECT:

A
Air Coolers, water evaporative type 7
Artificial Construction of Density to Obtain a Lower Class (Bumping) – Item (Rule) 171 15
Asbestos Articles, NOI 24
Attachments, equestrian arena or track grooming, tractor or vehicle 21
Augers, post hole 17

B
Binders, book or loose-leaf 8
Broilers, electric 4

C
Cabinets, shoe shining, household 24
Cable, lightguide or lightwave, glass fiber – Packaging .... 5 of Docket 2019-1
(See Section II herein.)
Carpet Cushions, Cushioning, Lining, Pads or Padding 16
Cigarettes, electronic (e-Cigarettes or e-Cigs) 22
Controllers, electrical – Packaging 5
Cookers, electric 4
Coolers, air, water evaporative type 7
Cords, power supply 20
Covers, book or loose-leaf 8

D
Diggers, post hole 17
Drags, equestrian arena or track, tractor or vehicle attaching 21

E
Electrical Controllers or Switchboards – Packaging 5
Electronic Cigarettes (e-Cigarettes or e-Cigs), Vape (Vaping) Devices or Other Electronic Nicotine Delivery Systems (ENDS) 22

F
Face Shields 10
Fiber Optic Cable –
Packaging .... 5 of Docket 2019-1
(See Section II herein.)
Flooring Underlayment.................................... 16
Flowers, dried, other than decorative 11
Food Shields, food service 19

G
Garage Door Operators or Openers 23
Gas Masks 10
Groomers, equestrian arena or track,
tractor or vehicle attaching 21

H
Heaters, water, tankless 18
Herbs 11

I
Item (Rule) 171, Artificial Construction of
Density to Obtain a Lower Class
(Bumping) 15
Item (Rule) 203, Definition and
Specifications for Plastic Semi-Bulk Bags 13
Item (Rule) 280, Definition of or
Specifications for Intermediate Bulk
Containers (IBCs) 13

L
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M
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Mobility Scooters, electric 2

N
Nicotine Delivery Systems, electronic
(ENDS) 22

O
Oleo Stock 24
Operators or Openers, garage or
commercial or industrial building
door 23
Organic Peroxides 1

P
Package 2345 5
Packaging – Cable, lightguide or lightwave,
glass fiber, or
Fiber Optic Cable .... 5 of Docket 2019-1
(See Section II herein.)
Packaging – Definition and Specifications
for Plastic Semi-Bulk Bags 13
Packaging – Definition of or Specifications
for Intermediate Bulk Containers (IBCs) 13
Personal Care Products 3
Post Hole Augers or Diggers 17
Power Supply Cords 20
Pressure Regulators, Pressure Reducing
Valves or Pressure Relief Valves 12

R
Rakes, equestrian arena or track,
tractor or vehicle attaching 21
Respirators, face, or Resuscitators 10
Roasters, electric 4
Roots 11
Rug Cushions, Cushioning, Lining, Pads
or Padding 16

S
Scooters, mobility, electric 2
Siding, plastic 6
Sneeze Guards, food service 19
Spices 11
Switchboards, electrical – Packaging 5

T
Telephone Parts, used 14
Telephones, video (Videophones) 14
Toilet Preparations 3

V
Vape (Vaping) Devices, electronic 22
Video Telephones (Videophones) 14

W
Water Heaters, tankless 18
Wheelchairs, motor-propelled 2
Windshield Wiper Arms, Blades or Motors,
separate or combined, or Wiper Parts, NOI 9

Shippers whose traffic may be affected by proposed changes should review the proposals and respond accordingly. Visit http://www.nmfta.org/pages/Public-Docket-Files-2019-2 to review the complete Docket online. Proposals to be included in the Public Docket must be submitted by 5:00 pm Eastern Time, May 31, 2019 and requests to be a Party of Record must be received no later than 5:00 pm Eastern Time, May 31, 2019.

The CCSB invites all interested persons to participate in the classification process. Anyone having an interest in a proposal listed in the docket is welcome to attend the meeting and/or submit a statement relating to the transportation characteristics of the product(s) involved — or relevant to packaging materials or methods in connection with proposed packaging amendments. Statements should include any underlying studies, supporting data and other pertinent information.

Written submissions will be included in the respective public docket file. Decisions on docketed proposals will be based on the information contained in the public docket file.

The address is: Commodity Classification Standards Board, 1001 North Fairfax Street, Suite 600, Alexandria, Virginia 22314, and the CCSB fax number is: 703.683.1094. Written statements may also be emailed to the staff contact involved. To schedule an appearance at the meeting, or if you require further information, please get in touch with the staff contact. Anyone requesting assistance in accordance with the Americans with Disabilities Act will be accommodated.

The CCSB's policies and procedures as well as other information on the CCSB and the National Motor Freight Traffic Association are available online at http://www.nmfta.org.

Amendments to the National Motor Freight Classification resulting from the proposals in this docket will be published in a supplement to the NMFC, unless reconsideration is granted or arbitration is sought in accordance with the CCSB's rules. The supplement is scheduled to be issued on July 25, 2019, with an effective date of August 24, 2019.

FUTURE COMMODITY CLASSIFICATION STANDARDS BOARD ("CCSB") DOCKETS

	Docket 2019-3	**Docket 2020-1**
Docket Closing Date	August 22, 2019	November 27, 2019
Docket Issue Date	September 19, 2019	January 9, 2020
Deadline for Written Submissions and to Become a Party of Record	October 10, 2019	January 31, 2020
CCSB Meeting Date	October 22, 2019	February 11, 2020

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

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.

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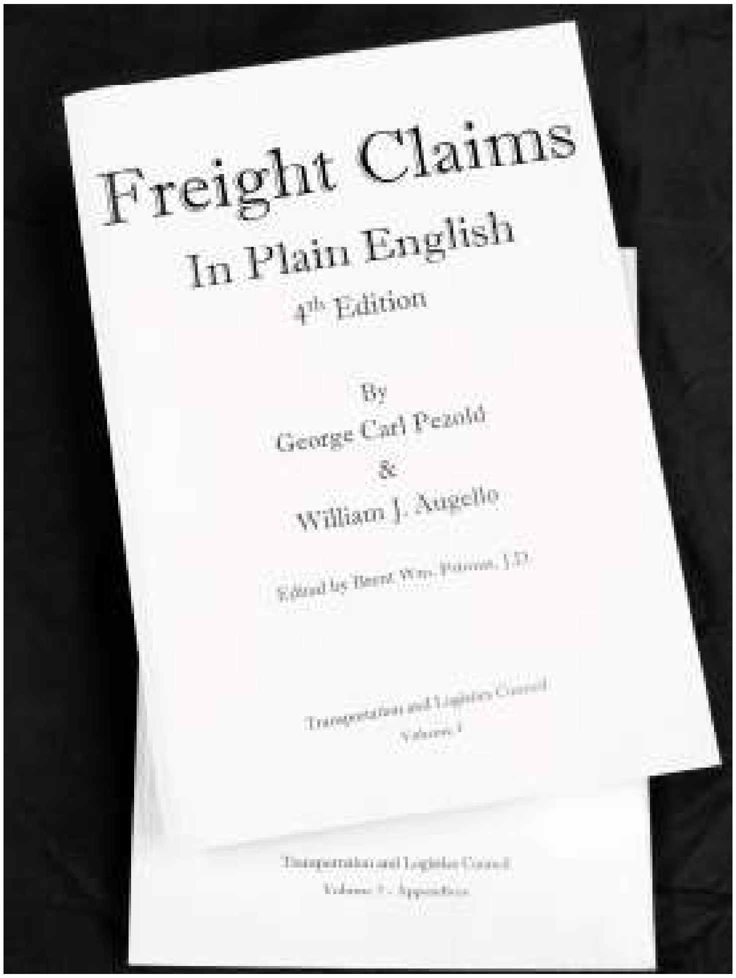

Freight Claims in Plain English (4th Ed.)

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.

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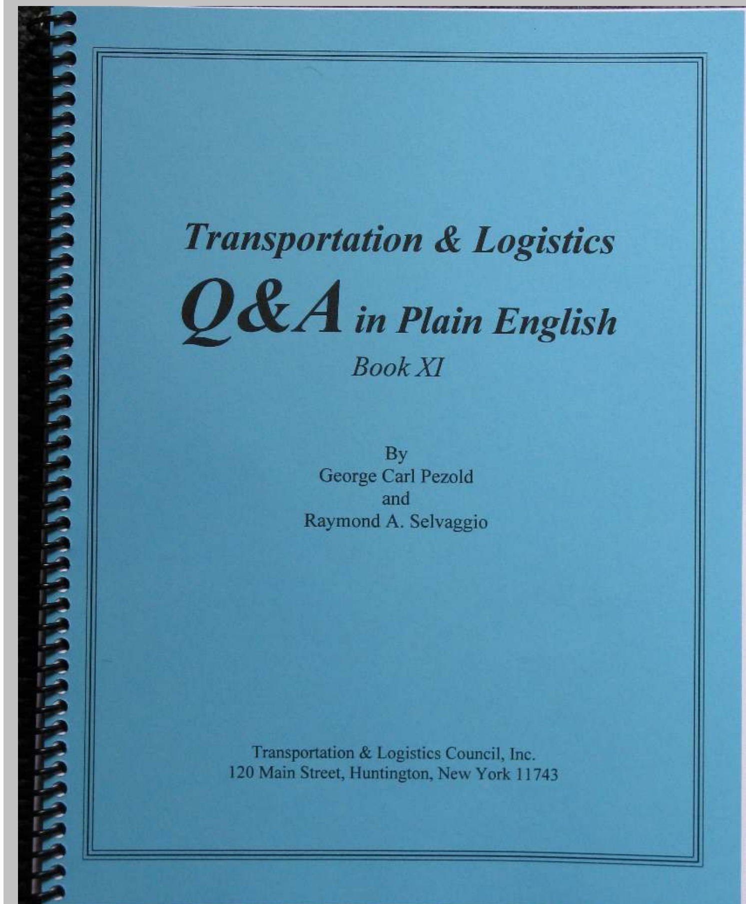

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"Transportation & Logistics - Q&A in Plain English - Book XI", by George Carl Pezold and Raymond A. Selvaggio, is the eleventh in this series of the Transportation & Logistics Council's popular texts, and is a compilation of 275 of the most recent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

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