# TRANSDIGEST

## Transportation & Logistics Council, Inc.

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## T&LC 47th Annual Conference Dates

- **On Becoming an Expert**
- **U.S. Trade Representative Seeks Comments on China Trade**
- **T&LC Opposes Exemptions to Broker Security**
- **Proposed Increase in Carrier Insurance Requirements**
- **How to Avoid Transportation Contract Failures**
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# EDITORIAL

## ON BECOMING AN EXPERT

By Stephen W. Beyer, Editor

During the recent social and economic upheaval due to the Coronavirus pandemic, we have repeatedly heard how critical it is to "listen to the experts." While that is generally sound advice, a dilemma arises when the "experts" don't agree, and we have to try to choose which experts to listen to.

Finding expertise in the recent situation has been particularly difficult as we are dealing with something new, which is why it is called the "novel" coronavirus. The result, unfortunately, has been that what we have been told by the "experts" has changed over time and even been contradictory between the "experts".

The result is that we have been guinea pigs in an ongoing situation, subject to conflicting advice, and the truth of the matter may take years to finally be known. This is disconcerting, as people like certainty, or at least something better than confusion.

Unlike the above pandemic examples, there are other areas of knowledge that are better understood and more clearly defined, and finding expertise in these areas is not as fraught with difficulty. We, in the transportation and logistics field, have the benefit of working in one such area.

Although there have been changes and advancements in technology, moving goods and products from one point to another hasn't changed all that much over the years, with the introduction of containers, use of pallets and electronic data transfer being some of the most significant changes.

While the expression "there is more than one way to skin a cat" holds true for many situations, it is less accurate in others. The Transportation & Logistics Council seeks to promote expertise in the finite universe of transportation and logistics (it's right in the name), focusing on developing expertise in the areas of contracting, security and claims. We do note that even within that limited universe, there are varied approaches and methods to accomplish the same goals. The same contract does not fit everyone's needs and there are different approaches to security, but the fundamentals remain the same, and the processing of claims is pretty straightforward.

It is to that end that the T&LC strives to educate and promote expertise in the field of transportation and logistics with seminars, publications and its annual conference. Be active, stay involved, get educated and become your own expert.

# 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.

# AIR

## IATA PROPOSES ALTERNATIVES TO QUARANTINE

According to a June 24, 2020 press release the International Air Transport Association ("IATA") urged governments to avoid quarantine measures when re-opening their economies. According to the press release:

> IATA is promoting a layered approach of measures to reduce the risk of countries importing COVID-19 via air travel and to mitigate the possibility of transmission in cases where people may travel while unknowingly being infected.
>
> "Imposing quarantine measures on arriving travelers keeps countries in isolation and the travel and tourism sector in lockdown. Fortunately, there are policy alternatives that can reduce the risk of importing COVID-19 infections while still allowing for the resumption of travel and tourism that are vital to jumpstarting national economies. We are proposing a framework with layers of protection to keep sick people from traveling and to mitigate the risk of transmission should a traveler discover they were infected after arrival," said Alexandre de Juniac, IATA's Director General and CEO.
>
> IATA encourages a layering of bio-safety measures in two areas:
>
> **Reducing the risk of imported cases via travelers**
>
> - **Discouraging symptomatic passengers from traveling**: It is important that passengers do not travel when ill. To encourage passengers to "do the right thing" and stay home if they are unwell or potentially exposed, airlines are offering travelers flexibility in adjusting their bookings.
> - **Public health risk mitigation measures:** IATA supports health screening by governments in the form of health declarations. To avoid privacy issues and cut the risk of infection with paper documents, standardized contactless electronic declarations via government web portals or government mobile applications are recommended. Health screening using measures such as non-intrusive temperature checks can also play an important role. Although temperature checks are not the most effective screening method for COVID-19 symptoms, they can act as a deterrent to traveling while unwell. Temperature checks can

also shore-up passenger confidence: in a recent IATA survey of travelers, 80% indicated that temperature checks make them feel safer when traveling.

- **COVID-19 testing for travelers from countries perceived to be "higher-risk":** When accepting travelers from countries where the rate of new infections is significantly higher, the arrival authority could consider COVID-19 testing. It is recommended that tests are undertaken prior to arrival at the departure airport (so as not to add to airport congestion and avoid the potential for contagion in the travel process) with documentation to prove a negative result. Tests would need to be widely available and highly accurate, with results delivered quickly. Test data would need to be independently validated so as to be mutually recognized by governments and securely transmitted to the relevant authorities. Testing should be for active virus (polymerase chain reaction or PCR) rather than for antibodies or antigens.

**Mitigating Risk in Cases Where an Infected Person Does Travel**

- **Reducing the risk of transmission during the air travel journey:** IATA encourages the universal implementation of the Take-Off guidelines published by the International Civil Aviation Organization (ICAO). Take-Off is a temporary risk-based and multi-layered approach to mitigate the risks of transmitting COVID-19 during air travel. The comprehensive Take-Off guidelines are closely aligned with the recommendations of the European Union Aviation Safety Agency (EASA) and the US Federal Aviation Administration (FAA). These include mask wearing throughout the travel process, sanitization, health declarations and social distancing where possible.
- **Contact tracing:** This is the back-up measure, should someone be detected as infected after arrival. Rapid identification and isolation of contacts contains the risk without large-scale economic or social disruption. New mobile technology has the potential to automate part of the contact-tracing process, provided privacy concerns can be addressed.
- **Reducing risk of transmission at destination**: Governments are taking measures to limit the spread of the virus in their territory that will also mitigate the risk from travelers. In addition, the World Travel and Tourism Council (WTTC) Safe Travel protocols provide a pragmatic approach for the hospitality sector to enable safe tourism and restore traveler confidence. Areas of the industry covered by the protocols include hospitality, attractions, retail, tour operators, and meeting planners.

The IATA goes on to point out that while quarantine measures may play a role in keeping people safe, they also keep many unemployed. They also point out that according to the World Travel and Tourism Council, travel and tourism accounts for 10.3% of global GDP and 300 million jobs globally (through direct, indirect and induced economic impact).

Visit https://www.iata.org/en/pressroom/pr/2020-06-24-02/ to view the full press release.

# HUMOR



# INTERNATIONAL

## USTR SEEKS COMMENTS ON TRADE WITH CHINA

On June 3, 2020 the Office of U.S. Trade Representative ("USTR") published notices in the Federal Register requesting comments on exclusions from duties regarding trade with China. The first involves exclusions that were granted on 14 products that are scheduled to expire on August 7, 2020, and the second involves another set of exclusions scheduled to expire on September 20, 2020.

The USTR will evaluate the potential extensions on a case-by-case basis. The focus will be on whether the particular product remains available only from China. Factors to be considered include:

- Whether the particular product and/or a comparable product is available from sources in the United States and/or in third countries.
- Any changes in the global supply chain with respect to the particular product or any other relevant industry developments.

- The efforts, if any, the importers or U.S. purchasers have undertaken to source the product from the United States or third countries.
- Whether the imposition of additional duties on the products covered by the exclusion will result in severe economic harm to the commenter or other U.S. interests.

Any comments must be submitted in a specified format on the UTRS's 301 web portal and address particular data points solicited by the portal. A separate comment must be submitted for each exclusion.

For more information, view the respective Federal Register notices at:

https://www.federalregister.gov/documents/2020/06/03/2020-11952/request-for-comments-concerning-the-extension-of-particular-exclusions-granted-under-the-200-billion

https://www.federalregister.gov/documents/2020/06/03/2020-11942/request-for-comments-concerning-the-extension-of-particular-exclusions-granted-under-the-september

## CHINA AND RESHORING

On June 24, 2020 Gartner, Inc., a leading research and advisory company, issued a press release regarding its survey of companies moving their supply chains out of China and closer to home. From the press release:

> **Tariff Costs and Resilience Concerns are Primary Reasons to Look for Alternative Locations**
>
> A Gartner, Inc. survey of 260 global supply chain leaders in February and March 2020 found that 33% had moved sourcing and manufacturing activities out of China or plan to do so in the next two to three years. Survey results show that the COVID-19 pandemic is only one of several disruptions that have put global supply chains under pressure.
>
> "Global supply chains were being disrupted long before COVID-19 emerged," said Kamala Raman, senior director analyst with the Gartner Supply Chain Practice. "Already in 2018 and 2019, the U.S.-China trade war made supply chain leaders aware of the weaknesses of their globalized supply chains and question the logic of heavily outsourced, concentrated and interdependent networks. As a result, a new focus on network resilience and the idea of more regional manufacturing emerged. But this kind of change comes with a price tag."
>
> **Tariff Costs are the Primary Reason to Move Supply Chains**
>
> For decades, China has been the go-to destination for high-quality, low-cost manufacturing, and it has established itself as a key source of supply for almost all major industries including retail and pharmaceutical. However, Gartner research showed that the margin between those companies planning to add jobs in China versus taking them away narrowed sharply in 2019. The primary reason is the increase in tariff costs.

Visit https://www.gartner.com/en/newsroom/press-releases/2020-06-24-gartner-survey-reveals-33-percent-of-supply-chain-leaders-moved-business-out-of-china-or-plan-to-by-2023 to view the press release.

# MOTOR

## BROKER SECURITY

In a May 4, 2020 Federal Register notice in Docket No. FMCSA-2020-0130, the Federal Motor Carrier Safety Administration ("FMCSA") extended the comment period and corrected a prior notice regarding an exemption from the $75,000 bond requirement for all property brokers and freight forwarders.

In response to the exemption application, the Transportation & Logistics Council, Inc. ("T&LC"), along with other stakeholders submitted comments that were for the most part in opposition to the granting of the exemption.

T&LC submitted the following comments:

> The Financial Security Requirements for Brokers should not be changed.
>
> For many years brokers were only required to have a surety bond in the amount of $10,000. It had become obvious that this was insufficient and organizations as the Council pressed for an increase in the bond amount, which was finally recognized in the MAP-21 legislation and is now $75,000.
>
> Many shippers and carriers carefully "vet" brokers before doing business with them. Typically they first check the FMCSA "Safer" and "Licensing and Insurance" websites to ensure that the broker's operating authority and surety bond are current and in effect. This is really the only official and trustworthy source of protection against the many shady entrepreneurs that hold themselves out – often as "dispatch services" – to "arrange" for motor carrier transportation. And many "unsophisticated" shippers and carriers are not even aware of this information that could protect them from potentially unfit or illegal operators.
>
> Unfortunately, and perhaps due to the limited resources for monitoring and enforcement, there is a virtual plague of situations where carriers, particularly small truckers, are not being paid for their services by these operators. As a result this has ensured the prosperity of commercial debt collectors that specialize in collecting unpaid freight charges, and if the "broker" has disappeared, or its bond has expired or been exhausted (which quickly happens), they pursue the shippers and consignees that have already paid the "broker".
>
> It is the Council's position that any person that arranges for motor carrier transportation, and receives compensation – either directly or indirectly – for its services, should be and remain subject to the financial security requirements of the law, and the Exemption Application should be denied.

Visit https://www.fmcsa.dot.gov/regulations/notices/2020-09467 to view the notice and visit https://www.regulations.gov/docket?D=FMCSA-2020-0130 to view all the comments.

## OOIDA SEEKS CHANGES IN BROKER DISCLOSURE REGULATIONS

In a May 19, 2020 press release, the Owner-Operator Independent Drivers Association ("OOIDA") announced that it had filed a petition for a rulemaking with the Federal Motor Carrier Safety Administration ("FMCSA") that would improve broker transparency. From the press release:

> Brokers are third-party entities that contract with truckers to haul freight for shippers, commonly known as broker-carrier agreements. Federal regulations require brokers to maintain detailed records of their transactions with motor carriers. Motor carriers have the right to view this

information, which includes how much a shipper is paying a broker and how much the broker is then paying the motor carrier.

OOIDA's petition explains that brokers often find ways of circumventing federal regulations (49 CFR §371.3) that require them to keep records of transactions and make them available to carriers upon request.

OOIDA petitioned DOT and FMCSA to strengthen the regulations in 49 CFR §371.3 by doing the following:

1. Require brokers to automatically provide an electronic copy of each transaction record within 48 hours after the contractual service has been completed.
2. Explicitly prohibit brokers from including any provision in their contracts that requires a carrier to waive their rights to access the transaction records as required by 49 CFR §371.3.

Visit https://www.ooida.com/MediaCenter/PressReleases/pressrelease.asp?prid=533 to view the press release and visit https://www.ooida.com/newsletter/OOIDAPetitionBrokerTransparency49CFR%C2%A7371.3.pdf to view the petition.

## FIVE KEYS TO AVOIDING TRANSPORTATION CONTRACT FAILURES

by Tony Nuzio, ICC Logistics

It is a known fact that all transportation and logistics services should be clearly and thoroughly documented in a bi-lateral contract between the shipper and the service provider before any services are provided. However, to avoid what we call contract failures, there are several key steps in the contracting process that must be taken into account before the parties ultimately sign on the dotted line.

1. **Qualifying the Partners:**

The first step in the process is for both sides to make sure they have qualified each other as an entity they actually want to do business with for the long term. While this sounds quite logical, you would be amazed at how many companies enter into long-term business agreements without fully vetting the prospective business partner. Do you truly know your business partner? Is it a business partner you actually want to do business with? And finally, don't assume anything!

2. **Understanding the Business:**

Before a transportation and logistics service provider can even think about doing business with a company, it must have a complete understanding of the business they wish to contract with. By the same token, the business seeking out the service provider must have a complete understanding of the services offered by the transportation and logistics service provider. Both parties must be sure that if they agree to "get married" both sides are capable of holding up their side of the bargain for the long term.

3. **Involve the Experts throughout the Entire Process:**

Sometimes companies on both sides of the fence make arrangements to do business with a particular company without involving their own in-house experts who truly understand all of the nuances of each businesses processes. This is a recipe for disaster. And if you think it can't happen, we can give you countless examples of where these failures to involve the experts resulted in utter disaster.

4. **Failure to Properly Communicate:**

Sometimes shippers fail to communicate all of their company's needs to the service provider, and sometimes the service providers fail to properly listen to the shipper's actual needs. Either one or both of these conditions will surely result in failure. The goal is to create a ROBUST contracting process. By ROBUST, we mean:

**R**esults oriented – produces the results both sides want to produce

**O**ptimizes Resources – makes the best possible use of the resources of both parties

**B**alanced – inputs, outputs and costs are appropriate to the result

**U**ser friendly – meets the satisfaction needs of all the parties involved in the process

**S**imple – easy to understand and operate

**T**rackable – Quantified and continually monitored

5. **Failure to Document Processes:**

You will want to avoid the "telephone game" where the parties speak, but sometimes what is heard is not exactly what was spoken. That's why each step in the contracting process must be documented in writing, agreed to by both parties and then signed off by both parties signifying complete understanding. And, this must be done before either party signs the contract.

As the old saying goes, "an ounce of prevention is worth a pound of cure."

## PROPOSED INCREASE IN CARRIER INSURANCE REQUIREMENTS

As the federal government seeks to pass a surface transportation reauthorization bill, U.S. Rep. Chuy Garcia, D-Illinois, introduced an amendment that would more than double the required amount of insurance coverage for truck owners from $750,000 to $2 million. The amendment passed the House Transportation & Infrastructure Committee on June 17, 2020 by a vote of 37-27.

Note that this amendment is not for cargo insurance, it addressed insurance coverage for public liability, bodily injury, property damage and environmental restoration.

Proponents of the amendment argue that the current insurance liability requirement does not adequately compensate victims of accidents involving large trucks or cover potential environmental damages. Opponents of the measure, including small-business truck owners represented by the Owner-Operator Independent Drivers Association ("OOIDA"), warn that raising the limits could put small-business truckers out of business.

"This amendment will do absolutely nothing to improve safety on our highways," Todd Spencer, President and CEO of OOIDA, said in a statement. "What this proposal will do is destroy small trucking businesses in every corner of the country."

The text of the highway bill, Investing in a New Vision for the Environment and Surface Transportation in America (INVEST in America) Act, is available online at: https://transportation.house.gov/imo/media/doc/Final%20Bill%20Text%20of%20the%20INVEST%20in%20America%20Act.pdf and visit https://transportation.house.gov/imo/media/doc/Garcia%20062.pdf to view the proposed insurance coverage amendment.

Visit https://landline.media/ooida-says-it-cant-support-highway-bill-with-minimum-insurance-amendment/ to view OOIDA's comments on the highway bill.

# OCEAN

## COGSA LIMITATIONS APPLY TO INLAND MOVE

A District Court in Kentucky found the Clause Paramount and Himalaya Clause in two "Through Bills of Lading" extend COGSA Limitations to the ocean carrier and inland rail carriers.

Recently, in *Siemens Energy, Inc. and Progressive Rail, Inc. v. CSX Transp., Inc.*, __ F. Supp. 3d __ (E.D. Ky. 2020), a district court held that the through bills of lading for an international shipment extended the limitation of liability provisions of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 30701, Note § 1(a), to the rail carrier for the inland leg of the transportation of cargo. The district court further held that the Covenant Not to Sue contained in the through bills of lading prohibited the Shipper from asserting a claim for cargo damage against the inland rail carrier.

The Freight Forwarder Issues Two Through Bills of Lading

Siemens Energy, an affiliate of Siemens AG in the U.S. (Siemens) agreed to sell two electrical transformers to Gallatin Steel ("Gallatin"), located in Ghent, Kentucky. The transformers were manufactured in Germany. Siemens hired Keuhne + Nagel, AG & Co. ("K+N") as a freight forwarder to arrange the international shipment of the transformers. Blue Anchor, a division of K+N, issued two identical bills of lading, providing that Siemens AG was the Shipper and Siemens Energy was the Consignee. Gallatin was reflected as the Notify Party and Ghent, Kentucky was listed as the Place of Delivery on both bills of lading. There was a notation "Multimodal Transport only."

There were three crucial provisions in both identical bills of lading:

The "Carrier's Liability" section contained a Clause Paramount providing that COGSA would apply to the entire shipment "so long as the goods remain in the custody of the Carrier or its Subcontractor."

Second, each bill of lading included a Himalaya Clause providing that COGSA's limitation of liability provisions would be applicable to the ocean carrier and all subcontracting parties performing services.

Third, each bill of lading incorporated a "Covenant Not to Sue" providing that a Merchant—which would include Siemens AG and Siemens Energy—agreed that "no claim or allegation shall be made against any Sub-Contractor whatsoever" arising out of the transportation of the transformers.

K+N arranged the ocean carriage of the transformers with K-Line aboard the M/V CALIFORNIA HIGHWAY from Germany to Baltimore, Maryland. K+N arranged the land transportation from Baltimore to Ghent, Kentucky with CSX as facilitated by K+N and Progressive Rail. Afterward, Progressive Rail prepared a bill of lading covering only the rail transport, identifying Progressive as the Shipper and Gallatin Steel as the consignee.

The Cargo Suffers Damage During the Inland Rail Shipment from Maryland to Kentucky—Siemens Asserts a Claim

Siemens asserted that the transformers were in good order and condition when they arrived in Baltimore, but sustained damage during the rail transport to Ghent. Siemen's asserted a claim for more than $1.5 million. Siemens and Progressive filed suit against CSX in Kentucky federal court.

CSX filed a Motion for Summary Judgment, arguing that the Identical Bills of Lading were Through Bills Limiting Liability of CSX as a Subcontracting Carrier for Cargo Damage.

In the landmark decision of *Norfolk S. Ry. Co. v Kirby*, 543 U.S. 14, 25-56 (2004), ("*Kirby*") the Supreme Court defined a "through bill of lading" as a shipping contract where a shipper "can contract for transportation

across oceans and to inland destination in a single transaction." CSX, also relying upon Supreme Court precedent in *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89 (2010), ("*Regal-Beloit*") filed a motion for summary judgment against Siemens and Progressive, contending that the two identical K+N bills of lading were through bills, entitling CSX to avail itself of the COGSA limitation of liability provisions.

The district court acknowledged that the pivotal question of whether CSX was entitled to limit its liability under the bills of lading was whether the bills were "through bills." The district court examined three factors in its analysis whether the identical bills of lading were through bills of lading. The factors considered were (i) the final destination on the bill of lading; (ii) the conduct of the parties; and (iii) the method of compensation. First, the court found that the bills of lading expressly stated that they were for "multimodal transport." Second, the court held that it was clear from the documentary evidence that the parties intended to contract for both sea and inland transport to the final Kentucky destination in the bills of lading. Finally, the court found that the transaction satisfied the third factor and that the bills of lading were unquestionably through bills.

CSX is Entitled to Limit its Liability Because the Bills of Lading Were Through Bills

The court, in reliance on the analysis in *Kirby* and *Regal-Beloit*, held that CSX the limitation provisions in the through bills of lading that were not limited to the ocean shipment. Accordingly, CSX was entitled to the limitation provisions in the bills of lading. The court granted CSX summary judgment, holding that the Covenant Not to Sue provision barred Siemens and Progressive for suing CSX for cargo damage. The court also held that the Clause Paramount and Himalaya Clause extended the limitation provisions of COGSA to all carriers for the shipment. Finally, the court denied a summary judgment motion filed by Siemens and Progressive arguing that the bills of lading were not "through" bills.

On April 10, 2020, Progressive appealed the district court's decision to the Sixth Circuit.

Thanks to the Association of Transportation Law Professionals for the above.

# PARCEL EXPRESS

## BY AIR OR BY GROUND – DOES IT MATTER?

By George Carl Pezold, Esq.

Federal Express recently announced that its FedEx Express unit, which handles time-definite shipments typically moving by air, will contract with its FedEx Ground unit to deliver residential parcels as long as they meet specific operating criteria. Under the new arrangement, FedEx Express drivers will pick up eligible parcels and transfer them into the FedEx Ground network for the line-haul and delivery to U.S. residences. The shipments to be transferred are classified as "day definite," meaning they have specific delivery windows but are not considered the most time-sensitive shipments. FedEx Express will continue to handle business-to-business ("B2B") traffic and it will also continue to manage the delivery of urgent, longer-haul residential parcels that can't meet service commitments with a ground service.

This "new arrangement" no doubt reflects the amazing growth of E-Commerce over the last few years, but has accelerated dramatically in recent months due to the Coronavirus pandemic, as millions have turned to shopping through the Internet, and should result in greater efficiency and lower costs to FedEx.

So, what is the problem?

Air carriers, parcel/package carriers, and surface freight carriers are subject to different legal regimes. Domestic air freight transportation is virtually unregulated; while motor carriers, brokers and surface freight forwarders are subject to the provisions of the Interstate Commerce Act and regulations of the Federal Motor Carrier Safety Administration ("FMCSA"). As such, the liabilities will vary depending upon the mode of transport.

Commercial practices among these services are also significantly different. Air carriers and air freight forwarders usually issue airbills or air waybills; parcel/package carriers also issue airbills (whether the shipment moves by air or only by ground), and less-than-truckload ("LTL") and truckload ("TL") freight carriers issue bills of lading, typically some version of the Uniform Straight Bill of Lading published in the National Motor Freight Classification ("NMFC"). The air waybill or bill of lading operates as the "contract of carriage" for the shipment. All of these "contracts of carriage" typically have terms and conditions either on the face or reverse side of the document and/or language that incorporates tariffs or "service guides" that are published or maintained by the carrier.

Questions arise, however, as to what law applies when a shipment that is designated as "air freight" or parcel/package, but actually is transported by truck and never moves, either wholly or partially, by air. In limited circumstances, such a shipment may nevertheless be exempt from federal regulations that would ordinarily apply to ground transportation and essentially be treated as an "air" shipment. There are generally two exemptions (the "continuous movement" exemption and the "bad weather/mechanical failure" exemption) which are found in 49 USC 13506(a)(8)(B) and (C) which provides:

> (B) transportation of property (including baggage) by motor vehicle as part of a continuous movement which, prior or subsequent to such part of the continuous movement, has been or will be transported by an air carrier or (to the extent so agreed by the United States and approved by the Secretary) by a foreign air carrier; or
>
> (C) transportation of property by motor vehicle in lieu of transportation by aircraft because of adverse weather conditions or mechanical failure of the aircraft or other causes due to circumstances beyond the control of the carrier or shipper.

Ground shipments moving under these exemptions are considered "air freight," and typically move on airbills or air waybills, with terms and conditions governed by Service Guides. Shipments that move only by truck and do not qualify for exemption are subject to different laws, regulations and practices, such as the "Carmack Amendment", that governs the liability of motor carriers and freight forwarders for loss or damage to goods, as well as different bills of lading and tariffs.

As far as Federal Express is concerned, its new service arrangement is only supposed to apply to "residential deliveries", but what liability regime will apply to these over-the-road shipments?

This is not an entirely new question, but has only been addressed in a few court decisions where the liability limitations in an air waybill were challenged because the shipment moved by truck.

See, for example, *Hartford Fire Ins. Co. v. LTD Air Cargo, Inc.*, 1998 U.S.Dist. LEXIS 23229, (S.D. Fla. 1998), where the court held:

> Finally, HASSETT [the carrier] can take little comfort by the fact that the bills were entitled 'air waybills' rather than 'bills of lading'. A bill of lading by any other name is a bill of lading. A Company may not evade the strict liability imposed by Carmack by calling its contract form an 'air waybill', then arranging for shipment by ground transportation."

In another case, a federal court in Tucson, AZ refused to enforce the liability limit of $.50 per lb. in an airbill issued by a freight forwarder when it trucked the shipment over-the-road, see *KPX, L.L.C. v. Transgroup Worldwide Logistics, Inc.*, 2006 WL 411255 (D. Az. Feb. 21, 2006); *rev'd on other grounds*, 267

Fed.Appx. 667 (9th Cir. 2008). See also *Phoenix v. Kmart*, 977 F.Supp. 319 (D.N.J. 1997) (Court referred to the Department of Transportation the question of whether air freight forwarder exemption applied).

Since so much merchandise consisting of parcels and/or packages is now being shipped by vendors directly to residential customers, the question is: if the shipper uses a FedEx Airbill (or an on-line shipping software program), which terms and conditions will apply? What liability limitations and rates will apply?

It will be interesting to see how loss and damage and/or overcharge charge claims will be handled.

## UPS AND FEDEX PEAK SEASON SURCHARGES

Both United Parcel Service ("UPS") and FedEx have announced the imposition of peak season surcharges. UPS added several new surcharges which they call a "Peak Surcharge" effective Sunday, May 31, 2020 and FedEx followed suit with its own surcharges, effective Monday, June 8, 2020.

Visit https://www.ups.com/assets/resources/media/en_US/2020_UPS_Peak_Surcharges.pdf to view the latest information on UPS peak surcharges.

Visit https://www.fedex.com/en-us/shipping/current-rates/surcharges-and-fees.html#peak-surcharge for the latest information on FedEx peak surcharges.

# QUESTIONS & ANSWERS

by George Carl Pezold, Esq.

## CARRIERS – CARB COMPLIANT TRAILERS

**Question:** We are looking to purchase some used refrigerated trailers. How can we check if they will be compliant in California?

**Answer:** I would suggest that you go to the CARB [California Air Resources Board] website at https://ww2.arb.ca.gov/homepage. Then click on "Truck and Bus Regulation" where you will see "Fact Sheets", "Regulation & Advisories", etc. as well as contact information:

PRIMARY CONTACT
TRUCRS Staff
Email trucrs@arb.ca.gov
Phone (866) 634-3735 / 866 6-DIESEL

## FREIGHT CHARGES – EXCESS CHARGES FROM UNAUTHORIZED CARRIER

**Question:** We had a shipment arrive via a national carrier, on a Friday evening after business hours that was left outside the doors of the warehouse. The shipper had used this carrier without our knowledge or authorization, and we had no idea freight was in-route or had been delivered until the following day.

The bill of lading ("BOL") left with the shipment had a "Freight Collect" charge 3x higher than our standard negotiated rate with another carrier, and this shipment would have been refused if delivered during business hours. The shipper was notified of the situation with the instruction to contact their carrier to pay the bill.

This did not happen and 10 days later the bill from the carrier arrived with request to pay. I sent the carrier an e-mail stating that we had not authorized nor accepted/signed for the shipment and were not responsible.

They responded, stating that per tariff rule item 361 it was our responsibility.

Who has the legal obligation to coordinate this further? Thanks!

**Answer:** There are two contracts here: the "contract of carriage" (the bill of lading) and the "contract of sale" (between the seller and the buyer). With the limited information provided all I can give you is some general observations.

Without seeing the bill of lading, you have not indicated whether it shows the freight charges as "prepaid" or "collect". If it was "prepaid" you might have a defense, provided that you paid the seller for the invoice price of the goods (which presumably included the cost of delivery). This known as an "estoppel" defense and the case law basically says that the consignee/buyer doesn't have to pay twice.

Then there is the contract of sale. If the contract required the seller to deliver to the buyer and the price included the cost of delivery, then the seller has to pay the freight charges and your beef is with the seller.

# RECENT CASES

## CALIFORNIA COURT SHOOTS DOWN BAXTER BAILEY COLLECTION EFFORT

The US District Court for the Central District of California recently granted summary judgment in favor of shippers in a defunct broker collection case. The problem of carriers not being paid for their services when the shipper has already paid a third party, like a broker, for the transportation is widespread and ongoing. The plaintiff in this action, Baxter Bailey & Associates ("BB") is a collection agency that has a long history of aggressively collecting on behalf of carriers.

The facts in this case are typical. The defendant Ready Pac Foods ("Ready Pac") manufactures fresh-cut salads and other produce, while TKM-Bengard Farms ("TKM") grows lettuce (collectively "Defendants"). Ready Pac entered into a Master Transportation Agreement ("MTA") with Expedited, a broker. Subsequently, between December 2017 and March 2018 Ready Pac contracted with Expedited to transport 47 shipments of lettuce. Expedited invoiced Ready Pac at the agreed upon rate pursuant to the MTA and Ready Pac paid Expedited for the service.

Expedited contracted with several motor carriers to provide the actual transportation and they were given Expedited's form contract ("Rate Confirmation") and a bill of lading for each delivery. Expedited ceased operations around February 2018 leaving many invoices unpaid to the motor carriers. BB, as assignee of the motor carriers, sought payment for the unpaid invoices from the Defendants.

Specifically, BB brought claims based on breach of contract, agency, open book account, account stated, quantum meruit, and unjust enrichment.

The Defendants moved for summary judgement on a number of theories, and prevailed on each and every one.

While not referenced specifically, the Court's conclusions fall within the purview of the doctrines of equitable estoppel and privity of contract. Equitable estoppel in this situation holds that it is not equitable for a party to have to pay for a service twice. The doctrine of privity of contract is a common law principle which

provides that a contract cannot confer rights or impose obligations upon any person who is not a party to the contract.

The Court handled BB's claims as follows:

Breach of Contract – Defendants pointed out that there were two separate sets of contracts containing payment terms; one between Ready Pac and Expedited, the MTA; and the second between Expedited and the carriers, the Rate Confirmations. As Defendants had already paid Expedited pursuant to the MTA, a payment to the carriers would amount to a second payment (estoppel). Defendants also pointed out that none of the documentation between Expedited and the carriers contained any payment liability terms that would make them liable for Expedited's unpaid contractual obligations to the carriers (privity of contract).

BB relied on the case, *Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co.*, 513 F.3d 949 (9th Cir. 2008) to support their contract claims. The Court noted that in *Oak Harbor*, the bills of lading and other contracts were distinguishable in that they were modeled on the Uniform Straight Bill of Lading ("USBL") and the National Motor Freight Classification ("NMFC") 100-AD form, which specifically incorporates default payment liability terms. Without those terms being incorporated, there was no basis to hold Defendants liable for payment.

Agency – Despite BB's assertions, the Court found no basis to find that Expedited was an actual agent of Defendants, or an "ostensible" agent. Whether an ostensible agent exists is dependent upon representations made by the principal to a third party.

Reviewing the facts of the case, the Court noted that neither defendant caused any carrier to believe Expedited was their agent, Defendants did not know identity of any carrier before any given shipment, that the MTA and Rate Confirmations were separate contracts, and that the MTA labeled Expedited as an independent contractor. While the independent contractor label was not dispositive, the only evidence BB offered in support of the ostensible agency theory were the declarations of the various carriers due money.

The Court dismissed the carrier declarations that Expedited was an agent as being speculative and conclusory, as they did not offer any evidence showing either defendant manifested an agency relationship to carriers.

Open Book Account – The essential elements of this claim are a statement of indebtedness in a certain sum and consideration. This claim was dismissed by the Court as BB failed to provide the court with any evidence of these elements.

Account Stated – An account stated requires three elements: 1) previous transactions between the parties establishing the relationship of debtor and creditor; 2) an agreement between the parties, express or implied, on the amount due from the debtor to the creditor; 3) a promise by the debtor, express or implied, to pay the amount due. Again, the Court found that BB provided no evidence to support this claim, noting that there was no agreement between the Defendants and the carriers (no privity of contract).

Quantum Meruit – This is an equitable remedy wherein "a plaintiff who has rendered services benefitting the defendant may recover the reasonable value of those services when necessary to prevent unjust enrichment of the defendant." In order to recover on a claim for the reasonable value of services, a plaintiff must establish both that it was acting pursuant to either an express or implied request for services from the defendant and that the services rendered were intended to and did benefit the defendant.

Again, BB failed to produce any evidence to demonstrate an understanding between Defendants and the carriers (no privity).

Unjust Enrichment – Finally, the Court dismissed BB's claim that Defendants would be unjustly enriched if they were permitted to retain the benefit of the goods delivered without payment as the Court

noted "the majority of state and federal district courts in California do not recognize unjust enrichment as a freestanding claim." It is a theory that permits recovery on other recognized causes of action, which BB failed to allege.

Not only did Defendants prevail on all counts, but the Court signed an order dismissing BB's action with prejudice and making it clear that BB would take nothing from either defendant.

This decision is significant in that we believe it is the first decision from a federal district court to address these issues in the context of the collection practices of Baxter Bailey. It is a given that carriers have the right to be paid for their services, but when a third party (broker), is involved it is not so clear who should make up the deficit. Baxter Bailey has a history of aggressively pursuing these types of claims on behalf of carriers, including against shippers who have already paid for those services. Unfortunately, facing the uncertainty of possible litigation, shippers who have already paid are coerced into paying again.

Knowledge is power and the more you know, the more powerful you are.

*Baxter Bailey and Associates v. Ready Pac Foods, Inc.*, (2:18-cv-08246) (District Court, C.D. California February 26, 2020)

A copy of this decision is available on the Transportation & Logistics Council, Inc. website.

## CONTINGENT DENIAL DOES NOT TRIGGER TIME LIMITS FOR SUIT

The court in the Southern District of Texas ruled that a contingent denial of a claim does not trigger the time limit for filing a lawsuit in a motion for summary judgment.

This case involves the transport of solar panels manufactured by JA Solar USA, Inc. ("Plaintiff") that were damaged while being transported by EP Expedited Transport, LLC ("Defendant") when its truck had a rollover accident on October 26, 2016. After the accident, the panels were inspected and then sold at a salvage sale on an "as is" basis on December 6, 2017.

On June 20, 2019 Plaintiff filed this suit against Defendant seeking $102,456.00 damages. Defendant moved for summary judgment, arguing that the applicable time limit was two years from the date of a letter sent by Defendant's insurer on October 31, 2016 that acknowledged and disallowed the claim.

The Court noted that:

> Under the Carmack Amendment to the Interstate Commerce Act, which the parties agree applies to JA's claim,
>
> A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice. 49 U.S.C. § 14706(e)(1).
>
> Additionally,
> (A) an offer of compromise shall not constitute a disallowance of any part of the claim unless the carrier, in writing, informs the claimant that such part of the claim is disallowed and provides reasons for such disallowance; and
>
> (B) communications received from a carrier's insurer shall not constitute a disallowance of any part of the claim unless the insurer, in writing, informs the claimant that such part of the claim is disallowed, provides reason for such disallowance, and informs the claimant that the insurer is acting on behalf of the carrier. Id. § 14706(e)(2).

The Court further pointed out that the carrier must provide "clear, final and unequivocal" notice that a claim was denied in order for the time limitations to run.

The letter that the Defendant sought to rely on from its insurer requested assistance "in conducting our investigation" and sought "copies of any and all documentation related to this claim." The letter concluded that the insurer is "unable to accept responsibility for any claims unless and until we receive the above information or documentation" and that the insurer "must deny [the] claim as presented."

The court concluded that this was "clearly a contingent denial, not the clear, final, and unequivocal type of denial required to commence the limitations period" and denied Defendant's motion for summary judgement.

*JA Solar USA v. EP Expedited Transport*, 2020 WL 2113616 (5/1/2020) available online at https://scholar.google.com/scholar_case?case=16295012062950927086&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

# CCPAC NEWS

## CCPAC HEADLINE NEWS

The Certified Claims Professional Accreditation Council ("CCPAC") announced that due to the Pandemic and for the safety of applicants, proctors and students, all Certified Claim Professionals ("CCP") Exams and CCP Primer Classes originally scheduled during 2020 are canceled.

The next CCP Exam will be conducted after the close of the Transportation & Logistics Council's ("T&LC") Annual Conference Wednesday afternoon, April 21, 2021, from 12:30 PM to 3:30 PM at the Catamaran Hotel, 3999 Mission Blvd., San Diego, CA 92109. A CCP Exam Primer Class will be held prior to the T&LC Annual Conference on Sunday, April 18, 2021, at the same location as the exam.

Candidates must apply and pre-qualify to take either or both the CCP Exam and/or the CCP Exam Primer Class. Additional information, including exam fees, preparation materials, registration to sit for the exam and registration for the celebrated exam primer class, is all available on our website at www.ccpac.com, under Headline News section.

David Nordt, CCP and CCPAC Council President has announced that the CCPAC Annual Membership Meeting will be held Monday Afternoon, April 19, 2021, at 5:30 P.M. (Pacific Time) at The Catamaran Hotel, 3999 Mission Blvd. San Diego, CA 92109. The meeting immediately follows the end of the first day of the T&LC Annual Claim Conference. The CCPAC Annual Membership Meeting is open to all CCPAC members, guests and anyone interested in learning more about CCPAC and meeting its officers and board members present.

ALL CCP's and CCPAC Associate Members are reminded that to maintain their membership in "Active" status, annual dues and membership are now due and renewable on-line or by mail. Dues can be paid with a major credit card on-line or a check by mail made payable to CCPAC, Inc. Checks should be mailed to CCPAC, Inc., Membership Dept., P.O. Box 550922, Jacksonville, FL 32255-0922.

Established in 1981, Certified Claims Professional Accreditation Council (CCPAC) is a nonprofit organization comprised of transportation professionals with manufacturers, shippers, freight forwarders, brokers, logistics, insurance, law firms and transportation carriers including air, ocean, truck and rail. CCPAC seeks to raise the professional standards of individuals who specialize in the administration and negotiation of cargo claims. Specifically, CCPAC gives recognition to those who have acquired the

necessary degree of experience, education, expertise and have successfully passed the CCP Certification Exam covering domestic and international cargo liability and to warrant acknowledgment of their professional stature. Only those who have passed the CCP Exam and maintain continuing education requirements may use the "CCP" professional designation following their name.

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/
Twitter: twitter.com/ccpac_1
Website www.ccpac.com

# CLASSIFICATION

## 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.

# ADVERTISE IN THE TRANSDIGEST

## TRANSDIGEST ADVERTISING

Full page and one-half page ads are now being accepted for the TRANSDIGEST. Reach a highly selective audience with information on your products and/or services at a reasonable cost. Rates are available for 3, 6 and 12 monthly issues, and include both print and electronic issues. For information contact Diane Smid or Stephen Beyer at (631) 549-8984.

# The Transportation & Logistics Council, Inc.

**Phone: (631) 549-8984** **120 Main Street, Huntington, NY 11743** **Fax: (631) 549-8962**
**E-Mail: diane@transportlaw.com**

## APPLICATION FOR ANNUAL MEMBERSHIP

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

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

All members receive:

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

New Members also receive:

- A complimentary copy of "**Shipping & Receiving in Plain English, A Best Practices Guide"**
- A complimentary copy of "**Transportation Insurance in Plain English**"
- A complimentary copy of **"Transportation & Logistics – Q&A in Plain English Books 4, 5 & 6 on CD Disk"**

If you are not presently interested in becoming a member, but would like to subscribe to the **TRANSDIGEST**, you can opt for a 1-Year/Non-member subscription to the newsletter by making the appropriate choice below.

How did you hear about TLC?

☐ **Internet** ☐ **Email**
☐ Seminar/Meeting. Please specify location_____
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☐ Other _____

*Please return completed Membership Application Form along with your payment to:*
***TLC, 120 Main Street, Huntington, NY 11743***

## Membership Application Form

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| Associate Member | [includes email subscription to ***TransDigest***] | | $345.00 | $ |
| Non-Member Introductory Subscriber | [email subscription to ***TRANSDIGEST*** only] | | $150.00 | $ |
| * *Optional:* Printed version of *TRANSDIGEST* by USPS | [added to membership fee] | | $50.00 | $ |
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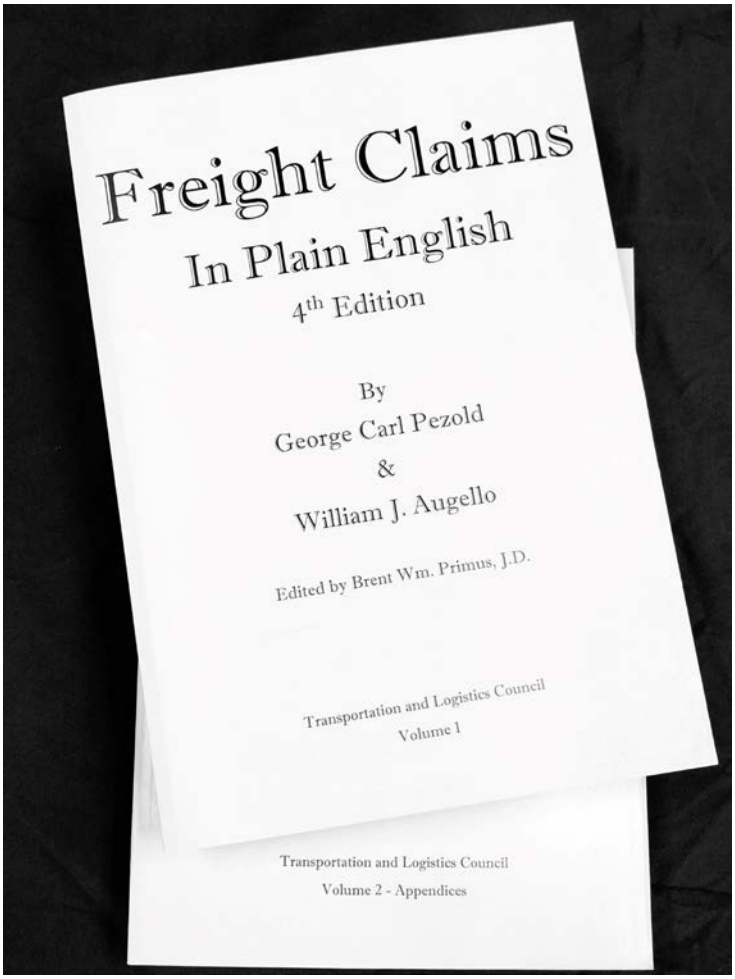


## Freight Claims in Plain English (4th Ed.)

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

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

The new soft-cover edition comes in two volumes in a handy 7" x 10" format. Volume 1 consists of 592 pages including full text, a detailed table of contents, topical index and table of authorities. Volume 2 consists of 705 pages with 161 useful appendices – statutes, regulations, forms and other valuable reference materials.

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.

*New York State residents sales tax applies.*

**Order Form**

Fill out the information below, detach and send with your payment to: **TLC, 120 Main St., Huntington, NY 11743**
**Or email diane@transportlaw.com**

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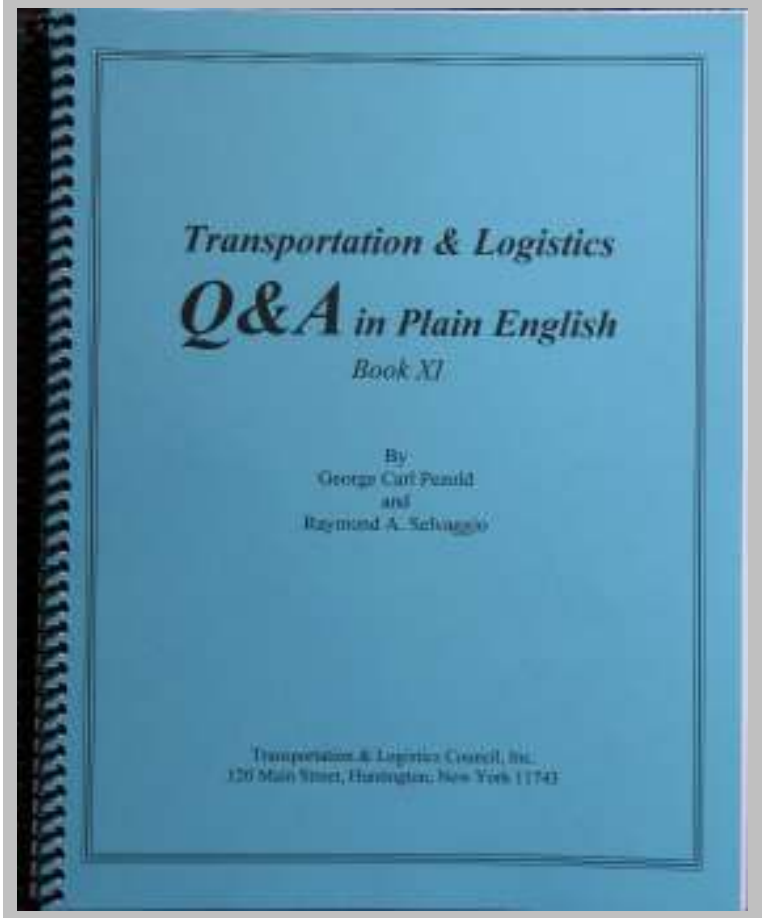


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# Transportation & Logistics Q&A in Plain English – Book XI

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

What is unique about this compilation of questions and answers is that the questions reflect the real problems that actually come up every day, and that the people actually doing the work - shippers, carriers, brokers, intermediaries and even truck drivers - need help with.

The answers range from simple advice to thorough explanations of the legal principles based on the authors' extensive experience in transportation law.

Transportation & Logistics - Q&A in Plain English is excellent resource of advice and knowledge about everyday problems in transportation and logistics, and a great training tool for anyone starting out in the transportation and logistics profession.

Between this new eleventh edition and the previous ones, the authors have created a virtual encyclopedia of almost every conceivable question that can come up. You can't find this kind of information anywhere else.

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