TRANSDIGEST

Transportation & Logistics Council, Inc.

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T&LC 47th Annual Conference Dates

- **"Freight Claims in Plain English" Seminars**
- **Reopening Air Travel**
- **Driver Classification - California Sues Uber & Lyft**
- **FMCSA - HOS Final Rule**
- **USPS Quarterly Loss Jumps**
- **FMC - Demurrage and Detention Rule**
- **STB – Rail Demurrage Decisions**
- **More Q & As**

NEW! IN A SOFT COVER EDITION!

FREIGHT CLAIMS IN PLAIN ENGLISH (4TH ED.)

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ASSOCIATION NEWS

SAVE THE DATE – T&LC'S 47TH ANNUAL CONFERENCE

The Transportation & Logistics Council, Inc. has scheduled its 47th Annual Conference to be held April 19-21, 2021 at the at the Catamaran Resort Hotel & Spa, located at 3999 Mission Blvd, San Diego, CA 92109.

Pre-conference Seminars will be offered the Sunday before the conference on April 18, 2021.

VIRTUAL SEMINARS

Join us for a four-part Virtual Instructor-Led Training on "Freight Claims in Plain English" that will be presented by Gerry Smith, Esq. on **June 2nd, 4th, 9th, and 11th at 2-4 PM ET.**

This training is based on the popular 4th Edition of *Freight Claims in Plain English*, authored by George Carl Pezold & William J. Augello, which is often referred to as the "Bible" on freight claims. It is a "soup to nuts" seminar covering a wide range of issues and topics related to freight claims and freight claim recovery, such as the basics of liability for loss and damage to freight in transit, bills of lading, burdens of proof, defenses, damages, limitations of liability, time limits, liability of carriers, freight forwarders, warehousemen, and other intermediaries. It will define the liability of a broker for negligence, breach of contract or when a broker holds itself out to be a carrier. It will explain how to assist your customer in filing a claim against a carrier, the measure of damages, and the proof required for a claim against a carrier.

These seminars are offered through the auspices of the Transportation Intermediaries Association ("TIA"). Further information and registration is available online at the TIA website at: https://member.tianet.org/TIAMEMBER/Event_Display.aspx?EventKey=BIZSEM0611

AIR

RESTARTING THE AVIATION INDUSTRY

In a joint May 20, 2020 press release, the International Air Transport Association ("IATA") and Airports Council International ("ACI") call on governments to ensure any new measures introduced for airports and airlines in the wake of COVID-19 are supported by scientific evidence and are consistent across the world.

According to the press release:

> The aviation sector has been brought to a standstill and a balanced and effective restart and recovery depends on collaboration among the key participants in the global aviation ecosystem.
>
> ACI and IATA have jointly issued a paper laying out a pathway for restarting the aviation industry - *Safely Restarting Aviation - ACI and IATA Joint Approach*. Airlines and airports have cooperated to build a roadmap for resuming operations which reassures the travelling public that health and safety remain the overall priorities.
>
> The joint approach proposes a layered approach of measures across the entire passenger journey to minimize the risk of transmission of COVID-19 at airports and onboard aircraft, and to prevent aviation becoming a meaningful source of international re-infection. Such measures should be globally consistent and subject to continued review, improvement, and removal when no longer required, to ensure an even recovery.
>
> ACI and IATA are both central members the COVID-19 Aviation Recovery Task Force (CART) being led by the Council of the International Civil Aviation Organization (ICAO). CART enables the collaboration - among governments and between governments and industry -that is vital to ensure the harmonization and consistency of measures that are essential to restoring air connectivity and passenger confidence in air travel.
>
> "Airports and airlines have come together with ICAO and the wider aviation industry to address the biggest challenge ever faced by commercial aviation in restarting a global industry while continuing to halt the spread of COVID-19," ACI World Director General Angela Gittens said. "There is currently no single measure that could mitigate all the risks of restarting air travel but we believe a globally-consistent, outcome-based approach represents the most effective way of balancing risk mitigation with the need to unlock economies and to enable travel."
>
> IATA's Director General and CEO Alexandre de Juniac said, "Safety is always our top priority and that includes public health. Restoring air connectivity is vital to restarting the global economy and reconnecting people. Our layered approach of measures recommended by airports and airlines safeguard public health while offering a practical approach for a gradual restart of operations. It is important to remember that the risk of transmission on board is very low. And we are determined that aviation will not be a significant source of re-infection. We are working continuously with governments to ensure that any measures put in place are done so consistently and with scientific backing. That is key to restoring public confidence so the benefits of safely re-starting aviation can be realized."

Visit https://www.iata.org/en/pressroom/pr/2020-05-20-01/ to view the press release and visit https://www.iata.org/contentassets/5c8786230ff34e2da406c72a52030e95/safely-restart-aviation-joint-aci-iata-approach.pdf to view the *Safely Restarting Aviation - ACI and IATA Joint Approach* paper.

HUMOR

SORRY, STILL TOO MUCH TIME ON MY HANDS

INTERNATIONAL

CBP ALLOWS LIMITED DEFERMENT OF DUTIES AND FEES

On April 19, 2020 the U.S. Customs and Border Protection ("CBP"), along with the Treasury Department, announced that they were issuing a joint Temporary Final Rule allowing for a 90-day deferment period on certain payments for importers who have faced a significant financial hardship due to the COVID-

19 pandemic response. The Temporary Final Rule was published in the Federal Register on April 22, 2020, available online at https://www.govinfo.gov/content/pkg/FR-2020-04-22/pdf/2020-08618.pdf.

According to the CBP press release:

> This payment flexibility will be available only for importers with a significant financial hardship and will apply to payments for goods entered in March or April. Imports subject to duties associated with antidumping and countervailing duties (AD/CVD), and Section 201, 232 and 301 Trade Remedies are not included in this relief effort.

Visit https://www.cbp.gov/newsroom/national-media-release/treasury-and-cbp-announce-deferment-duties-and-fees-certain to view the 4/19/20 press release.

MOTOR

FMCSA RELEASES FINAL HOS RULE

On May 14, 2020 the Federal Motor Carrier Safety Administration ("FMCSA") announced the release of its final rule on Hours of Service ("HOS") to be published in the Federal Register. It will take effect 120 days from the date of publication.

According to the press release:

> Based on the detailed public comments and input from the American people, FMCSA's final rule on hours of service offers four key revisions to the existing HOS rules:
>
> - The Agency will increase safety and flexibility for the 30-minute break rule by requiring a break after 8 hours of consecutive driving and allowing the break to be satisfied by a driver using on-duty, not driving status, rather than off-duty status.
> - The Agency will modify the sleeper-berth exception to allow drivers to split their required 10 hours off duty into two periods: an 8/2 split, or a 7/3 split—with neither period counting against the driver's 14-hour driving window.
> - The Agency will modify the adverse driving conditions exception by extending by two hours the maximum window during which driving is permitted.
> - The Agency will change the short-haul exception available to certain commercial drivers by lengthening the drivers' maximum on-duty period from 12 to 14 hours and extending the distance limit within which the driver may operate from 100 air miles to 150 air miles.
>
> FMCSA's final rule is crafted to improve safety on the nation's roadways. The rule changes do not increase driving time and will continue to prevent CMV operators from driving for more than eight consecutive hours without at least a 30-minute break.
>
> In addition, FMCSA's rule modernizing hours of service regulations is estimated to provide nearly $274 million in annualized cost savings for the U.S. economy and American consumers. The trucking industry is a key component of the national economy, employing more than seven million people and moving 70 percent of the nation's domestic freight.

To view the press release, visit https://www.fmcsa.dot.gov/newsroom/us-department-transportation-modernizes-hours-service-rules-improve-safety-and-increase, and to view the final rule go to: https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2020-05/HOS%20Master%20050120%20clean.pdf

DRIVER CLASSIFICATION – AGAIN!

On May 5, 2020 the state of California filed a "Complaint for Injunctive Relief, Restitution, and Penalties" against Uber Technologies, Inc. and Lyft, Inc., initiating the next round in the driver classification dispute.

In the suit, California's top prosecutor, Attorney General Xavier Becerra, and the city attorneys of Los Angeles, San Diego and San Francisco allege the gig companies' behavior is robbing workers of wages and benefits while dodging their fair share of taxes used to protect workers when they get sick, especially as many drivers continue to work during the coronavirus pandemic.

The suit is based upon the strict three part test for classifying independent contractors that was established in the 2018 California Supreme Court decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* and codified in Assembly Bill 5 ("AB5") in September, 2019.

Instead of acquiescing, numerous gig employers and their supporters refused to follow the new state law and continued operations. However, AB5 gave the state enforcement tools which they are now utilizing in this suit.

Pursuant to the suit, the state and cities are demanding that the defendants:

- Be enjoined from engaging in unfair competition;
- Pay all wages they would have paid to current and former drivers had they been classified as employees during the past four years;
- Pay penalties of $2,500 for each act of unfair competition (presumably each driver) and additionally a penalty of $2,500 for violations against senior citizens or individuals with disabilities, and;
- Stop classifying drivers as freelancers.

The authorities assert that immediate action must be taken in part due to risks drivers are taking by continuing to work during the current pandemic. However, AG Becerra admits that the pandemic has also had an impact on the court system, with many courts operating in very limited capacities and many time limits extended.

The state's lawsuit is available online at https://oag.ca.gov/system/files/attachments/press-docs/2020-05-05%20-%20Filed%20Complaint.pdf.

FMCSA COVID-19 REGULATORY RELIEF

As truckers have played a key role in getting America through the COVID-19 public health emergency, the Federal Motor Carrier Safety Administration ("FMCSA") has provided regulatory relief to commercial drivers to get critically important medical supplies, food, and household goods to Americans in need.

The nation's truck drivers have been on the front lines of this effort and are vital to America's supply chain. The latest information, declarations, and resources on FMCSA's response to the COVID-19 are available at https://www.fmcsa.dot.gov/COVID-19.

ECONOMIC SLOWDOWN RESULTS IN LOSS OF TRUCKING JOBS

According to the "Employment Situation Summary" published by the U.S. Bureau of Labor Statistics ("BLS") May 8, 2020 some 88,000 trucking jobs were lost from March to April 2020, despite increased demands for essential goods transport. This represents a 5.8 percent drop in employment from March and a

6.2 percent year-over-year decline. Payrolls at the truckload and less-than-truckload ("LTL") carriers tracked by the BLS included more than 1.4 million workers.

While this reduction is less than in the overall workforce, it is substantial and the speed of recovery will depend on how quickly the overall economy recovers.

Visit https://www.bls.gov/news.release/empsit.nr0.htm to view the BLS news release and to view the trucking specific numbers, visit https://www.bls.gov/iag/tgs/iag484.htm.

FMCSA ISSUES CDL DRUG & ALCOHOL NPRM

On April 28, 2020 the Federal Motor Carrier Safety Administration ("FMCSA") issued a Notice of Proposed Rulemaking ("NPRM") and request for comments regarding state licensing compliance with federal commercial driver's license ("CDL") regulations. According to the NPRM summary:

> FMCSA proposes to prohibit State Driver's Licensing Agencies ("SDLAs") from issuing, renewing, upgrading, or transferring a commercial driver's license ("CDL"), or commercial learner's permit ("CLP"), for individuals prohibited under current regulations from driving a commercial motor vehicle ("CMV") due to controlled substance (drug) and alcohol program violations. The CMV driving ban is intended to keep these drivers off the road until they comply with return-to-duty ("RTD") requirements. FMCSA also seeks comment on alternate proposals establishing additional ways that SDLAs would use information, obtained through the Drug and Alcohol Clearinghouse ("Clearinghouse"), to increase compliance with the CMV driving prohibition. Further, the Agency proposes to revise how reports of actual knowledge violations, based on a citation for Driving Under the Influence ("DUI") in a CMV, would be maintained in the Clearinghouse. These proposed changes would improve highway safety by increasing compliance with existing drug and alcohol program requirements.

Currently, most states are not aware when a CDL holder licensed in their State is prohibited from driving a CMV due to an alcohol or drug testing violation. Consequently, there is no Federal requirement that SDLAs take any action on the license of drivers subject to that prohibition. As a result, a driver can continue to hold a valid CLP or CDL, even while prohibited from operating a CMV under FMCSA's drug and alcohol regulations.

The proposed downgrade would align a driver's CLP or CDL status with his or her CMV driving status under CFR § 382.501(a), thus closing the current regulatory loophole that allows these CMV drivers to evade detection. Additionally, state licensing agencies may be required to query FMCSA's Drug & Alcohol Clearinghouse prior to issuing a CLP or CDL.

Visit https://www.govinfo.gov/content/pkg/FR-2020-04-28/pdf/2020-08230.pdf to view the Federal Register notice. Comments must be received on or before June 29, 2020.

CRASH PREVENTABILITY PROGRAM

On May 1, 2020 the Federal Motor Carrier Safety Administration ("FMCSA") announced that it had decided to resume ruling on the preventability of certain categories of commercial motor vehicle ("CMV") crashes in its Crash Preventability Determination Program ("CPDP"). The FMCSA published a Notice in the May 6, 2020 Federal Register regarding the start of this new CPDP.

Motor carriers and drivers that have an eligible crash that occurred on or after August 1, 2019 may now submit a Request for Data Review ("RDR") with the required police accident report and other supporting documents, photos, or videos through the agency's DataQs website (https://dataqs.fmcsa.dot.gov).

The new CPDP expands on the categories of crashes to be reviewed beyond those in the pilot program; excludes crashes deemed not preventable from the Safety Measurement System ("SMS"); and streamlines the review process.

In response to concerns raised about determinations on crash preventability being used in litigation, the FMCSA emphasized its determinations do not establish legal liability, fault, or negligence by any party. "Fault is generally determined in the course of civil or criminal proceedings and results in the assignment of legal liability for the consequences of a crash," FMCSA said in the draft notice. "By contrast, a preventability determination is not a proceeding to assign legal liability for a crash. Under 49 U.S.C. § 504(f), FMCSA's preventability determinations may not be admitted into evidence or used in a civil action for damages and are not reliable for that purpose."

To that end, the FMCSA has added a disclaimer to the SMS website that states:

> A crash preventability determination does not assign fault or legal liability for the crash. These determinations are made on the basis of information available to FMCSA by persons with no personal knowledge of the crash and are not reliable evidence in a civil or criminal action. Under 49 U.S.C. § 504(f), these determinations are not admissible in a civil action for damages. The absence of a not preventable determination does not indicate that a crash was preventable.

The agency also will provide language in its notifications to submitters, as it did in the demonstration program, that determinations are not appropriate for use by private parties in civil litigation and that they do not establish legal liability, fault, or negligence. The language also confirms that crash preventability determinations will not affect safety ratings or result in any penalties or sanctions.

Visit https://www.fmcsa.dot.gov/crash-preventability-determination-program for more information on the CPDP, and visit https://www.govinfo.gov/content/pkg/FR-2020-05-06/pdf/2020-09679.pdf to view the Federal Register notice.

OCEAN

FMC FINALIZES DETENTION AND DEMURRAGE RULE

On April 28, 2020 the Federal Maritime Commission ("FMC") announced that it had issued new guidance on how it will assess the reasonableness of detention and demurrage regulations and practices of ocean carriers and marine terminal operators ("MTOs") under 46 U.S.C. 41102(c).

The final rule, "Docket No. 19-05, Interpretive Rule on Demurrage and Detention under the Shipping Act", became effective upon its publication in the Federal Register on 5/18/20.

According to the FMC announcement:

> Under the new interpretive rule, the Commission will consider the extent to which detention and demurrage charges and policies serve their primary purpose of incentivizing the movement of cargo and promoting freight fluidity. The rule also provides guidance on how the Commission may apply that principle in the context of cargo availability (and notice thereof) and empty container return.
>
> The Commission may also consider in assessing the reasonableness of detention and demurrage practices factors related to:
>
> - Content and clarity of carrier and MTO policies addressing detention and demurrage.

- Clarity of carrier and MTO detention and demurrage terminology.

The final rule adds two provisions that were not included in the proposed rule published in September 2019. The first clarifies that the guidance in the rule is applicable in the context of government inspections. The second clarifies that the rule does not preclude the Commission from considering additional factors, arguments, and evidence outside those specifically listed.

This final interpretive rule is the culmination of a process initiated by a petition (Petition P4-16) submitted to the Commission in December 2016 by a coalition of shipper groups. In the intervening period, the FMC held public hearings in January 2018; initiated a Fact Finding Investigation in March 2018 led by Commissioner Rebecca Dye (Fact Finding 28); and issued a proposed rule in September 2019.

It should be noted that the finalized rule provides guidance for the industry to resolve disputes, it does not provide any civil penalties for violating the rule.

Visit https://www.fmc.gov/new-guidance-detention-demurrage/ to view the FMC announcement and visit https://www.federalregister.gov/documents/2020/05/18/2020-09370/interpretive-rule-on-demurrage-and-detention-under-the-shipping-act to view the published rule.

FMC ALLOWS TEMPORARY FILING EXEMPTIONS FOR SERVICE CONTRACTS

In an order served April 27, 2020 the Federal Maritime Commission ("FMC") granted temporary relief to parties by allowing them to file service contracts up to 30 days after they take effect. The order took effect immediately and lasts until December 31, 2020.

The FMC noted that, as a result of the disruption from the pandemic, it has become difficult for carriers and their customers to comply with certain burdensome FMC regulations. In particular, as many businesses have been working remotely due to social distancing and stay-at-home orders, complying with service contract filing requirements has become difficult.

In particular, the regulations (49 CFR § 530) require that carriers file original service contracts with the FMC "before any cargo moves pursuant to that service contract."

In drafting its order, the FMC noted that if there is a need for immediate relief, the FMC can waive its normal requirement that there be advance notice and an opportunity for a hearing.

From the order:

THEREFORE IT IS ORDERED, That a temporary exemption from the requirements of 46 C.F.R. §§ 530.3(i); 530.8(a)(1), (b)(8)(i); and 530.14(a) for original service contracts is GRANTED, provided that:

1. Authorized persons must file with the Commission, in the manner set forth in appendix A of 46 C.F.R. part 530, a true and complete copy of every original service contract no later than thirty (30) days after any cargo moves pursuant to that service contract amendment;

2. Every original service contract filed with the Commission must include the effective date, which may be no more than thirty (30) calendar days prior to the filing date with the Commission; and

3. Performance under an original service contract may not begin until the day it is effective, provided that the service contract is filed with the Commission no later than thirty (30) calendar days after the effective date.

IT IS FURTHER ORDERED, That this temporary exemption will remain in effect until December 31, 2020.

Visit https://www.fmc.gov/commission-provides-temporary-relief-service-contract-filing/ to view the FMC announcement and visit https://www2.fmc.gov/readingroom/docs/20-06/20-06_ord_grnt_exmpt.pdf/ to view the order.

JUNE 1, 2020 GENERAL RATE INCREASE

by Tony Nuzio, ICC Logistics Services, Inc.

Here we go again! It's hard to believe with the cargo volumes down tremendously that the Ocean Carriers for Asia to USA, Canada and Mexico markets are actually seeking another General Rate Increase. On the other hand, they do need to raise revenues as quickly as possible to offset the shipping slowdown.

Effective June 1, 2020 General Rate Increase ("GRI") has been filed for all cargo imported from Asia ports of loading, to U.S.A., Canada, and Mexico ports/ramps of discharge.

The proposed increases are as follows:

General Rate Increase – June 1, 2020

USD 900 / 20'

USD 1,000 / 40'

USD 1,125 / 40' HQ

USD 1,125 / 40' Reefer

USD 1,266 / 45'

USD 1,600 / 53'

It certainly is not possible to predict current and future markets based on the current trade conditions, so stay tuned for further up-dates.

PARCEL EXPRESS

USPS QUARTERLY LOSS DOUBLES YEAR OVER YEAR

On May 8, 2020 the United States Postal Service ("USPS") released its second quarter fiscal 2020 results (1/1/20-3/31/20). While its revenue increased $348 million to $17.8 billion over the same quarter last year, its net loss for the same quarter increased from $2.1 billion in 2019 to $4.5 billion in 2020. Total operating expenses were $22.3 billion for the quarter, an increase of $2.8 billion, or 14.2 percent, compared to the same quarter last year.

In the report, the USPS pointed out that:

> "Although the pandemic did not have significant impact on our financial condition in our second quarter, we anticipate that our business will suffer potentially dire consequences for the remainder of the year, and we are already feeling those impacts during the last half of March. At a time when America needs the Postal Service more than ever, the pandemic is starting to have a significant effect on our business with mail volumes plummeting as a result of the

> pandemic," said Postmaster General and CEO Megan J. Brennan. "As Congress and the Administration take steps to support businesses and industries around the country, it is imperative that they also take action to shore up the finances of the Postal Service, and enable us to continue to fulfill our indispensable role during the pandemic, and to play an effective role in the nation's economic recovery."

The health of the USPS is important because it is a significant player in the shipping industry, with its quarterly sales roughly equal to both FedEx (at $17.5 billion) and United Parcel Service ("UPS") (at $18 billion) for the same time period.

For the USPS, one big problem is marketing mail, which accounts for about 20% of total sales. Year over year, marketing mail sales fell 2% in the quarter just reported, but declines accelerated in April. Additionally, the USPS faces problems such as how to offset other mail losses and compete with UPS and FedEx, along with competing with Amazon and Walmart as they build out their own "last mile" shipping capacity. This is a service that the USPS had previously provided.

To view the USPS report, visit https://about.usps.com/newsroom/national-releases/2020/0508-usps-reports-second-quarter-fiscal-2020-results.htm.

INTERNATIONAL MAIL DISRUPTIONS

International mail and parcel delivery has been significantly impacted by the global pandemic as countries have shut borders in an attempt to limit the spread of the disease. Of note, suspension of mail to a number of countries has ended and acceptance has resumed. Visit https://faq.usps.com/s/article/Mail-Service-Alerts-and-Updates#temporary_international_service_suspensions for a complete, up to date list.

QUESTIONS & ANSWERS

by George Carl Pezold, Esq.

FREIGHT CHARGES – DELIVERY APPOINTMENT CHARGES

Question: It's my understanding that all billing for a shipment shall be billed to the "Bill To" party on the bill of lading ("BOL"). However, I have an issue with a less-than-truckload ("LTL") carrier attempting to invoice my company for delivery appointment fees, despite my company not being the "Bill To" party on the aforementioned BOL. After speaking with the carrier, they stated that delivery appointments are an exception and they can bill the receiver if they choose. Is this accurate?

Answer: You indicate that the freight charges were supposed to be billed to the "Bill To" party on the BOL, so the freight charges would be considered "prepaid" and not "collect" (from the consignee).

The answer could depend on whether the shipper executed what is known as the "Section 7" box on the BOL. The language on the typical bill of lading is taken from the Uniform Straight Bill of Lading as published in the National Motor Freight Classification ("NMFC"), and is referred to as a "Section 7" or "Non-Recourse" provision. The actual language on the face of the NMFC bill of lading states:

> FOR FREIGHT COLLECT SHIPMENTS:
>
> If this shipment is to be delivered to the consignee, without recourse on the consignor, the consignor shall sign the following statement:

> "The carrier may decline to make delivery of this shipment without payment of freight and all other lawful charges."
>
> _____
>
> (Signature of Consignor)

The Straight Bill of Lading - Short Form, as published in the NMFC, incorporates the "Terms and Conditions" on the reverse side of the long form of the Uniform Straight Bill of Lading, and Section 7 states:

> Sec. 7. (a) The consignor or consignee shall be liable for the freight and other lawful charges accruing on the shipment, as billed or corrected, except that collect shipments may move without recourse to the consignor when the consignor so stipulates by signature or endorsement in the space provided on the face of the bill of lading.

Essentially, if the non-recourse section on the face of the bill of lading ("Section 7") has been signed by the shipper, it has no liability for the freight charges, including destination charges such as detention, redelivery, etc., see e.g., *Southern Pacific Transportation Co. v. Commercial Metals*, 456 U.S. 336, 102 S.Ct. 1815 (1982).

It should be noted that, although the current version of the NMFC bill of lading says "For Freight Collect Shipments", the older court decisions also applied the same rule on a "prepaid" shipment.

Thus, one answer to your question would be that the carrier has the right to bill the consignee for "delivery appointment fees", and this would certainly be true if the shipper executed the "Non-Recourse" provision on the BOL.

The answer is less clear if the shipper did not execute the "Non-Recourse" provision, and could depend on provisions set forth in the carrier's Rules Tariff.

In any event, your "beef" may be with the shipper/seller of the goods, for example if the invoice price included "delivery" – which necessarily included the "delivery appointment fees". You might want to ask the shipper to reimburse you for these fees.

BILLS OF LADING – WHO IS THE SHIPPER?

Question: When a company's inventory is sitting at a contractor's warehouse, who should bear responsibility as the (signing) shipping party on the bill of lading when it's time to send it out? The business that owns the inventory or the contractor? Does it matter who is actively arranging the shipment?

Answer: I assume that the "contractor" is either manufacturing or packaging the product for your company and shipping to your customers when instructed to do so.

It's a common practice to use language such as: "[Contractor], as Agent for [Shipper/owner]" on the bill of lading. One of the reasons is that the contractor usually would not want to be shown as the "shipper" on the bill of lading since it is not the beneficial owner of the goods and could be liable for the freight or accessorial charges.

FREIGHT CLAIMS – CLEAN DELIVERY RECEIPT WITH PHOTO OF DAMAGE

Question: I am curious if a delivery receipt ("DR") or bill of lading ("BOL") is signed at the consignees as "Subject to Inspection", and they have photos backing up the shipping boxes are damaged with product sticking out of the boxes, can a carrier decline liability just because of the consignee lack of doing an inspection immediately while the driver is present? I know that this should be the proper procedure, and

would not allow this to go further if there was no photographic proof, but if there are photos that show this was damaged on arrival, can a claim be denied solely on the words written on the DR?

It is at times hard to get receiving workers at consignees to know the proper procedure for cargo claims. Should this be always a total loss to our customers since they paid for the product and shipment but their consignee didn't express details on the DR?

Answer: It is always a "best practice" to record any damage on the bill of lading or delivery receipt at the time of delivery and when the driver is still present. Signing "subject to inspection" really has no legal significance. Any loss or damage not noted on the bill of lading or delivery receipt, and that is discovered after the truck has left will be treated by the carrier as "concealed damage", and the consignee will have the burden to provide reasonable evidence that the loss or damage existed at the time of delivery and not afterwards.

You ask whether it makes a difference "if there are photos that show this was damaged on arrival". I would say that this is exactly the kind of evidence, if supported by a witness that was present at the time of delivery, that would support the fact that damage existed when the goods were delivered and not afterwards.

To answer your question, a claim should not be denied solely on a "clean" delivery receipt, and the carrier does have duty to consider evidence such as you have described.

I would note that there are relevant items in the National Motor Freight Classification that deal with concealed damage.

Item 300140, Inspection by Carrier, requires the carrier to make an inspection "as promptly as possible and practicable after receipt of request by consignee".

Item 300145, Failure to Inspect, states: "In the event carrier does not make an inspection the consignee must make the inspection and record all information to the best of his ability pertinent to the cause. Consignee's inspection, in such case, will be considered as the carrier's inspection and will not jeopardize any recovery the consignee is due based on the facts contained in the report."

FREIGHT CHARGES – TIME IN WHICH TO CORRECT INVOICES

Question: Can a carrier require that a shipper make invoice correction requests within a certain time period in order to honor them?

This case was specifically regarding a commodity dispute which could be backed up by the shipper with documentation.

Answer: I am not sure what you are asking, but I assume it apparently involves a claim for some type of overcharges by the shipper. If so, the only relevant statutory provision in the Interstate Commerce Act is 49 USC 13710 (a)(3)(B):

> (3) Billing disputes.—
>
> (B) Initiated by shippers.—
>
> If a shipper seeks to contest the charges originally billed or additional charges subsequently billed, the shipper may request that the Board determine whether the charges billed must be paid. A shipper must contest the original bill or subsequent bill within 180 days of receipt of the bill in order to have the right to contest such charges.

You state that "the carrier's policy was to only allow 30 days for such submissions". It would seem that, unless this "policy" is incorporated in a tariff either by a contract or through the bill of lading, it should not be enforceable.

RAIL

STB ISSUES RAIL DEMURRAGE DECISIONS

On April 30, 2020 the Surface Transportation Board ("STB") announced that it issued a series of three decisions on demurrage and accessorial rules and charges, continuing its efforts to promote transparency, timeliness, and mutual accountability by rail carriers and the shippers and receivers they serve.

According to the press release:

> Informed by the significant number of comments received during the notice-and-comment process, the Board issued three related decisions today.
>
> In Policy Statement on Demurrage & Accessorial Rules & Charges, Docket No. EP 757, the Board issued a final policy statement that provides the public with information on principles the Board would consider in evaluating the reasonableness of demurrage and accessorial rules and charges. With the policy statement, the Board intends to facilitate more effective private negotiations and problem solving between rail carriers and shippers and receivers, to help prevent disputes from arising, and to help resolve disputes more efficiently and cost-effectively.
>
> In Demurrage Billing Requirements, Docket No. EP 759, the Board issued a final rule requiring Class I carriers to directly bill the shipper for demurrage when the shipper and warehouseman agree to that arrangement and notify the carrier. The Board intends the rule to help ensure the responsibility for demurrage is placed on the party in the best position to expedite the loading or unloading of rail cars.
>
> Also, in Demurrage Billing Requirements, Docket No. EP 759, the Board issued a supplemental notice of proposed rulemaking (SNPRM) inviting parties to comment on certain modifications and additions to the proposed requirements for minimum information to be included on or with Class I carriers' demurrage invoices. The SNPRM proposes to include additional information such as (1) the date range (i.e., the billing cycle) covered by the invoice; (2) the original estimated date and time of arrival and the date and time cars are received at interchange; (3) the ordered-in date and time; and (4) machine-readable data. The Board also invited further comment from the Class I carriers regarding what actions they currently take, and from all stakeholders on what actions Class I carriers reasonably should be required to take, to ensure that demurrage invoices are accurate and warranted. The intent of this proceeding is to ensure that the recipients of demurrage invoices will be provided sufficient information to readily assess the validity of those charges without having to undertake an unreasonable effort to gather information.
>
> The final policy statement will be effective on May 30, 2020, and the final rule in Demurrage Billing Requirements will be effective on June 20, 2020. Comments on the SNPRM in Demurrage Billing Requirements are due by June 5, 2020, and replies are due by July 6, 2020.
>
> The Board's decision in Policy Statement on Demurrage & Accessorial Rules & Charges, Docket No. EP 757, may be viewed and downloaded here. The Board's final rule in Demurrage Billing Requirements, Docket No. EP 759, may be viewed and downloaded here, and the SNPRM in Demurrage Billing Requirements, Docket No. EP 759, may be viewed and downloaded here.

Visit https://prod.stb.gov/news-communications/latest-news/pr-20-03/ to view the STB press release and for links to the decisions

For additional information, General Counsel for the National Industrial Transportation League, Karyn Booth, along with her colleagues at Thompson Hine, drafted a detailed summary on the rulings available online at https://www.thompsonhine.com/publications/stb-issues-demurrage-policy-and-direct-billing-rule-proposes-billing-requirement-modifications.

RECENT CASE

TIMELY FILING OF A CARMACK CLAIM – DID "LIST" CONSTITUTE CLAIM?

A federal district court in Texas denied summary judgment to a motor carrier who claimed that a proper claim had not been filed. In this case, the plaintiff had provided the carrier a list of that identified 53 items purportedly lost or broken and the original cost of 36 of those items. The list did not identify the original price of the remaining 17 items, nor did it identify the cost of repairing or replacing any of the 53 items purportedly lost or broken.

The Carmack Amendment (49 U.S.C. § 14706 and regulations at 49 C.F.R. § 1005.2(b)) requires that a claimant must file "allegations or proof of (a) delivery in good condition, (b) arrival in damaged condition, and (c) the amount of damages" in order to make a prima facie case. The carrier moved for summary judgment alleging claimant failed the third prong, in that it did not make a claim for "payment of a specified or determinable amount of money."

The court noted:

> The third prong of 49 C.F.R. § 1005.2(b) is a "disjunctive test" that allows claims to proceed under two different methods. *Williams v. N. Am. Van Lines of Tex., Inc*., 731 F.3d 367, 370 (5th Cir. 2013), "The purpose of this disjunctive test is to permit claims to proceed when, even if a specified total amount is not listed, the amount requested can be determined by calculating the values of the individual items." *Id*. (citing *Salzstein*, 993 F.2d at 1190). Claimants may either assert a specific total or list individualized damages which can be aggregated. See *id*. at 369-70; *Salzstein*, 993 F.2d at 1190 (finding that a "determinable" claim " 'means an amount determinable, as a matter of mathematics, from a perusal of the documents submitted in support of the notice of a claim.' " (quoting *Bobst Div. of Bobst Camplain, Inc. v. IML-Freight, Inc*., 566 F. Supp. 665, 669 (S.D.N.Y. 1983))). In *Williams*, the Fifth Circuit also clarified that an "estimate of the value" of damaged items could satisfy 49 C.F.R. § 1005.2(b), while an "estimate of the damage [claimant] was seeking" could not. Id. at 369.
>
> The "Carmack Amendment incorporates common law principles for the calculation of damages," such that the measure of damages will be determined by the "method [that] more accurately reflect[s] the loss actually suffered by the plaintiff." *Nat'l Hispanic Circus, Inc. v. Rex Trucking, Inc*., 414 F.3d 546, 552 (5th Cir. 2005) (citations omitted). While replacement cost may be the default measure of damages, see *Maass Flanges Corp. v. Totran Tramp. Serv. Inc.*, Civ. A. No. H-13-1090, 2014 WL 29006, at *4 (S.D. Tex. Jan. 2, 2014) (collecting authorities), the Court has found no authorities claiming that it is the exclusive measure under the Carmack Amendment.

The court found that the list satisfied the requirement of a "specified or determinable claim" as it specifically identified the value of the property allegedly lost that, when aggregated, provided defendant with a claim of $449,500.

In reaching its conclusion, the court also found:

> that the List advised Defendant of a specific or determinable claim even though it only listed the original purchase cost of the allegedly damage[d] items. The Carmack Amendment incorporates common law principles on the measure of damages and dictates that the measure of damages will be determined by the "method [that] more accurately reflect[s] the loss actually suffered by the plaintiff." *Rex Trucking, Inc*., 414 F.3d at 552 (citations omitted). The Court has found no authorities suggesting that replacement cost is the exclusive measure of damages. While the use of original costs may suggest that the List's figures are estimates, that conclusion has little impact post-Williams. Accordingly, viewing all evidence and drawing all reasonable inferences in the light most favorable to Plaintiffs, the Court finds that Defendant is not entitled to summary judgment.

Seinfeld v. Allied Van Lines, Inc., Docket No. 3:19-CV-0849-S (USDC ND TX 3/27/20) 2020 WL 1493662

The lesson here for claimants is that failure to properly file a claim is risky. Although the claimant in this situation prevailed on the motion for summary judgment, the proper filing of a claim will preclude that risk.

Editor's Note: The opinion erroneously refers to "49 C.F.R. § 1005.2(b)", which only applies to rail carriers. It is 49 C.F.R. Part 370 that applies to motor carriers and freight forwarders.

CCPAC NEWS

CCPAC NEWS UPDATE

The Certified Claims Professional Accreditation Council ("CCPAC") Officers and Board of Directors are pleased to announce the newest Certified Claim Professionals ("CCP"). Kudos to those who after many hours of self-study successfully passed the CCP Annual Fall Exam held on the first Saturday of November each year nationwide.

Unfortunately, the CCP Primer Class that was to be held in conjunction with TLC's Annual Conference in Orlando also has been canceled and will have to be rescheduled.

At this time, the next CCP exam will be the Annual Fall Exam to be held November 7, 2020 at various locations around the country. Visit https://www.ccpac.com/calendar/current-year/ for more information.

For further announcements visit www.ccpac.com for general information and membership in CCPAC or email director@ccpac.com.

CCPAC also has the following online presence:

FaceBook: www.facebook.com/certifiedclaimsprofessional
FaceBook Blog: www.facebook.com/groups/410414592821010/
LinkedIn Group: www.linkedin.com/groups/4883719/
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Website www.ccpac.com

CLASSIFICATION

NEW CCSB DOCKET 2020-2

The Commodity Classification Standards Board ("CCSB") will conduct its next public meeting to consider proposals for amending the National Motor Freight Classification ("NMFC") in Docket 2020-2 on Tuesday, June 2, 2020. Due to the COVID-19 health emergency, this will be a virtual, online meeting. The meeting will commence at 11:00 am Eastern Time. For information on how to attend, please contact Colleen Airgood, Meeting Coordinator, at airgood@nmfta.org or 703-859-3924.

Anyone having an interest in a proposal listed in this docket may attend the meeting on June 2, 2020 and/or communicate that interest in writing by mail, email or fax prior to the meeting. Such Interested Persons will be notified of the CCSB's disposition of the proposal.

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

COMMODITY CLASSIFICATION STANDARDS BOARD DOCKET 2020-2
INDEX OF SUBJECTS (PROPOSALS) - DESCRIPTION and SUBJECT:

Shippers whose traffic may be affected by proposed changes should review the proposals and respond accordingly. Visit http://www.nmfta.org/pages/Public-Docket-Files-2020-2 to review the complete Docket online. Proposals to be included in the Public Docket must be submitted by 5:00 pm Eastern Time, May 21, 2020 and requests to be a Party of Record must be received no later than 5:00 pm Eastern Time, May 21, 2020.

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

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

The address is: Commodity Classification Standards Board, 1001 North Fairfax Street, Suite 600, Alexandria, Virginia 22314, and the CCSB fax number is: 703.683.1094. Written statements may also be emailed to the staff contact involved. To schedule an appearance at the meeting, or if you require further information, please contact Colleen Airgood, Meeting Coordinator, at airgood@nmfta.org or 703.859.3924. Anyone requesting assistance in accordance with the Americans with Disabilities Act will be accommodated.

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

Amendments to the National Motor Freight Classification resulting from the proposals in this docket will be published in a supplement to the NMFC, unless reconsideration is granted or arbitration is sought in accordance with the CCSB's rules. The supplement is scheduled to be issued on July 16, 2020, with an effective date of August 15, 2020.

FUTURE COMMODITY CLASSIFICATION STANDARDS BOARD ("CCSB") DOCKETS

	Docket 2020-3	Docket 2021-1
Docket Closing Date	August 6, 2020	November 25, 2020
Docket Issue Date	September 2, 2020	January 7, 2021
Deadline for Written Submissions and to Become a Party of Record	September 25, 2020	January 29, 2021
CCSB Meeting Date	October 6, 2020	February 9, 2021

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

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APPLICATION FOR ANNUAL MEMBERSHIP

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

- **Regular Member** (shippers, brokers, third party logistics and their representatives);
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- **Associate Member** (non-voting members – carriers and freight forwarders).

All members receive:

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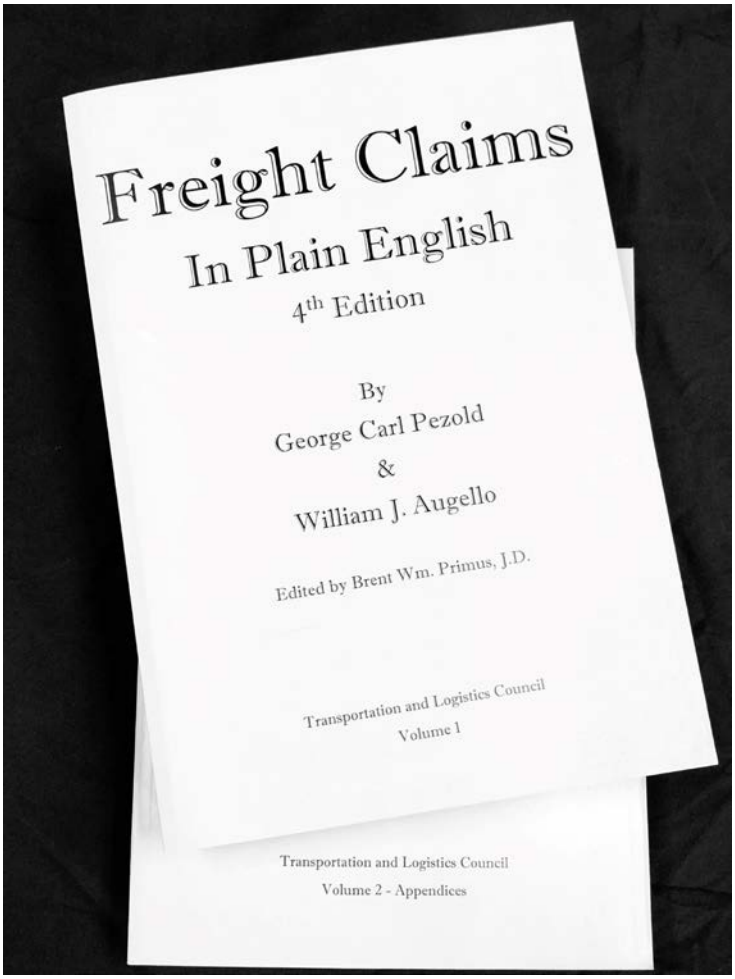

Freight Claims in Plain English (4th Ed.)

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

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

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Click here to see the Table of Contents

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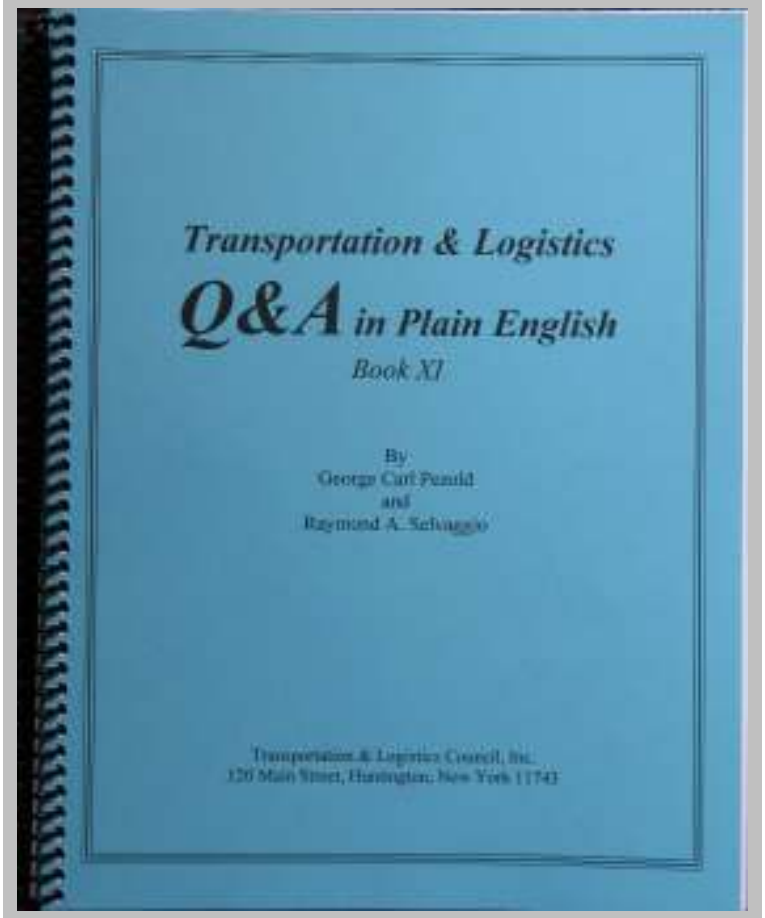

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