

TRANSDIGEST

Transportation & Logistics Council, Inc.

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Plan Now for TLC's 46th Annual Conference!

- **Accessorial Charges**
- **Trucking Industry Concerns**
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- **DHL Rate Increases**
- **STB Proposes Rules on Demurrage and Accessorial Charges**
- **Court Rules on Contractual Waiver of Carmack**
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- **More Q&A's**

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GUEST EDITORIAL

ACCESSORIAL CHARGES

By: Douglas Arents, Manager – Corporate Logistics
Rite Hite LLC

Just over a year ago I submitted a Guest Editorial concerning the proliferation of accessorial fees from all of the less-than-truckload (“LTL”) carriers we use. Since we’re still experiencing the same issues, I thought I would re-visit the topic and discuss some of the challenges we’ve faced and the resolutions that have been attempted during the last 14 months.

As I’m sure is the case with the vast majority, if not all, of our members, our company is more than willing to pay for those accessorial fees that have been incurred and are rightfully invoiced to us. In fact, our mantra has always been that we need our carriers as much or more so than they need us, and we want to make sure that they are fairly compensated for all of the services that they perform for us. However, having said that, we also will not tolerate being repeatedly invoiced for services that are not performed on our shipments. And that is the issue at hand here.

A quick Google search provides a definition of Accessorial Charges as “... a fee added to a shipper’s freight invoice for a service the motor carrier performed beyond the standard pick-up and delivery operation designated at the time a shipment is tendered” and lists up to (30) examples of these additional services ranging from “advanced notifications” to “yard pulls”. Although there are many additional services that will incur accessorial charges that are known at the time of tender, such as “liftgate”, “inside delivery”, “driver assist” and “residential delivery”, there are as many that cannot be known by the shipper before tender. Those are the most contentious because the carrier holds the shipper responsible for payment even though the shipper has zero control over the service being required and in many cases, does not have an easy method to verify that the additional service was, in fact, provided.

For us, the most contentious accessorial charges include “detention”, “liftgate”, “lumper” and “sort and segregation charges”. Compounding the issue is that we operate in a paperless environment with our core carriers so we don’t become aware of the additional charges until after they have been reported as Past Due/Balance Due and have been elevated to the carrier’s collection departments.

Since notification to us is now 30+ days past delivery, our customers, not surprisingly, do not warmly embrace receiving an additional invoice from us for only additional freight charges and for the main part, refuse payment. Because that cost ultimately hits the Logistics budget, we’ve challenged each and every accessorial charge billed to us and have found many to be frankly, fraudulent. That, in my estimation is a

fairly strong accusation, but I believe it to be accurate in the following described circumstances that happen to us regularly.

My comments in last year's guest editorial pointed to the "computerization" of carrier's billing practices in an effort to streamline and simplify the process to ensure that carriers are compensated for all of the additional services that they perform. To do that they have "hard loaded" various accessorial charges such that they are automatically charged to every invoice that is generated for shipments destined to a specific consignee, regardless of the shipment's contents.

I understand and in general support those efforts, however it is my contention that, in doing so, they are regularly and knowingly charging for services that are not only not performed, but could not physically be performed. The best example I can offer here is the driver's performance of "sorting and segregating" a shipment. Sorting and segregating is the process through which a driver is expected to dismantle a single shipment into various smaller lots identified by "marks, brands, flavors or other distinguishing characteristics" (this from a national carrier's current Rules Tariff).

A large percentage of the shipments we make consist of a single product that is complete and ready for installation "as is" or is a single product broken down into individual, usually large, components crated completely into a single shipping unit. As such, there is no physical method that a delivery driver could "sort and segregate" these shipments, but we are regularly sent Past Due/Balance Due invoices from carriers for this service. Lumper fees are another accessorial charge that is "hard loaded" and falls within this category but is not as clear cut.

So the question is, "How does a shipper resolve an issue such as this with their carriers?" Bottom line is, "they don't", or more appropriately, "we haven't been able to", after more than a year of trying. For us, every accessorial charge invoiced to us is reviewed, challenged and denied where appropriate. Usually, in the case of "sort and segregate" invoices, that involves a call or email to our sales person who waives the cost. Not a big deal but in today's overly busy world, that amounts to an unnecessary waste of limited time and resources.

As for lumper fees, we've found that the carriers we use issue a ComCheck to the lumper and get a receipt of payment from the Lumper for the carrier's records. We now demand a copy of that lumper receipt before payment. Ensuring that they get that receipt from the lumper is a process that is entirely within the carrier's control and they now recognize that, without it we won't be reimbursed by the consignee so they won't be reimbursed by us.

Editor's Note: See below for a list and review of common Accessorial Charges in the Motor section.

ASSOCIATION NEWS

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

The Transportation & Logistics Council will hold its 46th Annual Conference at the Double Tree by Hilton at SeaWorld, 10100 International Drive, Orlando, Florida on April 27-29, 2020. Other organizations have conventions and trade shows, but whether you are a seasoned professional or a newcomer, there is no other program that exclusively dedicates itself to providing educational opportunities to the people that actually "make the wheels go round".

And, for those that want an in-depth educational experience, before the Conference on Sunday, April 26th, the Council also offers three optional full-day seminars - Contracting for Transportation & Logistics

Services, Freight Claims in Plain English, and Transportation, Logistics and the Law, all presented by leading transportation attorneys.

Registration for the Conference and full-day seminars is now open, see registration form attached. The Council has also made arrangements with the Double Tree for a block of rooms, available to registrants on a first come, first serve basis.



For Conference attendees, hotel rates are \$149.00 and rooms will be held until 4/3/20 or until we have exhausted the block of rooms held for our event.

To make reservations, visit https://doubletree.hilton.com/en/dt/groups/personalized/M/MCOSRDT-TLC-20200420/index.jhtml?WT.mc_id=POG.

The group name for registration is “Transportation & Logistics Council, Inc.” with a group code of “TLC”. Check-in dates and rates for the Conference begin April 20, 2020 and run to May 4, 2020. For more information at the hotel, call 321-946-0651.

What to Do: Orlando Attractions

Orlando, the “Theme Park Capital of the World”, is home to a number of world class theme parks and numerous other attractions suitable for all ages and interests. The major theme parks include Walt Disney World Resort, Universal Orlando Resort, SeaWorld Orlando, and LEGOLAND Florida Resort.

Visit <https://www.visitorlando.com/en> for more information and details of what is available in the area.

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HAZMAT

FINAL RULE ISSUED ON CDL HAZMAT ENDORSEMENTS

On October 1, 2019 the Federal Motor Carrier Safety Administration (“FMCSA”) published its final rule formally adopting without change provisions of interim final rules (“IFRs”) published in May 2003 and April 2005 related to commercial driver’s licenses (“CDLs”) with hazardous materials endorsements that had not already been finalized.

From the Summary:

The 2003 IFR amended the Federal Motor Carrier Safety Regulations (FMCSRs) to prohibit States from issuing, renewing, transferring, or upgrading a commercial driver's license (CDL) with a hazardous materials endorsement unless the Transportation Security Administration (TSA) in the Department of Homeland Security has first conducted a security threat assessment of the applicant and determined that the applicant does not pose a security risk warranting denial of the hazardous materials endorsement, as required by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act). The 2005 IFR amended the FMCSRs to conform to the TSA's compliance date and reduce the amount of advance notice that States must provide to drivers that a security threat assessment will be performed when they renew a hazardous materials endorsement.

Specifically, it authorizes a state to issue a license to operate a motor vehicle transporting hazardous material in commerce to an individual who holds a valid transportation security card. In particular, the FMCSA incorporates the Transportation Security Administration’s (“TSA”) definition of a Transportation Worker Identification Credential (“TWIC”) as equivalent to a Transportation Security Card (“TSC”). It becomes effective October 31, 2019.

Visit <https://www.federalregister.gov/d/2019-20584> to review the Federal Register Notice.

MOTOR

REPORT ON TRUCKING INDUSTRY CONCERNS

On October 6, 2019 the American Transportation Research Institute (“ATRI”), the trucking industry’s not-for-profit research institute, unveiled its annual Top Industry Issues report, which includes the list of the top ten critical issues facing the North American trucking industry. For the third year in a row, the driver shortage is the top-ranked issue for trucking fleets, as they struggle to recruit and retain qualified drivers.

According to the ATRI press release:

The Hours-of-Service [“HOS”] rules held on to the #2 issue in the survey for a second consecutive year, reflecting the industry’s call for additional flexibility in the rules, particularly the sleeper berth provision.

Two new issues appeared on this year’s list for the first time ever, ones that also impact the industry’s ability to recruit and retain qualified drivers; Driver Compensation and Detention/Delay at Customer Facilities. Driver Compensation ranked third overall and

represents two sides to a complex issue; motor carriers who have raised driver pay significantly over the past year in response to the driver shortage and drivers who are concerned that their pay has not kept pace with inflation. Driver detention at customer facilities, making its debut at #4 on this year's list, reflects growing concern over excessive delays that create cascading impacts for drivers' hours-of-service compliance, compensation, and ability to find safe, available truck parking.

The lack of available truck parking rounds out the top five issues on this year's list, but ranks 3rd among commercial driver respondents after compensation and HOS rules.

The complete results of the annual survey, which generated more than 2,000 responses from motor carriers and commercial drivers, were released today at the 2019 American Trucking Associations' ["ATA"] Management Conference and Exhibition in San Diego, California. Now in its 15th year, the ATRI Top Industry Issues report also includes prioritized strategies for addressing each issue.

"While 2018 was an incredible year for trucking, we've seen some challenges in 2019 and certainly finding and retaining qualified drivers remains at the top of the list for our industry, said Barry Pottle, ATA Chairman and president and CEO of Pottle's Transportation. "ATRI's analysis reveals the interconnectedness of these top issues and provides a roadmap for how motor carriers and professional drivers believe we should move forward as an industry."

Visit <https://truckingresearch.org/2019/10/06/critical-issues-in-the-trucking-industry-2019/> to obtain a copy of the complete ATRI report.

In response to the ATRI report, the Owner-Operator Independent Drivers Association ("OOIDA") responded in a press release with advice to motor carriers that if they are so concerned about a driver shortage, hiring and keeping drivers, they should provide better compensation.

According to OOIDA, a "driver shortage" is more of a myth, when the real issue is driver turnover/retention. From the OOIDA press release:

"Pay them," said OOIDA vice president Lewie Pugh. "As a matter of fact, trucking companies could solve both of their top two concerns by addressing what matters most to drivers."

The survey was conducted by American Transportation Research Institute. They asked participants, who identified themselves by their occupations, to rank trucking's most critical issues in order of importance.

Truck driver respondents said compensation is the most critical issue in the industry, while carriers insisted on perpetuating their decades-old claim that they can't find enough workers.

"The real problem is carriers aren't taking the necessary steps to keep their drivers," said Pugh. "This fact is demonstrated in [other ongoing research](#) and the high ranking of retention in this latest survey."

OOIDA has long held that the [myth of a truck driver shortage](#) is actually more of an extremely high turnover problem in the truckload sector.

"There is a pretty simple solution to everything and that is to pay drivers for their time," he added. "We think it's rather hypocritical for big trucking to keep saying there is a shortage when, according to the survey, the top concern of drivers isn't even on their radar."

Visit <https://www.ooida.com/MediaCenter/PressReleases/pressrelease.asp?prid=518> to view the OOIDA press release.

HOS UPDATE

The Federal Motor Carrier Safety Administration's ("FMCSA") Motor Carrier Safety Advisory Committee ("MCSAC") has been meeting to discuss proposed changes to the hours of service ("HOS") rules and taking public comments.

The proposed changes would allow truck drivers more flexibility with their 30-minute rest break and with dividing their time in the sleeper berth. It also would extend by two hours the duty time for drivers encountering adverse weather and extend the shorthaul exemption by lengthening the drivers' maximum on-duty period from 12 hours to 14 hours and increasing the distance limit in which drivers can operate from 100 air miles to 150 air miles.

Among questions on the proposal asked by MCSAC:

- Would the proposal to allow drivers to add two hours of driving time to their day when they need to stop due to adverse weather or extreme traffic congestion be susceptible to abuse?
- Would extending the distance and time for shorthaul carriers cause more accidents?
- Why doesn't the proposal permit drivers to take three 10-minute breaks rather than one 30-minute break?
- Why does the proposed rule not allow drivers to split their sleeper berth time six-and-four hours or five-and-five hours, rather than limiting the split to eight-and-two hours or seven-and-three hours?
- Will shippers disregard some of the hours-of-service changes, making it difficult for drivers to get the proper rest?

The Owner-Operator Independent Drivers Association ("OOIDA") submitted comments and noted that it "strongly supports the Agency's approach, which will provide drivers more opportunities to rest when they are tired, to stay off the road during adverse weather condition, and to maintain greater control over their own schedules."

Following are highlights of OOIDA's positions on the provisions in the proposal and recommendations to make further improvements:

1. OOIDA recommends eliminating the 30-minute rest break altogether. However, as an alternative, drivers should be allowed to split the 30-minute break in smaller segments, such as multiple 5 or 10 minute breaks.
2. OOIDA supports the 7/3 split sleeper provision, but recommends the agency also include 6/4 and 5/5 options.
3. OOIDA supports split-duty provision which will allow drivers to "pause" the 14-hour clock for up to 3 consecutive hours once per duty period.
4. OOIDA supports both changes to the short haul exceptions, which will extend the driving window from 12 to 14 hours and expand the air mile radius from 100 to 150 air miles. OOIDA also recommends allowing drivers using the short haul exception to end their work shift at a location different from their original dispatch.
5. OOIDA supports extending the duty period from 14 to 16 hours for drivers that use the adverse driving provision. OOIDA also recommends expanding and clarifying conditions that would qualify for the adverse driving provision.

The FMCSA was accepting comments through October 21, 2019. To view the docket and comments go to <https://www.regulations.gov/docket?D=FMCSA-2018-0248>.

CRASH PREVENTABILITY DETERMINATION PROGRAM

Last month (TRANSDIGEST 259) we wrote about the “Call to Action” regarding the Federal Motor Carrier Safety Administration’s (“FMCSA”) Crash Preventability Determination Program. On October 4, 2019 the Motor Carrier Regulatory Reform Coalition (“MCRRC”) submitted its comments with supporting Affidavits, which with its previously filed Petition for Rulemaking is a comprehensive effort to address this important issue. The Transportation and Logistics Council, Inc. is part of the MCRRC and supports these efforts.

Visit <https://www.regulations.gov/document?D=FMCSA-2014-0177-0251> to view the comments and see <http://asectt.blogspot.com/> for more information. Your continuing support and comments are welcomed.

ACCESSORIAL CHARGES

“The large print giveth and the small print taketh away” – Tom Waits: *Step Right Up*, January 4, 2006

Accessorial charges are fees applied to a freight bill after shipment for additional services the carrier provided. They are legitimate fees the carrier has earned for services provided, but can catch the uninformed shipper by surprise. On September 17, 2019 FLS Transport released a sort of “Kelly Bluebook” for accessorial fees – “The Master List of Accessorials for Shippers”.

According to the FLS website, the List is:

Your guide to avoiding unnecessary freight costs & strengthening carrier relationships

Detention... Lumpers... TONU...

It’s the stuff we don’t really want to talk about, but it’s important that we do.

Accessorial charges are a part of the business.

Not every freight shipment is the same... some loads require special handling... and, well, things happen on loading docks... on receiving docks... and on the open road.

Truth is, logistics isn’t always easy or smooth.

Welcome to the world of accessorial fees... totally legit charges applied to a freight bill after shipment for additional services the carrier provided.

While you can’t eliminate them, you can address them up front with your carriers and shipping partners.

Having a list of pre-determined accessorial charges helps you better anticipate, mitigate, manage, and in some cases prevent any unnecessary charges.

It’ll also build better carrier relations and reduce some of the freight stress...

Because this is so important, the team at FLS put together this Master List of Accessorial charges.

It covers the 28 fees and charges you need to discuss with your carriers and partners before tendering any load.

It’s the A-to-Z guide of accessorial charges... it includes an explanation of each fee, the standard industry rates, as well as tips on how to handle them like a pro.

Pull it up, print it out, keep it nearby. This little sucker’s going to be your shortcut to success when it comes to calculating extra costs, becoming a shipper of choice & eliminating some of the nightmares.

The last 36 months have been the most volatile years ever for freight.

Wild capacity fluctuations, ELDs, HOS rules, gas prices, trade wars and black swan events delivered a new level of unpredictability to the shipping market.

And the result...total spending for freight costs increased 19.3% from September 2017 to September 2018.

The Master List of Accessorials will help you keep your costs in check in 2019 by allowing you to address any extra charges up front with your carriers.

THE MASTER LIST OF ACCESSORIALS (TABLE)

ACCESSORIAL	STANDARD FEE
Additional Stops	\$50 per stop
Advance Notification	\$0 - \$50
After-hour/Before-hour Deliveries	\$150 - \$250
Blind Shipments	\$50 - \$100
Corrected Bill of Lading (LTL)	\$25 - \$100 carrier dependent
Cross Border Processing Fee	Via Customs Broker — \$
Customs or In-Bond Freight	\$150 flat fee
Detention	\$40 per hour
Diversion Miles/ Reconsignment (LTL & TL)	Variable based on miles from original destination to corrected destination and includes Corrected Bill of Lading Fee — \$50 - \$500
Driver Load/Unload	\$50 per hour
Exhibition Shipments	\$50 per hour
Extra Labor/Helper/ Lumper	\$50 - \$150 per hour
Fuel Surcharge	Determined by the Department of Energy and is updated every Tuesday at 8am CST.
Hazardous Materials	\$250 - \$500
Specialized Limited Access Pickup or Delivery	\$150 - \$200

ACCESSORIAL	STANDARD FEE
Layover	\$150 Dry Van • \$250 - \$300 Refrigerated, flatbed or anything specialized
Liftgate service	\$200 - \$250
Metro Pickup/Delivery	\$150 - \$250
Oversized Freight (LTL)	\$50 - \$250
Packaging	\$50 - \$100 per pallet
Pallet Jack	\$100 - \$150
Protective Service – Winter Program	\$50 - \$200
Redelivery (LTL)	\$100 - \$500
Reclassification and Reweigh (LTL)	\$25 - \$50 inspection charge, on top of additional weight & classification change. Can range between \$25 - \$300+
Residential Service (LTL)	\$100 - \$500
Sort and segregation (LTL); Driver Assist (TL)	Charged by piece count, or every 100 lbs. Typically, minimum \$50 charge, and up to \$5 for every 100 lbs. thereafter
Storage	\$75 - \$250 for dry van • Per day for refrigerated trailer fee
Tarps (Flatbed)	\$100 - \$200
Tolls	\$100 - \$250
Truck Ordered Not Used (TONU)	\$150 Dry Van • \$250 - \$300 Refrigerated, flatbed or anything specialized

Visit <https://www.flstransport.com/master-list-of-accessorials/> for the full details.

THE FUTURE OF TRUCK DRIVING JOBS

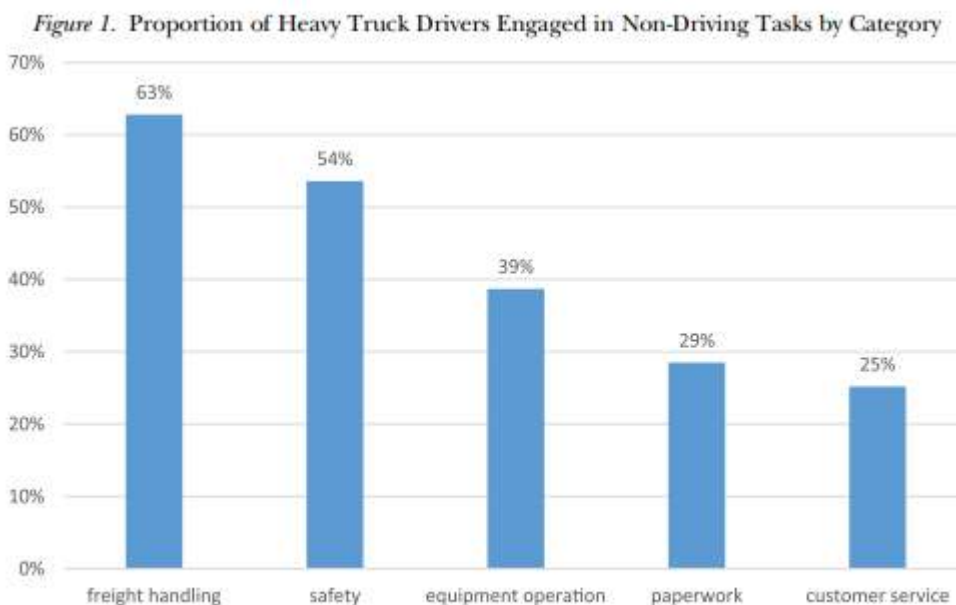
A recent study released by Maury Gittlemen and Kristen Monaco of the Bureau of Labor Statistics (“BLS”) titled *Truck Driving Jobs: Are they Headed for Rapid Elimination?* Concludes that media stories predicting the imminent loss of truck driving jobs are overstated.

Their conclusion is based on three main factors:

First, the count of truck drivers is often inflated due to a misunderstanding of the occupational classification system used in federal statistics. Second, truck drivers do more than drive, and these non-driving tasks will continue to be in demand. Third, the requirements of technology, combined with complex regulations over how trucks can operate in the United States, imply that certain segments of trucking will be easier to automate than others. Long-haul trucking (which constitutes a minority of jobs) will be much easier to automate than will shorthaul trucking (or the last mile), in which the bulk of employment lies. Although technology will likely transform

the status quo in the trucking industry, it does not necessarily imply the wholesale elimination of the demand for truck drivers, as conventional accounts suggest.

One of the things the report focuses on is differentiating between driving and non-driving tasks that occur amongst drivers, and the Figure below shows evidence of a good deal of non-driving work being performed by truck drivers. Many of these non-driving tasks are not readily automatable.



Source: Occupational Requirements Survey microdata, 2016.

As a result, the study concludes automation won't lead to massive unemployment for several reasons:

First, the number of truck drivers that can be potentially affected by automation is fewer than many have assumed, because of misunderstandings about the nature of the occupational classification system. Second, although the occupational designation of heavy and tractor-trailer truck driver makes the primary task of the job—driving—apparent, it is important to note a number of non-driving tasks required of truck drivers, many of which are less susceptible to automation. Third, and most important, the requirements of autonomous vehicle technology, combined with complex regulations over how trucks can operate in the United States, imply that certain segments of trucking will be easier to automate than others.

Visit <https://journals.sagepub.com/doi/pdf/10.1177/0019793919858079> for the complete study.

FMCSA DRUG, ALCOHOL CLEARINGHOUSE

On October 1, 2019 the Federal Motor Carrier Safety Administration (“FMCSA”) announced that registration for the Congressionally-mandated Commercial Driver’s License Drug and Alcohol Clearinghouse registration was open. Commercial driver’s license (“CDL”) holders, employers, medical review officers, and substance abuse professionals now can visit <https://clearinghouse.fmcsa.dot.gov> and register to create a secure online user account.

According to the FMCSA website:

Registration is required to be able to access the clearinghouse once it is fully implemented on January 6, 2020. To access the clearinghouse, authorized users must register. These users include:

- Drivers who hold a commercial driver's license (CDL) or commercial learner's permit (CLP).
- Employers of CDL drivers. This includes those who employ themselves as CDL drivers (owner-operators), typically a single-driver operation.
- Consortia/Third-Party Administrators (C/TPAs).
- Medical Review Officers (MROs).
- Substance Abuse Professionals (SAPs).

There is no cost for registration. Commercial drivers are not required to immediately register for the clearinghouse, but will need to register to respond to an employer's request for consent prior to a pre-employment query or other full query being conducted.

The clearinghouse will be a secure online database that will allow FMCSA, commercial motor vehicle ("CMV") employers, State Driver Licensing Agencies, and law enforcement officials to identify – in real-time – CDL drivers who have violated federal drug and alcohol testing program requirements, and thereby improve safety on our nation's roads.

When the Clearinghouse goes into effect Jan. 6, employers will be required to list truck and bus drivers who have failed or refused to take DOT drug tests, and the results for drivers required to complete a return-to-duty program and clean drug test.

In addition to checking the Clearinghouse for all prospective new employees, motor carriers will be required to check for violations at least annually for all of its employed drivers. The database is aimed at mitigating job-hopping by drivers who fail their drug and alcohol tests.

On October 22, 2019 the FMCSA published in the Federal Register a Notice of a new system of records regarding the Drug and Alcohol Clearinghouse and will accept comments on the announcement for 30 days after publication.

In addition to employers, the Clearinghouse system will allow:

- Motor Carrier Safety Assistance Program partner agencies access to the database for use during investigations, roadside inspections and safety audits of motor carriers.
- State driver licensing agencies to verify a driver's qualification to operate a CMV prior to completing any licensing transactions, including issuance, renewal, transfer, or upgrade of any commercial learner's permit or commercial driver license.
- The National Transportation Safety Board ("NTSB") access to the system when a driver is involved in a crash under investigation by NTSB.

"This routine use will strengthen the enforcement of the current prohibition against operating a commercial motor vehicle, or performing other safety-sensitive functions due to drug and alcohol program violations, as well as other drug and alcohol program requirements," the pre-publication announcement said.

Visit <https://www.govinfo.gov/content/pkg/FR-2019-10-22/pdf/2019-22915.pdf> to view the Federal Register Notice. Comments must be submitted on or before November 21, 2019.

Visit <https://clearinghouse.fmcsa.dot.gov/> for the FMCSA's Clearinghouse website.

OVERALL FATALITIES DOWN, BUT LARGE TRUCK CRASH FATALITIES INCREASED

According to an October 22, 2019 report from the National Highway Traffic Safety Administration (“NHTSA”) fatalities in crashes involving large trucks increased by just under 1% from 2017 to 2018, to 4,951 from 4,905.

There were 3,863 fatalities in crashes involving large trucks in 2016, according to amended final statistics compiled by NHTSA. At the same time, there was a decline in overall highway fatalities of 2.4% in 2018, decreasing 913, down to 36,560. The fatality rate per 100 million vehicle miles traveled also decreased by 3.4 percent (from 1.17 in 2017 to 1.13 in 2018), the lowest fatality rate since 2014, even though the overall vehicle miles traveled increased slightly over the same period.

According to U.S. Transportation Secretary Elaine Chao “This is encouraging news, but still far too many perished or were injured, and nearly all crashes are preventable, so much more work remains to be done to make America’s roads safer for everyone.”

The report also showed:

- Overall large-truck occupant fatalities rose to 885 in 2018 from 878 in 2017, a 0.8% increase. The 2018 number of large-truck occupant fatalities is the highest since 1988, when the agency reported 911 occupant fatalities.
- Pedestrians killed in crashes involving large trucks increased by 13%.
- Large-truck occupant fatalities in single-vehicle crashes increased to 535 from 525 (1.9% increase from 2017).
- Large-truck occupant fatalities in multiple-vehicle crashes decreased to 350 from 353 (0.8%).

Visit <https://www.nhtsa.gov/press-releases/roadway-fatalities-2018-fars> for the announcement and access to the full NHTSA Report.

OCEAN

FMC MEETING RESULTS

At a September 26, 2019 meeting the Federal Maritime Commission (“FMC”) voted on changes to enforcement procedures and the World Shipping Council’s (“WSC”) petition to exempt service contract filings. From the FMC announcement:

The Federal Maritime Commission (FMC) voted today to move forward with proposed rules that would provide partial regulatory relief sought by a petition of ocean carriers, would implement regulatory changes mandated by recent legislation, and publish a direct final rule that would restructure how the agency oversees enforcement matters.

The vote to approve an order exempting ocean carriers from publishing essential terms of service contracts came at a meeting of the FMC where Commissioners granted in part a petition filed by the World Shipping Council (Petition P3-18) in September 2018 seeking regulatory relief from 46 U.S.C §40502(b) and (d).

The Shipping Act requires vessel operating common carriers to publish concise statements of certain essential terms in tariff format when they file each service contract with the Commission. These essential terms include the origin and destination port ranges, the commodities involved,

the minimum volume, and the service contract duration. The Commission denied a second aspect of the petition that sought exemption from service contract filing requirements because the agency found it was unable to determine such an exemption would not be detrimental to commerce.

The order will be finalized by the Commission following the addition of a dissent by Commissioner Rebecca Dye, who stated she would have granted the petition in its entirety. The Commission approved the issuance of the Notice of Proposed Rulemaking (NPRM) to adopt this regulatory relief subject to finalization of the order.

The second NPRM approved at today's meeting will implement FMC specific provisions of the *Frank LoBiondo Coast Guard Authorization Act of 2018* (Public Law 115-282). Once finalized, the rule will update Commission's regulations to:

- Include provisions on “nonpublic collaborative discussions”
- Expand the class of persons that must be licensed as OTIs and meet associated financial responsibility requirements
- Expand the prohibition on common carriers knowingly and willfully accepting or transporting cargo for OTIs that do not have a tariff or do not meet financial responsibility requirements
- Make clear that OTI licensing and financial responsibility requirements do not apply to a person performing OTI services on behalf of an OTI for which it is a disclosed agent
- Make comments submitted to the Commission regarding filed ocean common carrier and marine terminal operator agreements confidential

The Commission met in closed session to discuss revisions to the delegated authority of the Bureau of Enforcement (BoE) and enforcement procedures. Commissioners voted to issue a Request for Comments on a Direct Final Rule creating a new enforcement process for BoE, especially regarding Commission oversight. The revised procedures will:

1. Provide notice to the subjects of investigations that BoE intends to recommend that the Commission initiate enforcement proceedings and allow them an opportunity to respond before BoE submits those recommendations;
2. Require Commission approval before formal or informal enforcement action is taken; and,
3. Require Commission approval of any proposed informal compromise agreements.

Barring significant adverse comments to the changes, the rule will become final 75 days from its publication in the Federal Register.

Both NPRMs and the Request for Comments on a Direct Final Rule will be published in the *Federal Register* in the coming weeks.

Visit <https://www.fmc.gov/fmc-votes-on-carrier-petition-changes-to-enforcement-procedures/> to view the announcement.

PARCEL EXPRESS

DRONE DELIVERIES

The use of drones to deliver small packages that has long been touted by the likes of Amazon is now becoming a reality. In recent news the Federal Aviation Administration (“FAA”) has granted full air carrier and operator certification to Flight Forward, the drone delivery subsidiary of United Parcel Service (“UPS”). This certification allows Flight Forward to begin commercial deliveries; until now, it has been operating drone delivery pilot programs focusing on medical supply deliveries.

The FAA gave Flight Forward permission to use delivery drones at hospital, university and corporate campuses with few restrictions, for example, letting operators fly the aircraft at night and over people. Current regulations prohibit drone flights after dark, above people, beyond the remote pilot’s line of sight and at weights heavier than 55 pounds.

In addition, FedEx officials said that its test drone program completed the first U.S. residential delivery of commercial goods, a scheduled trip to a home in Christiansburg, VA, on October 18, 2019. This was conducted by Wing Aviation, owned by Alphabet Inc., in collaboration with FedEx Express, as part of the U.S. Department of Transportation’s Unmanned Aircraft Systems Integration Pilot Program.

The FAA certification comes under Part 135 of FAA regulations, which requires extensive manuals, training routines, maintenance plans and a safety program. The designation for UPS also makes it easier to obtain exemptions at locations other than campuses.

Drone adoption has been slow going as authorities wrestle with how to regulate the devices. Early drone deliveries such as those conducted by UPS and other companies assist authorities and couriers to address challenges such as creating a traffic-management system and testing technology for the unmanned aircraft to avoid objects in flight.

DHL EXPRESS ANNOUNCES 2020 RATES

On September 27, 2019 DHL Express, the world’s leading international express services provider announced its 5.9% general average shipment price increase for U.S. account holders that will take effect on January 1, 2020.

According to the announcement:

Prices are adjusted on an annual basis by DHL Express, taking into consideration inflation and currency dynamics such as administrative costs related to regulatory and security measures. These measures are updated by national and international authorities on a regular basis in each of the more than 220 countries and territories that DHL Express serves. Depending on local conditions, price adjustments will vary from country to country, and will apply to all customers where contracts allow.

A guide to the 2020 rates will be published when available.

Visit <https://www.logistics.dhl/us-en/home/press/press-archive/2019/dhl-express-announces-annual-price-adjustments-in-the-us.html> for more information.

QUESTIONS & ANSWERS

By George Carl Pezold

FREIGHT CLAIMS – CONCEALED DAMAGE AND “SUBJECT TO INSPECTION”

Question: I have a quick question regarding concealed damages/shortages. If a consignee signs a delivery receipt “subject to inspection”, does that statement allow a claim to be filed past the legal time period to file a concealed/short claim? Would the carrier have to honor that claim and does a carrier’s general rules tariff supersede any law or regulation on concealed damages/shortages?

Answer: First, writing “subject to inspection” has no legal effect on either reporting concealed damage or filing a loss or damage claim.

Second, there is a difference between reporting concealed damage and filing a claim for loss or damage.

Time limits for reporting concealed damage may be found in the National Motor Freight Classification (“NMFC”) or a carrier’s rules tariff.

For many years the NMFC required notice of concealed damage within 15 days. That was shortened to 5 days in 2015, and additional requirements in connection with such claims were added.

NMFC Item 200135-A reads as follows:

ITEM 300135-A REPORTING CONCEALED DAMAGE

(a) When damage to, or loss of, contents of a shipping container is discovered by the consignee that could not have been determined at time of delivery it must be reported by the consignee to the delivering carrier upon discovery.

(b) Reports must include a request for inspection by the carrier’s representative.

(c) Notice of loss or damage and request for inspection may be given by telephone or in person, but in either event must be confirmed by Δ a written or electronic communication.

Δ (d) While awaiting inspection by carrier, the consignee must hold the shipping container and its contents in the same condition they were in when damage was discovered, insofar as it is possible to do so.

Δ (e) Unless otherwise specified by the carrier, notice of loss or damage should be provided to the carrier within Δ five (5) business days from the date of delivery.

Δ (f) If five (5) business days, or such other period as specified by the carrier, pass between the date of delivery of the shipment by carrier and date of report of loss or damage and request for inspection by consignee, it is incumbent upon the consignee to offer reasonable evidence to the carrier’s representative when inspection is made that loss or damage was not incurred by the consignee after delivery of shipment by carrier.

Δ (g) Reasonable evidence includes, but is not limited to:

1. Identifying the party(ies) responsible for unloading,
2. Identifying the chain of custody of the article, including prior transportation by any mode,
3. Location(s) of the article(s) once the shipment was received until the damage was noted,
4. Any mechanical or physical handling by the consignee subsequent to delivery by the carrier.

Δ (h) If a clear delivery receipt is available on the shipment, e.g., no damage or shortage is noted, the claimant must provide documentation showing that damage or loss occurred prior to delivery.

In any event it must be noted that this notice requirement does not shorten the statutory minimum time to file a claim for loss or damage, which is 9 months from the date of delivery, as provided in the “Carmack Amendment”, 49 USC 14706.

RAIL

DEMURRAGE AND ACCESSORIAL CHARGES

On October 4, 2019 the Surface Transportation Board (“STB”) issued three decisions related to demurrage and accessorial rules and charges being implemented by the Class I railroads:

- a proposed policy statement to facilitate more effective problem solving between railroads, shippers, and receivers by providing information on principles the Board would consider in evaluating the reasonableness of demurrage and accessorial rules and charges;
- a proposed rule to enhance the transparency and accuracy of demurrage invoices; and
- a proposed rule to make unambiguous that the regulation of demurrage is not excluded for exempt miscellaneous commodities and boxcar transportation, and to treat the exemption for certain agricultural commodities similarly.

According to the press release issued October 7, 2019:

The Board is issuing these three decisions concurrently to address matters arising from the Board’s May 2019 two-day public hearing on railroad demurrage and accessorial charges, Oversight Hearing on Demurrage and Accessorial Charges, Docket No. EP 754. The hearing was held in response to significant recent changes in demurrage and accessorial rules and charges implemented by several Class I railroads, which the Board was actively monitoring. The Board received over 90 pre-hearing submissions from stakeholders; heard testimony from 12 panels; and received 36 post-hearing comments. In testimony and in written comments, shippers, receivers, and others expressed concern about the commercial fairness, reciprocity, and feasibility of the recent changes to demurrage and accessorial rules and charges being implemented by the Class I railroads.

Today’s proposed policy statement, Policy Statement on Demurrage and Accessorial Rules and Charges, Docket No. EP 757, provides information on principles the Board would consider in evaluating the reasonableness of demurrage and accessorial rules and charges. The proposed policy statement addresses a number of key areas of concern raised during the hearing, including free time, bunching, overlapping charges, invoicing and dispute resolution, credits, notice of major tariff changes, and warehouseman liability. With the proposed policy statement, the Board expects to facilitate more effective problem solving between railroads, shippers, and receivers; to help prevent unnecessary future issues; and when disputes arise, to help resolve them more efficiently and cost-effectively.

The Board also is issuing a proposed rule, Demurrage Billing Requirements, Docket No. EP 759 (Demurrage Billing NPRM), to enhance the transparency and accuracy of demurrage invoices by requiring Class I railroads to include on or with those invoices specific, minimum information that would assist shippers and receivers in verifying charges, determining who is responsible for delays, and evaluating whether and how they can expedite their handling of cars. The Board also proposes a requirement that Class I railroads send demurrage invoices directly to the shipper,

instead of the warehouseman, if the shipper and warehouseman agree to such an arrangement and so notify the railroad.

In its third decision, Exclusion of Demurrage Regulation from Certain Class Exemptions, Docket No. EP 760 (Exclusion of Demurrage NPRM), the Board proposes to clarify its regulations governing exemptions for certain miscellaneous commodities, such as paper products and steel scrap, and boxcar transportation to ensure that they clearly reflect longstanding court and agency rulings that these exemptions do not apply to the regulation of demurrage. The Board also proposes to make the exemption for certain agricultural commodities consistent with those exemptions by revoking, in part, the exemption that currently covers certain agricultural commodities so that the exemption does not apply to the regulation of demurrage.

Comments on the proposed policy statement, the Demurrage Billing NPRM, and the Exclusion of Demurrage NPRM are due by November 6, 2019, and replies are due by December 6, 2019.

The Board's decision in Policy Statement on Demurrage and Accessorial Rules and Charges, Docket No. EP 757, may be viewed and downloaded [here](#). The Board's decision in Demurrage Billing Requirements, Docket No. EP 759, may be viewed and downloaded [here](#), and the decision in Exclusion of Demurrage Regulation from Certain Class Exemptions, Docket No. EP 760, may be viewed and downloaded [here](#).

Visit

https://www.stb.gov/_85256593004F576F.nsf/0/FDF7975C980B398A8525848C005061B9?OpenDocument to view the full press release.

RECENT COURT CASE

CONTRACTUAL WAIVER OF CARMACK PREEMPTION

On a motion for summary judgment the U.S. District Court for the Southern District of New York ruled that provisions of the contract between the parties expressly waived provisions of the Carmack Amendment.

As background, the court noted:

The Carmack Amendment to the Interstate Commerce Act requires that “[a] carrier and any other carrier that deliver[] the property and is providing transportation or service subject to jurisdiction under [49 U.S.C. § 13501] are liable to the person entitled to recover under the receipt or bill of lading.” 49 U.S.C. § 14706(a)(1). The Amendment further specifies that “liability imposed under this paragraph is for the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.” *Id.* The Amendment covers interstate transports that are made “by motor carrier,” which is defined as “a person providing motor vehicle transportation for compensation.” 49 U.S.C. § 13102(14); see 49 U.S.C. § 13501(1)(A). The Carmack Amendment authorizes suits “brought against a delivering carrier in a district court of the United States or in a State court.” 49 U.S.C. § 14706(d)(1).

The court went on to note that the Carmack Amendment preempts all state law on the issue of interstate carrier liability. However, the court went on to say “parties to a shipping contract may validly waive the Carmack Amendment if they, ‘in writing, expressly waive any or all rights and remedies under [the part of the United States Code governing the liability of carriers that includes the Carmack Amendment] for the transportation covered by the contract.’ 49 U.S.C. § 14101(b)(1).”

The key is that the parties must expressly waive Carmack. Looking at the facts in this case, the court held that a contract which provides “[t]his contract service is designed to meet the distinct needs of the customer and the parties expressly waive all rights and obligations allowed by 49 U.S.C. 14101 to the extent they conflict with the terms of this contract” was adequate as an express waiver of the Carmack Amendment as the exclusive remedy. The court also noted that for the waiver to be effective, it did not need to expressly make reference to the ICC Termination Act.

Aviva Trucking Special Lines v. Ashe, 18-cv-11180, 2019 WL 4387339 (U.S. District Court, Southern District of New York, September 26, 2019)

TECHNOLOGY

ADA AND WEB ACCESS

Last month we reported on the *Domino’s Pizza* case seeking to be heard before the U.S. Supreme Court. On October 7, 2019 by Order the Supreme Court declined Certiorari, leaving the case to be resolved at the District court in California pursuant to the ruling of the 9th Circuit Court of Appeals. It should be noted that Domino’s petition was denied, without any written decision or reasoning provided. The U.S. Supreme Court has a limited docket and most petitions for Certiorari are simply denied without any further explanation.

It should also be noted that the 9th Circuit did not rule that Domino’s violated the Americans with Disabilities Act (“ADA”). It concluded:

We express no opinion about whether Domino’s website or app comply with the ADA. We leave it to the district court, after discovery, to decide in the first instance whether Domino’s website and app provide the blind with effective communication and full and equal enjoyment of its products and services as the ADA mandates.

What this means is that until there is either federal legislation, or some other case gets before the Supreme Court, website operators around the country are at risk for failing to make their websites ADA compliant, without any solid guidance on how to accomplish that.

For those interested in the Domino’s case, the U.S. Supreme Court filings, including the decision below, are available online at <https://www.scotusblog.com/case-files/cases/dominos-pizza-llc-v-robles/>

For some more information on the breadth of ADA compliance litigation, UsableNet, Inc. has published its “2018 ADA Web Accessibility Lawsuit Recap Report”. The report tracks 2285 lawsuits in 2018, up 181% from 2017 when 814 suits were filed.

Visit <https://blog.usablenet.com/2018-ada-web-accessibility-lawsuit-recap-report> to access the report.

UsableNet also advertises an online “Automated Accessibility Testing Tool” for websites and apps available at <https://usablenet.com/automated-accessibility-testing-tool>. This link is provided for information purposes only as the Transportation & Logistics Council, Inc. has not reviewed their services and therefore cannot endorse them.

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

FUTURE COMMODITY CLASSIFICATION STANDARDS BOARD (“CCSB”) DOCKETS

	Docket 2020-1	Docket 2020-2
Docket Closing Date	November 27, 2019	April 2, 2020
Docket Issue Date	January 9, 2020	April 30, 2020
Deadline for Written Submissions and to Become a Party of Record	January 31, 2020	May 21, 2020
CCSB Meeting Date	February 11, 2020	June 2, 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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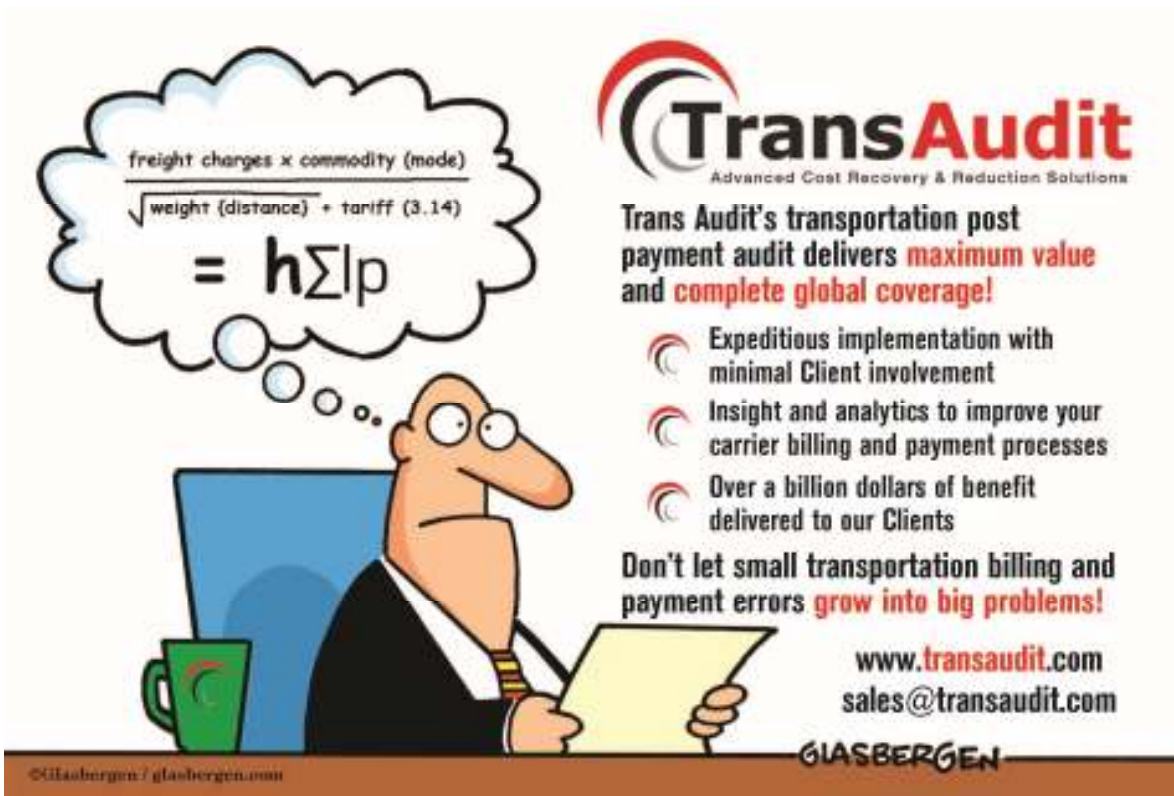
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The Transportation & Logistics Council, Inc.

Phone: (631) 549-8984

120 Main Street, Huntington, NY 11743

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

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

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

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[Click here to see the Table of Contents](#)

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.

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