TRANSDIGEST

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Robotics in Logistics

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GUEST EDITORIAL

THE RISE OF ROBOTICS IN LOGISTICS

By: Doug Frank, Geodis

With a record-low unemployment rate of 3.8% and e-commerce sales expected to top $4 trillion by 2021, more consumers are purchasing products with fewer workers to fulfill those orders.

The need for warehouse jobs continues to grow. A Wall Street Journal article estimates that the logistics industry will need to add 25,000 jobs this year, giving warehouse job seekers the upper hand when it comes to selecting an employer. This labor shortage has forced employers to start providing a unique and more engaging work environment to attract and retain quality employees.

This labor shortage coupled with the e-commerce boom has led to the rise of robotics in logistics. Robotics spending is set to top $115 billion in 2019 - a 17.8% increase over 2018 spending. As more and more employers and logistics providers embrace advanced technologies, robotics seems to be leading the pack.

What are the benefits of using robotics?

There are a lot of advanced technologies to explore such as automated conveyance, artificial intelligence, drones, and Google Glass. So why are so many people (including 3PLs) landing on robotics as their solutions of choice?

1. Flexible options

Robots are small, mobile, and easy to expand into multiple operations. Building infrastructure that is bolted to the ground is a permanent (and expensive) investment. Robotics give companies that flexibility to utilize the technology during busy seasons such as startup and peak but not necessarily all year long.

2. Increased productivity

One of the main benefits of robotics is increased productivity. Operations are able to double their pick rate and reduce training time - lowering cost per unit while fulfilling twice as many orders. Collaborative robots work with the teammates on the floor to help the operation run as efficiently as possible.

3. More engaging work environment

Using robotics in the warehouse enhances (not replaces) the workforce. Working with robotics can make employees more efficient. Robots replace the need to push heavy carts, have an intuitive user

interface which is easy to use, and can "speak" multiple languages. These robots can reduce training times up to 50% and when many operations offer a "pay for performance" incentive, any saved training time can help both the brand and the employee.

How soon could companies expect a return on investment?

The number one question executives ask when it comes to robotics is "how soon will I see a return on investment?" It's a fair question as many companies are risk-averse to investing in new technology without knowing what a tangible return on investment could be.

There are many factors that are at play when determining ROI - size of operation, number of robots, types of products, etc. While it depends on the operation, there are some common denominators to seeing a return on investment.

Robotics vendors continually improve both their technology and their cost models to make them more affordable. Look for a partner who can ensure you get a return on investment. Ask for references, case studies, etc. The best way to ensure an ROI is to work with a partner who has valid proof sources. With the right logistics partner, companies can see returns on their investment in under 2 years - some in less than a year.

More organizations are starting to embrace technology in order to differentiate themselves from their competitors. Using robotics in your supply chain can be a strategic advantage. A strategic logistics partner can help you select the right robotics vendor to ensure your business stays ahead of the competition.

Follow this link to see robotics in action: https://info.geodis.com/case-study-robots.

ASSOCIATION NEWS

PLAN EARLY, SAVE THE DATE FOR TLC'S 46TH ANNUAL CONFERENCE

The Transportation & Logistics Council, Inc. will hold its 46th Annual Conference at the Double Tree by Hilton at SeaWorld, 10100 International Drive, Orlando, Florida on April 27-29, 2020. Pre-conference seminars will be offered on Sunday April 26, 2020. Stay tuned!

INTERNATIONAL

TARIFFS & TRASH

The implementation of restrictive environmental policies by China along with the ongoing trade/tariff dispute has resulted in a year over year drop in U.S. recyclable exports of 20.4 percent for 2018 and 32 percent since 2014. This decrease occurred despite a shift from China to other destinations for containerized scrap product shipments.

The U.S. trade dispute has also had an impact on the export of containerized scrap to China. Last year when the Trump administration imposed 10 percent tariffs on some merchandise imports from China, China responded with tariffs on mostly U.S. commodity exports, including 25 percent tariffs on a number of scrap products and 50 percent tariffs on aluminum exports from the U.S.

Unfortunately, even if the trade dispute is resolved, China will only accept a limited amount of high quality recyclable material, and scrap exports will likely continue to decline.

The scope of the problem is that containerized exports of recyclables to Northeast Asia, which is primarily China, decreased 57.2 percent since 2014, while exports to Southeast Asia increased 314 percent and were up 250 percent to the Middle East. But those are much smaller markets and China received nearly four times the exports of its Asian neighbors combined in 2018.

Also exacerbating the problem is that other countries are following China's example. Vietnam and Thailand have said they will block all imported plastic waste in the next few years and Taiwan announced it will only accept plastic scrap if sorted into a single type, making it easier to recycle. The Philippines and Malaysia are also considering outright bans and even forced exporting countries to take back containers of waste that entered its ports illegally.

In addition to these countries' changing stance on importing scrap, in May 2019 representatives of more than 180 countries agreed to expand the 1989 global treaty known as the Basel Convention (not ratified by the U.S.) to expand its restrictions on shipping toxic waste to poor countries to include most plastic waste. This Basel amendment, which takes effect in January 2021, requires shippers of plastic scrap to obtain prior consent from the destination country, and gives countries the legal authority to refuse unwanted or unmanageable waste. (https://www.nationalgeographic.com/environment/2019/05/shipping-plastic-waste-to-poor-countires-just-got-harder/).

As previously reported (TRANSDIGEST #253) the ramifications of these trade changes are widespread and trickle down to your neighborhood. First, the scrap trade provided needed revenue for moving containers back to Asia rather than having them empty. Then, without a suitable market for the material, it gets backed up and storage facilities stateside are running out of room and are collecting material they may not be able to get rid of.

As the system backs up, at the local level, many municipalities have had to cut back or even eliminate their recycling programs.

The problem with plastic is that much of it cannot be recycled because it is dyed, contains food or liquid residue, or is mixed with other non-recyclable waste. Mixed packaging (like plasticized or coated cardboard and paper) also is a significant problem because it cannot be recycled.

Ultimately, the resolution of this problem will require a paradigm shift in how we package the stuff around us. Manufacturers need to start considering the complete duty cycle of both their products and the packaging used and make them more environmentally friendly, before we get buried.

Let us hope the solution does not create new problems. Remember, those flimsy single-use plastic bags that you got at the grocery, and are now being banned, were originally introduced with the idea that using them would protect the trees.

MOTOR

DRIVER CLASSIFICATION UPDATE

California Legislation

In the ongoing question of driver classification – employee or independent contractor – the California state assembly on May 29, 2019 passed AB 5, which would codify the 2018 California Supreme Court

decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*. That decision presumes a worker is an employee unless a hiring entity satisfies all three factors in what is commonly known as the ABC test. The bill is currently in the state senate.

Pursuant to the ABC test, in order for a worker to be an independent contractor, businesses must prove that the worker (a) is free from the company's control, (b) is doing work that isn't central to the company's business, and (c) has an independent business in that industry. If they don't meet all three of those conditions, then they have to be classified as employees.

While this bill applies to all types of workers and is not specific to the trucking industry, it is the (b) factor "work that is outside the usual course of the hiring entity's business" that is problematic for trucking as owner-operators in trucking are in the same business as trucking companies they contract with. This factor appears to bar carriers from leasing owner-operators as independent contractors.

Although the bill specifically made exemptions for workers that are "licensed insurance agents, certain licensed health care professionals, registered securities broker-dealers or investment advisers, a direct sales salesperson, real estate licensees, workers providing hairstyling or barbering services, and those performing work under a contract for professional services," it fails to do the same for truckers.

The change from independent contractor to employee has significant impacts and could affect hundreds of thousands of workers in California, including not only truck drivers but also Uber and Amazon drivers, and others such as manicurists and exotic dancers. These workers would suddenly get labor protections and benefits that all employees get, such as unemployment insurance, health care subsidies, paid parental leave, overtime pay, workers' compensation, and a guaranteed $12 minimum hourly wage.

Many businesses in California are concerned and the California Chamber of Commerce and dozens of industry groups, while supporting the bill in general, are lobbying for more exemptions and have conditioned their support on the bill being amended "to provide a more progressive and holistic approach to the application of *Dynamex* that reflects today's modern workforce."

In particular they note that:

> This new test places in doubt the sustainability of a significant portion of independent contractor relationships in California and has the potential to cause substantial economic harm to millions of California citizens. Because of the rigidity of the test, specifically factors "B" and "C", most individuals who control their own schedule, control the projects or tasks that they take on, and control the way in which they perform the tasks or projects, will likely lose existing contracts and work opportunities because they perform work that is similar to that of the business entity retaining their services and/or are not in an independent business or trade of the same work being performed.

It is not clear whether the Chamber's letter requesting additional exemptions would include truckers, but they do request a "Business to Business" exemption that would allow that "Any sole proprietor, partnership, LLC, LLP, or corporation should be able to contract with another lawful business to provide services, despite whether the services provided are within the "usual course of business"."

If granted, that exemption seems to be broad enough to essentially eviscerate the entire bill, as most people who operate as independent contractors, are essentially "sole proprietors" of a business.

Visit http://ctweb.capitoltrack.com/public/publishviewdoc.ashx?di=wDxbr1f6SC%2bzuMYgSQGylTfZYinrFAhCFXD08n9Sg3I%3d to view the full text of the Chamber's letter.

The *Dynamex* decision currently is being challenged by the Western States Trucking Association, which has appealed the ruling to the U.S. Court of Appeals for the 9th Circuit.

Visit https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5 to view the text of AB 5 and follow its progress.

Uber et al

Since their inception, ride-sharing apps like Uber and Lyft have classified drivers as independent contractors rather than employees. The result being they don't need to pay certain taxes, benefits, overtime, or minimum wages to tens of thousands of drivers. As self-employed contractors, drivers don't have a legal right to form labor unions and negotiate contracts either.

Uber drivers have spent years fighting the company in court arguing that they were intentionally misclassified and are in reality employees, with all the associated benefits. Uber has fought back with varying success and the litigation is ongoing.

Under California's AB 5, it would be difficult for Uber to pass the ABC test as driving people around in cars is a central part of Uber's business. However, if the California Chamber of Commerce request for a "business to business" exemption were to be granted, it would seem that Uber's drivers would also be included.

Misclassification in General

As is apparent from the scope of California's AB 5 and the surrounding discussion, employee classification is an issue affecting a wide range of work situations and ranges from outright abuse to harmonious relationships.

Separate from how it impacts particular workers, the government has an interest in how workers are classified: it's called money. The Treasury Inspector General for Tax Administration ("TIGTA") issued a report in February 2018 (https://www.treasury.gov/tigta/iereports/2018reports/2018IER002fr.pdf) regarding worker misclassification and its impact on taxpayers, noting that "from a tax perspective, employers are avoiding the payment of payroll taxes, which are used to fund important programs such as Medicare and Social Security."

The TIGTA report goes on to state "Worker misclassification can affect Federal, State, and municipal governments due to lost revenue, while placing honest employers and businesses at a competitive disadvantage. No single agency is directly responsible for ensuring proper worker classification."

An earlier Government Accountability Office ("GAO") report on tax compliance issued in 2017 summarized findings from an IRS audit of 15.7 million tax returns from 2008 to 2010. It turns out that about 3 million of those returns involved misclassification, adding up to about $44.3 billion in unpaid federal taxes that were later adjusted.

The GAO report further noted that:

> Every year, the federal government forgoes hundreds of billions of dollars of tax revenue through the gross tax gap—the difference between taxes owed and taxes voluntarily paid on time. The Internal Revenue Service (IRS) estimated that the annual average gross tax gap for tax years 2008 to 2010, the most recent estimate, totaled $458 billion. One portion of the gross tax gap, estimated to be $16 billion (3.5 percent), is due to taxpayers underreporting employment taxes that employers are to withhold and remit to cover liabilities for Social Security, Medicare, and federal unemployment insurance.

Visit https://www.gao.gov/assets/690/684162.pdf to view the full GAO report.

From reviewing these documents, it would appear that the revenue problem is not so much one of whether a worker is classified as an employee or an independent contractor, but rather one of tax compliance. Apparently those working as independent contractors are not reporting all their earnings properly. Resolving this problem really should have nothing to do with shoehorning workers who want to be independent contractors into being employees, and should focus on compliance.

MARIJUANA AND OTHER DRUGS

Drug Testing

There has been a push in recent years to allow employers to use hair testing for drugs rather than the current urinalysis standard. In June a proposed hair drug-testing rule was sent to the White House Office of Management and Budget ("OMB") for review. It is anticipated that the OMB will take from 60 to 90 days to review the proposed rule before it will be published for public comment according to Ron Flegel, chairman of the U.S. Substance Abuse and Mental Health Services Administration's ("SAMHSA") Drug Testing Advisory Board ("DTAB").

At a June 11, 2019 meeting the DTAB was informed by Patrice Kelly, director of the U.S. Department of Transportation's Office of Drug, Alcohol, and Compliance, that a new panel to test truck drivers and other security-sensitive federal DOT employees implemented last year recorded a 1.01% positive test rate for the first half of 2018. Kelly also said the rate for the second half of 2018 is declining but that a final rate has yet to be determined.

DTAB members also were updated on several developments, including:

- A number of agency studies are underway to assess the medical benefits of CBD oil derived from hemp.
- Discussions are underway at SAMHSA and other drug agencies over whether to add fentanyl to federal drug-testing panels.
- Marijuana laws are being passed at a dizzying pace across the United States, but drug officials are "not anywhere near" developing tests to determine a user performance standard, Kelly said.

Hemp Transportation

According to a legal opinion published by the U.S. Department of Agriculture ("USDA") dated May 28, 2019, states and Indian tribes may not prohibit the interstate transportation or shipment of hemp products grown under a program authorized by the government (they can, however, regulate the lawful production and sale of hemp).

The opinion also pointed out that as of the enactment of the 2018 Farm Bill on December 20, 2018, hemp has been removed from schedule I of the Controlled Substances Act and is no longer a controlled substance (hemp is defined as any cannabis plant, or derivative thereof, that contains not more than 0.3 percent delta-9 tetrahydrocannabinol ("THC") or a dry weight basis).

There is also a ten-year ineligibility restriction on producing hemp for persons with a state or federal felony controlled substance conviction.

While the USDA is signaling where it is going with regard to hemp, it still needs to promulgate regulations and in the meantime, without regulatory guidelines, there remains confusion among law enforcement and motor carriers.

Visit https://www.ams.usda.gov/content/legal-opinion-authorities-hemp-production for the USDA announcement and link to the full legal opinion.

REPORT ON TRUCK STOP CARGO THEFTS

The Inland Marine Underwriters Association ("IMUA") and CargoNet released their "U.S. Truck Stop Cargo Thefts" report covering the period of January 1, 2012 and December 31, 2018.

Truck stops are target rich environments spread out across the U.S. The report breaks down the data in 4 major regions and 9 divisions.

From the Introduction to the report:

> The information was compiled from a number of sources, principally CargoNet, which track cargo theft occurrences in the United States. This is, by no means, an exhaustive listing of all events that took place in our nation's truck stops (we intentionally left out some incidents that have no details on the location other than the city) and the patterns, if any, which can be derived from it, are certainly not immutable.
>
> Since this information is gathered by independent third parties and open source documents, we cannot guarantee the accuracy of every listing. Another caveat is that driver collusion ("load give-ups") cannot be ruled out so while a truck stop might be mentioned, it is possible that the theft of conveyance and/or cargo was not due to any external factors.
>
> While the name of the facility was generally not provided in the theft alerts we receive there was enough information, i.e. physical address to allow us to discern the truck stop operator although again, it is quite possible there are occasional errors. That said, I do not think this materially distracts from the data presented.
>
> It is hoped that by highlighting certain common threads shippers, their trucking companies as well as individual drivers can make informed decisions on routing and stops for convenience, fuel or meals. As we stated earlier the location of cargo crime is fluid so past history is not always a good predictor for the future. However, we would suggest that the patterns we saw last year mirrored closely the data gathered in 2013 and 2014. The listing of incidents should give everyone a good idea where "hot spots" exist such as the stretch along I-20 between Exits 454 and 472 in Texas as well as singular locations, specifically on I-4 at Exit 72 in Orlando, FL.
>
> In an ideal world, truckers would be sharing their knowledge of truck stops and rest areas as we believe that the best guidance is based on word-of-mouth from driver to driver.

In conclusion, the report details 9 Best Practices for protecting cargo:

> No matter where a driver chooses to park, adherence to proven security protocol is critical. Some best practices include:
>
> - Drivers should have enough Hours of Service and fuel to travel at least 200 miles before stopping. They should take their mandated short (30-minute) rest break either before leaving the shipment origin or after driving the 200 miles.
> - Drivers should never discuss the nature of the cargo, routing or other relevant details with anyone.
> - Drivers should never transport unauthorized passengers.
> - Drivers should use truck and rest stops that are well lighted and secure. They should park along with fellow drivers and position their truck so that it is always visible to them.

- Drivers should park so that the trailer doors are tight against a wall, pole or other immovable object.
- Drivers should remove all door and ignition keys and take them with them every time they leave the vehicle. They must also lock all doors when they exit the truck.
- Drivers should carry identification of both the tractor and trailer/container on their person. This information should contain relevant details such as make, model, year and vehicle license numbers and other pertinent details.
- Drivers should immediately contact their home base/dispatcher/law enforcement if their truck is stolen.
- Shippers, trucking companies or logistics intermediaries should embed tracking devices in the load so that the shipments can be covertly monitored throughout transit. There are companies that provide the telematics (units) as well as tracking and recovery of stolen trucks and their cargo from 24/7 Command and Control Centers.

Visit https://www.imua.org/Files/reports/2019reports/TruckStopReportCargoNetIMUA2012.2018.pdf to view the full report.

OCEAN

EC BLOCK EXEMPTIONS

The European Commission ("EC") has been struggling with its options in its review of the ocean carrier consortia block exemption regulation ("BER"). Similar to our anti-trust exemptions for ocean carrier pricing, the BER has been a contentious issue between shippers and carriers.

Carriers claim they are unable to get the freight rates they need and want the BER renewed. Shippers, frustrated over carrier schedule reliability and a reduction in the number of port calls, want the BER eliminated. However, shippers have not been able to show that eliminating the BER will resolve their concerns.

The World Shipping Council ("WSC"), the European Community Shipowners' Associations ("ECSA"), the International Chamber of Shipping ("ICS"), and the Asian Shipowners' Association ("ASA") presented a combined effort and called for renewal, while the Global Shippers Forum ("GSF"), which has a history of taking exception to conferences on behalf of shippers across the globe, put forward arguments for non-renewal. Other stakeholders have intermediate positions.

The three pathways being considered by the European regulator: allow the regulation to expire, retain the existing agreement, or amend it. The current BER that governs container shipping expires on April 23, 2020.

PARCEL EXPRESS

"ROADIE" PARCEL DELIVERY

Started in 2015, "Roadie" is a crowdsourcing package delivery service that had over 120,000 pre-screened and verified drivers as of May 2019. The idea is as simple as making the connection between someone who is going there already and the package that needs to get there. Roadie helps make those connections.

According to Roadie founder Marc Gorlin, "It's essentially people on the road heading in the right direction," an "on the way" delivery service. Initially working with individuals, Roadie now works with companies like Home Depot, Macy's, Walmart and Delta Airlines amongst others.

According to a February 25, 2019 press release announcing a successful round of funding:

> This funding follows Roadie's announcement of recent delivery partnerships with Delta Air Lines, The Home Depot, and Walmart. Roadie has used these partnerships to strengthen its foothold in 224 metro areas across the country. Many of these metro areas were initially launched with consumers and small businesses, but have now scaled to meet the needs of enterprises delivering anything up to 100 miles around every major city in America.
>
> Because Roadie's on-the-way model taps into unused capacity in passenger vehicles already on the road, the company is uniquely positioned to help America's largest retailers bring same-day delivery to millions of customers nationwide — even in small cities and towns that most retailers struggle to reach. The company's same-day delivery footprint now reaches 89 percent of U.S. households.
>
> "In today's hyper-competitive retail environment, it's not enough to only offer same-day delivery to folks in NFL cities," said Marc Gorlin, Founder & CEO of Roadie. "Our model is a game-changer for retailers, wholesalers and consumers who want same-day delivery of any item, of any size, to any zip code, at any time. An investment like this further validates our crowdsourced model, which retailers are fast realizing is a highly flexible, scalable, and cost-efficient option to reach all of their customers, wherever they might live."

As an example of their unique service, Delta Airlines uses Roadie to get delayed bags to customers, who are able to track their wayward bags in real-time after they have left the airport. According to Delta's article, "The airports using Roadie see 65% faster delivery times on average while delivery times at established locations have improved 20% year over year, thanks to Roadie's continued investment in technology improvements and driver growth."

Roadie makes its money by taking about 20 percent of each gig, with drivers reportedly able to earn anywhere from $8 up to $650 or more per job, depending on the size of the package and the delivery distance.

Senders pay a flat rate based upon distance and size, broken down as fitting in: a shoebox; the front seat of a car; the back seat; a hatchback or SUV; or a pick-up truck. They also will transport pets, crated and in the back seat.

Roadie provides $500 of free item protection for every delivery with up to $10,000 more available from UPS Capital (the financial services division of UPS that offers cargo insurance).

Editor's Note: It will be interesting to see how this "Uber" of package delivery plays out. To the extent drivers/vehicles are available, this service can allow many more businesses to provide cost effective same-

day or next day delivery service. Will the Roadie delivery drivers follow the Uber drivers and eventually start litigating their status as employees or independent contractors?

Visit https://www.roadie.com/resources/press-releases/roadie-investment-home-depot to see the press release and visit https://www.roadie.com/ for more information about the app.

Visit https://news.delta.com/delivering-bags-and-saving-day-delta-s-partnership-roadie-expands to view Delta's article.

QUESTIONS & ANSWERS

By George Carl Pezold

CARRIERS – CLAIM AFTER CLEAR DELIVERY

Question: I have recently been issued a claim for damaged freight. My seal was intact, freight was strapped and secured and my bill of lading was clear and signed. What can I do to prove that the freight damage was not caused during transport?

Answer: From your limited description of the facts it sounds like this falls into the category of "concealed damage", i.e. discovered after the load was delivered and the seal was broken.

While delivery with the shipper's seal intact is generally good evidence that a SHORTAGE did not occur during transit, it doesn't help much if there is damage discovered upon delivery. Assuming that the shipment was in good condition when tendered to the carrier at origin, the damage could have been caused by inadequate packaging, loading, blocking, bracing, etc. or by rough handling during transit.

Basically, if the shipper can prove good condition at origin and damage at delivery, you have the burden of proving that you were not negligent in some way that may have caused or contributed to the damage. This is a factual question and a statement from the driver that the trip was normal without any incidents may help your position

Freight Claims – COD Gone Awry

Question: We shipped a full truck load COD through a freight broker who then contracted with the carrier. The COD was cashier's check only and the COD amount was about $80,000. The receiver tricked the driver into leaving his truck and while he was away from this truck they unloaded the truck and then refused to give him the check. Would I file a claim with the broker or the carrier?

Answer: You have not indicated who prepared the bill of lading or provided a copy. However, as a general rule, if the words "C.O.D" and instructions such as "cashier's check only" are shown clearly on the face of the bill of lading, and if the carrier fails to do so, it is liable for damages for the full amount that was supposed to be collected.

The other question is whether the broker might be liable (if it failed to properly instruct the carrier). Normally, absent a clear contractual requirement, a broker would not be liable even if it were negligent in failing to do so.

Freight Charges – Disappearing Freight Forwarder

Question: If a freight forwarder closes operations but has collected payment from the company for the shipments they did move --can the carriers who performed the services but were not paid attempt to collect from consignor shippers? The shipper paid the forwarder and the consignees have paid the shipper.

Answer: Carriers can and do try to collect from shippers and/or consignees, but I don't think they would be successful in the situation you have described. If the "failed company" was actually a freight forwarder (not a broker), it would legally be considered the "shipper" with regard to the carriers it used. Thus, there is no contract of carriage as between the forwarder's customers (shippers) and the carriers.

Regarding the liability of the consignees, there is a line of court decisions applying the principle of "estoppel" where the bill of lading is marked "prepaid" and the consignee has paid the shipper for the goods (including the delivery charges).

FREIGHT CHARGES – CARRIER MODIFIES SHIPMENT

Question: I work for a shipper, and recently, a carrier we booked to haul an inbound shipment for us modified that shipment by removing a pallet without authorization from us. My question is what can we legally do since they are in breach of contract? Can we deduct from the agreed upon rate since they did not haul the exact load they booked with us, without having to take it as far as litigation?

Answer: Without seeing the bill of lading, I would think that if it specified a number of packages or pallets and the rate was based on the quantity shown on the bill of lading, you would be entitled to deduct a pro-rata portion of the charges for the number that was not delivered.

FREIGHT CHARGES – DISPUTE OVER PREPAY & ADD

Question: We placed an order with a vendor. They then called their provider and placed the order so it was shipped from a 3rd party. He also provided our company account to the 3rd party for the freight shipping charges. He then told me that they did not use our account, and now we have to provide payment for freight.

I have requested a copy of the freight bill with a total on it and they are refusing to give me a copy which makes me feel that they are not being honest about how much they were charged for freight. Are they allowed to withhold freight invoices and are they allowed to charge more for freight then what they were billed?

Answer: I assume that you were invoiced "prepay & add", i.e. the cost of the goods plus the freight charges for delivery.

There is no "law" that says the vendor/provider must disclose the actual freight charges or that it can't charge more than the actual charges (although it might be considered commercial fraud if they represented that the amount was the actual freight that was paid to the carrier).

My only suggestion - if you have not already paid the vendor - is to withhold payment for the freight charges and demand a copy or the paid freight bill.

3PLS – PROVIDING INSURANCE COVERAGE

Question: I am wondering what determines whether a company is deemed a third party logistics provider ("3PL") for purposes of shipping insurance. In other words, if I am not packaging, arranging for the shipping or packaging, nor shipping myself, but simply offering an online tracking tool for individual consumers using the tracking information from a carrier -- could I be considered a transportation intermediary and eligible to provide insurance for those packages as a service? I would like to offer insurance coverage

on packages that people want to track using my website, but I need the transportation intermediary policy to do that and I don't know if my business (offering online tracking) is considered that?

Answer: If all you are doing is "simply offering an online tracking tool for individual consumers using the tracking information from a carrier", I don't think that you need to be registered as a freight broker with the Federal Motor Carrier Safety Administration ("FMCSA").

However, in most all states you cannot sell insurance coverage unless you are a licensed insurance broker.

LIABILITY – CUSTOMER BREAKS DOWN PALLET ON TRUCK

Question: Is my employee allowed to open a pallet and unload from the deck of a UPS Freight delivery truck?

Answer: I don't know if UPS Freight has any policies or tariff rules that would be applicable. However, there is an item in the National Motor Freight Classification that deals with loading and unloading:

> Item 568
>
> HEAVY OR BULKY FREIGHT-LOADING OR UNLOADING
>
> Unless otherwise provided in carriers' individual tariffs, when freight (per package or piece) in a single container, or secured to pallets, platforms or lift truck skids, or in any other authorized form of shipment:
>
> (a) weighs 110 pounds or less, the carrier will perform the loading and unloading;
>
> (b) weighs more than 110 pounds but less than 500 pounds:
>
> (1) The carrier will perform the loading and unloading where the consignor or consignee provides a dock, platform or ramp directly accessible to the carrier's vehicle except when the freight exceeds 8 feet in its greatest dimension or exceeds 4 feet in each of its greatest and intermediate dimensions-See paragraphs (b)(2) and (d). Where the consignor or consignee does not provide a dock, platform or ramp, the truck driver, on request, will assist the consignor or consignee in loading or unloading.
>
> (2) The carrier will perform the loading and unloading where the consignor or consignee provides a dock, platform or ramp directly accessible to the carrier's vehicle if such freight: (1) exceeds 8 feet but does not exceed 22 feet in its greatest dimension and does not exceed 2 feet in its intermediate dimension, or (2) does not exceed 10 feet in its greatest dimension and does not exceed 5 feet in its intermediate dimension and does not exceed 1 foot in its least dimension. Where the consignor or consignee does not provide a dock, platform or ramp, the truck driver, on request, will assist the consignor or consignee in loading or unloading.
>
> (c) weighs 500 pounds or more, the consignor will perform the loading and the consignee will perform the unloading. On request of consignor or consignee, the truck driver will assist the consignor or the consignee in loading or unloading.
>
> (d) exceeds 8 feet in its greatest dimension or exceeds 4 feet in each of its greatest and intermediate dimensions, the consignor will perform the loading and the consignee will perform the unloading. On request of consignor or consignee, the truck driver will assist the consignor or consignee in loading or unloading. The provisions of this paragraph will not apply to the extent provisions are published in paragraph (b)(2) of this Item.

The only comment that I have is that if your employee opens the pallet and unloads from the truck you could be responsible for any damage or injury that occurs while doing so.

FREIGHT CLAIMS – RULES REGARDING MITIGATING LOSS ON FOOD OR DRUGS

Question: Are there specific CFR regulations about mitigating damages when food or drugs are damaged by the carrier, and the customer demands immediate disposal to minimize risk or liability exposure?

Answer: Contamination of food and food-related products, drugs, medicines or other items intended for human consumption is a serious matter. The mere possibility of contamination may, in and of itself, be sufficient.

There are federal regulations that cover food and drug items, and essentially state that a product is deemed "adulterated" if it is damaged and may have been contaminated. For example, there are provisions governing contaminated food under the Federal Food, Drug and Cosmetic Act - 21 USC 342(a)(4) and 342(i):

Section 342(a)(4) states, "A food shall be deemed to be adulterated ... if it has been prepared, packed, or held in insanitary conditions whereby it may become contaminated with filth, or whereby it may have been rendered injurious to health." This provision has been used in the past to support damage claims.

Section 342(i), entitled "Noncompliance with sanitary transportation practices." This provision states, "food shall be deemed adulterated ... if it is transported or offered for transport by a shipper, carrier by motor vehicle or rail vehicle, receiver, or any other person engaged in the transportation of food under conditions that are not in compliance with regulations under section 350e of this title."

See also the discussion in *Freight Claims in Plain English* (4th Ed.) at Section 11.5.

CONTRACTS – AVAILABILITY OF CANNED CONTRACTS

Question: I was given your website to check out today by a friend. Do you have any canned contracts that would be written in favor of a carrier or a broker?

Looking for something that protects our interests in general, but specifically around claims and deductions (e.g. not reference Carmack Agreement if possible)? If you do not - can you point me in the correct direction of someone or some organization that would? Thanks so much.

Answer: Neither the Transportation & Logistics Council nor our law firm has any "canned" contracts available.

It is our experience that there are no good "one size fits all" transportation agreements and that these contracts generally need to be tailored to meet the specific requirements of the client.

RAIL

SMALL SHIPPERS STUNG BY RAIL DEMURRAGE POLICIES

While the Surface Transportation Board ("STB") is reviewing the issue of rail demurrage charges and recently heard testimony on the matter (see TRANSDIGEST 255), another problem has been raised. In particular it involves small shippers who are not able to take cargo deliveries over the weekend.

Railroads seek to have cargo move through their terminals rapidly, and not sit for any length of time. To encourage this, they have been making changes to their "free time" policies, with the result that shippers

whose business is not open over the weekend are facing increased demurrage charges. Basically, the railroads are now considering Saturday and Sunday as business days. Their terminals are open, so shippers should also be open and available to take delivery or else pay a storage penalty for being closed.

The railroads' position is that customers are storing their boxes at and congesting the railroad terminals, and why should they spend millions to expand a terminal solely to provide customer storage space. Imposing these fees provides incentive for shippers to find alternative yard space.

The problem typically arises when the railroad provides notification of availability late on a Friday. If the shipper cannot pick up the container before Monday, they may be subject to a charge.

Rail shippers need to be aware of these policy changes and take them into consideration.

RECENT COURT CASE

BROKER DEFEATS CARGO CLAIM

The U.S. District Court for the Southern District of Texas on summary judgment ruled in favor of the broker after there was an accident resulting in $675,947.16 damages.

Enbridge Energy, LP purchased equipment from Toshiba International Corp. that needed to be moved from Texas to Michigan. Toshiba contracted with C.H. Robinson ("CHR") as a freight broker to move the load, which included two 3,500 horsepower drives. CHR hired Imperial Freight Inc. to transport the load. While enroute, Imperial's driver exited the highway so fast that the truck overturned on the off-ramp in Arkansas, damaging the drives "beyond economic repair." The driver was cited for careless and prohibited driving.

Enbridge filed a claim with CHR, who then began the claims process with the carrier and its insurer. Imperial's insurer denied coverage on the claim as the policy did not cover the driver, and Enbridge filed suit.

The court noted that CHR could only be liable to Enbridge under the Carmack Amendment (49 U.S.C. §14706) if it was a motor carrier, and that as a broker, it is not liable for the negligence of its independent contractor trucking company or their driver.

The court also addressed Enbridge's other state law claims against CHR noting that they are preempted under the Federal Aviation Administration Authorization Act ("FAAAA"). In particular, Enbridge's common-law negligent hiring and failure to verify adequate insurance claims were preempted by the FAAAA.

The court went on to discuss why, even absent FAAAA preemption, Enbridge's state law claims would have failed, addressing in turn claims for negligent hiring, negligent misrepresentation, breach of contract and breach of fiduciary duty.

Negligent hiring requires a showing of CHR's breach of legal duty to protect Enbridge from the actions of its independent contractors and that any damages sustained were proximately caused by such a breach.

The court found no breach as Imperial was a qualified, federally licensed carrier and also no proximate cause as it was the driver's miscalculation that caused the accident.

To prevail on its negligent misrepresentation claim, Enbridge was required to show: 1) the defendant made a representation to the plaintiff in the course of the defendant's business; 2) the defendant supplied false information for the guidance of others; 3) the defendant did not exercise reasonable care or competence in

obtaining or communicating the information; 4) the plaintiff justifiably relied on the representation; and 5) the defendant's negligent misrepresentation proximately caused the plaintiff's injury.

Enbridge did not identify what particular information CHR gave it upon which it relied.

The court noted that Enbridge's claim for breach of contract would fail as there was no express contract between Enbridge and CHR and that Enbridge was not an intended beneficiary of CHR's contract with Toshiba.

For similar reasons, Enbridge's breach of fiduciary duty claim against CHR would also fail, as there was no contract between the parties and CHR had no fiduciary duty to Enbridge.

As a result, Enbridge's sole recourse was against the carrier, Imperial.

It is interesting to note that according to the written decision, "while . . . Robinson vetted and retained a qualified motor carrier that was insured both by the liability and cargo insurance Robinson requires of all motor carriers and the cargo insurance Toshiba specified", there was no explanation as to why Imperial's insurance carrier refused to provide coverage for the driver other than the vague "because the policy did not cover the driver".

As was noted in last month's TRANSDIGEST guest editorial, "So, You Think Your Shipment is Insured?", all too often shippers' only find out after the fact that there is inadequate or no coverage for their loss. While that article focused more on carrier liability limitations, it did also discuss the use of cargo insurance to provide protection.

Also not mentioned in the decision were the terms of sale, i.e. FOB origin or FOB destination. As it was Enbridge pursuing the claim, it is most likely that the terms were FOB origin, leaving Enbridge liable for any loss enroute. The problem in that situation is that, as the court noted, Enbridge had no contractual relation with CHR and therefore had no control over or ability to modify any of the terms between the shipper and the broker.

In such a situation, how should a purchaser/consignee protect itself? It appears that it must either purchase separate insurance coverage, and/or somehow include protections in the purchase agreement.

Enbridge Energy, LP v. Imperial Freight, Inc. 2019 WL 1858881

TECHNOLOGY

FMCSA PUBLISHES ANPRM ON AUTOMATED VEHICLES

On May 28, 2019 the Federal Motor Carrier Safety Administration ("FMCSA") published an "Advance Notice of Proposed Rulemaking" ("ANPRM") seeking comments on possible changes that may need to be made to the Federal Motor Carrier Safety Regulations ("FMCSR") to facilitate the introduction of automated driving system ("ADS") commercial motor vehicles ("CMVs") onto the nation's roadways.

The ANPRM referred to the following different levels of automation:

- *SAE Level 0, No Driving Automation:* The performance by the driver of the entire dynamic driving task (DDT), even when enhanced by active safety systems.

- *SAE Level 1, Driver Assistance:* The sustained and operational design domain (ODD) specific execution by a driving automation system of either the lateral or the longitudinal vehicle motion

control subtask of the DDT (but not both simultaneously) with the expectation that the driver performs the remainder of the DDT.

- *SAE Level 2, Partial Driving Automation:* The sustained and ODD-specific execution by a driving automation system of both the lateral and longitudinal vehicle motion control subtasks of the DDT with the expectation that the driver completes the object and event detection and response (OEDR) subtask and supervises the driving automation system.

- *SAE Level 3, Conditional Driving Automation:* The sustained and ODD-specific performance by an ADS of the entire DDT with the expectation that the DDT fallback-ready user is receptive to ADS-issued requests to intervene, as well as to DDT performance-relevant system failures in other vehicle systems, and will respond accordingly.

- *SAE Level 4, High Driving Automation:* The sustained and ODD-specific performance by an ADS of the entire DDT and DDT fallback without any expectation that a user will respond to a request to intervene.

- *SAE Level 5, Full Driving Automation:* The sustained and unconditional (*i.e.,* not ODD-specific) performance by an ADS of the entire DDT and DDT fallback without any expectation that a user will respond to a request to intervene.

The FMCSA noted that this ANPRM is focused primarily on SAE Levels 4-5, because it is only at those levels that the ADS can control all aspects of the driving task, without any intervention from a human driver.

Comments are due by 7/29/19 (note that this is a corrected date as the original ANPRM stated 8/26/19).

Visit https://www.federalregister.gov/documents/2019/05/28/2019-11038/safe-integration-of-automated-driving-systems-equipped-commercial-motor-vehicles to view the ANPRM.

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 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 is now open on the website www.ccpac.com.

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

CCSB DOCKET 2019-2 DISPOSITION

On June 14, 2019 the CCSB published its Notice of Disposition for Docket 2019-2. The dispositions resulting in amendments to the National Motor Freight Classification ("NMFC") will be published in a supplement to the NMFC, unless reconsideration is granted, to be issued July 25, 2019 with an effective date of August 24, 2019.

We always say that the Classification matters, and shippers can be surprised and impacted by changes that are made.

The results from the June 11, 2019 CCSB meeting provide another example. At this meeting, the CCSB decided to cancel all references to Item 171. This is the so-called "bumping" rule, which allowed shippers to artificially increase the density of a shipment in order to lower its class, and therefore the freight charges. The net result of this change will be higher costs for shippers.

Visit http://www.nmfta.org/Dockets/Docket%202019-2/2019_2_Disposition.pdf to view the docket disposition.

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.

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

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All members receive:

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

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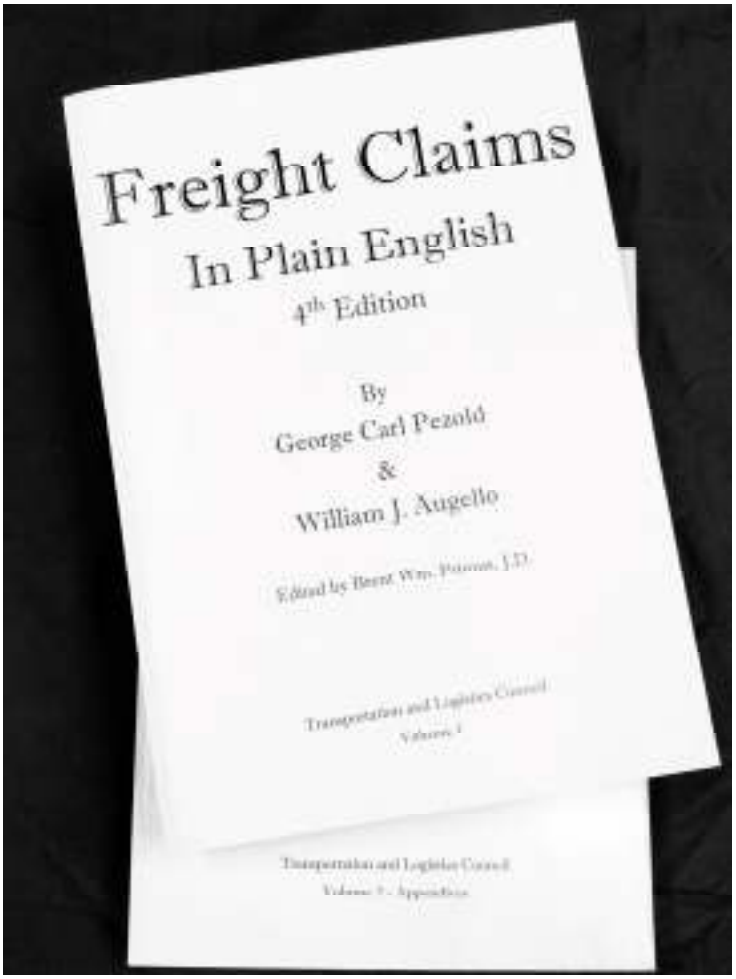

Freight Claims in Plain English (4th Ed.)

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.

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.

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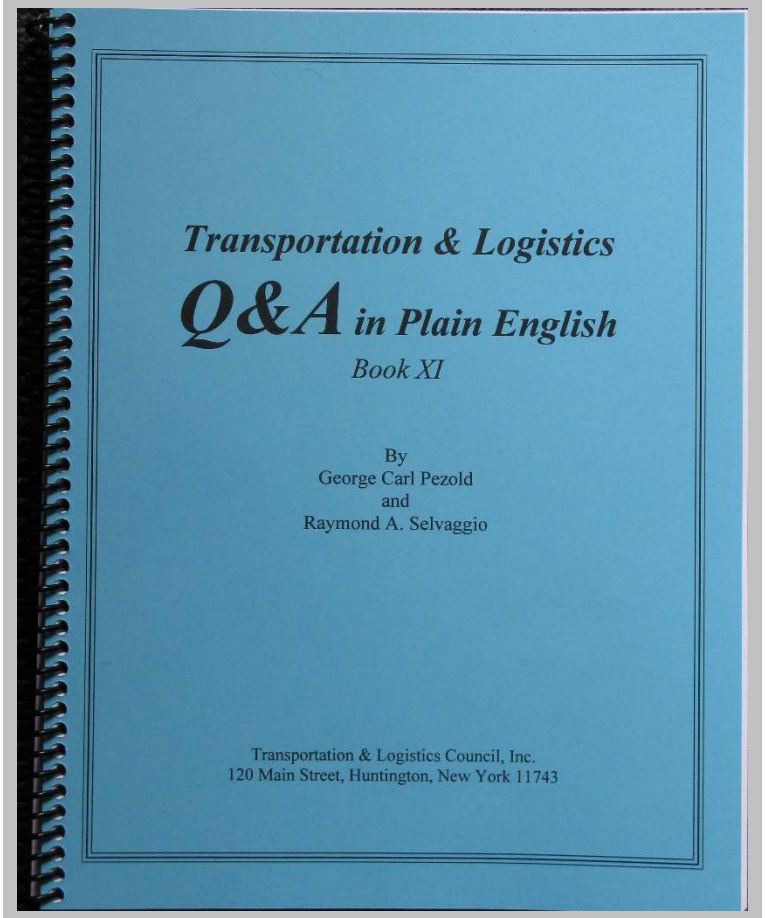

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Transportation & Logistics Q&A in Plain English – Book XI

"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,

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