

# ***TRANSDIGEST***

**Transportation & Logistics Council, Inc.**

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**VOLUME XXV, ISSUE NO. 274, DECEMBER 2020**

## **T&LC Interactive “Virtual Workshops”**

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- **Air Industry In Duress**
- **Proposed Changes in Broker Regulations**
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- **Driver Classification Update**
- **More Rate Increases**
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***FREIGHT CLAIMS IN PLAIN ENGLISH (4<sup>TH</sup> ED.)***

**Published by the TRANSPORTATION & LOGISTICS COUNCIL, INC.**

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## GUEST EDITORIAL

### THE CURRENT CHALLENGES OF THE TRANSPORTATION INSURANCE MARKET

By Dan Bohlman, Butterball, LLC

2020 has presented all sorts of challenges to the transportation industry. Covid-19 has exacerbated the already chronic driver shortage issue as more drivers stayed home or perhaps retired early. The entrance of new drivers into the industry was also hampered by the closure of driving schools for periods of time. Shippers and receivers had closures or adjusted hours of operation. After closures and reopening, it created a backlog of demand in certain instances and large imbalances of freight in many areas around the country. Meanwhile rates dropped early in the year only to aggressively move to record high levels in some areas of the spot market. It has been a roller coaster. While all of this has occurred and will continue to change, another challenge in the transportation industry that has become more of a concern is the topic of insurance.

Motor carrier insurance has grown in recent surveys as another pain point for fleets of all sizes. The insurance premiums are increasing at alarming rates and the availability of many insurance policies at certain levels is decreasing. As an example, the current federal minimum insurance liability level required is \$750,000, however there have been recent proposals in Congress to raise this to \$2,000,000, or perhaps higher. Some motor carrier industry groups have objected to these higher limits based upon accident data not warranting the increase, yet the number of nuclear verdicts has skyrocketed in recent years, again raising the issue of tort reform. What is the “right” amount of liability insurance?

In some informal surveys this year, I heard from many third party logistics (“3PL”) brokers that most of the thousands of small carriers and owner operators that they represent in the temperature-controlled market maintain \$1,000,000 in liability insurance. While this sampling does not represent all carriers, the response was rather consistent, and each of the 3PLs said this represented greater than 95% of their carrier base on average. While the legal requirement is \$750,000, the industry norm seems to be \$1,000,000, but that is far from the \$2,000,000-\$5,000,000 being proposed.

The responses from asset based trucking companies were very similar to those represented by the 3PL brokers. While there were some mid to large size carriers that do carry higher levels of liability insurance, in a very fragmented industry, the large players don’t represent much of the for hire industry. When asked about increasing the liability coverage to \$2 million or \$5 million, carriers either were not willing, or if they were able to find the coverage, would need to pass this increased cost back onto the shippers. The number of insurers writing policies for \$5,000,000 or greater in liability coverage is few, if they are even willing to underwrite those policies at all. Many carriers and brokers have elected to purchase umbrella, excess liability, or other ancillary policies. But in some cases, these ancillary policies may not provide the protection they are truly looking for, due to many exclusions and fine print.

Thus, if a shipper or carrier wants to increase liability insurance coverage, it is a very challenging and expensive task. While we do not know what Congress will do, shippers and carriers do have to determine how much risk mitigation is prudent. Is the \$750,000 required sufficient? Is the current industry norm of \$1,000,000 the right amount? If \$2,000,000 or \$5,000,000 or more is the right amount, will the insurance industry take on this risk? If the nuclear verdicts continue to increase and the insurers must continue to increase premiums at this aggressive pace, this will ultimately be another tremendous challenge for the transportation industry in years to come.

## ASSOCIATION NEWS

### T&LC's INTERACTIVE VIRTUAL WORKSHOPS

Never before has anything like the Coronavirus so disrupted our lives, our businesses and the economy of this Country. For the first time in 46 years the Council had to cancel its Annual Conference, as well as the Spring and Fall Seminar programs.

To be true to our Mission, the "Education of Transportation Professionals", we have launched a series of what would normally be full-day seminars as intensive, interactive "webinars" and have also initiated a series of "Virtual Workshops" on various topics similar to those in our traditional live Annual Conference.

We hope you would agree that these are top experts in their field presenting on topics that we feel are timely and relevant for the members of the TLC. As we continue into 2021, we will be planning additional Virtual Workshops on a regular basis. For more information and updates, visit <https://www.tlcouncil.org/>

Coming up next on January 13<sup>th</sup> at 1:00-2:00pm EST the Council will present the fourth in its series of free Virtual Workshops, this one to discuss the impact of cyber security and social media. A topic of even greater relevance considering the recent news of widespread hacking throughout federal agencies and corporations in the U.S.

#### **"DUE DILIGENCE" SEARCHES – USING SOCIAL MEDIA**

**Wednesday January 13, 2021 1:00pm - 2:00 pm EST**

Presented by Cynthia Hetherington, MLS, MSM, CFE of the Hetherington Group:

Shippers, brokers, transportation intermediaries and carriers all need to know who they are dealing with. This hands-on, intermediate to advanced webinar will explore the latest search tools—free and fee-based—popular for accessing chatter on social networks from Facebook to Burn Book. Participants will learn how to narrow a large profile to identify assets, evidence, and important details quickly and will observe demonstrations of software applications relevant to search applications. Upon completion of the webinar, you will be able to:

- Learn how to locate key information, such as friends and associates, in social media profiles
- Understand how to narrow down a large profile to identify assets, evidence, and important details quickly
- Understand the objects to be searched in language (native or foreign), imagery (pictures or emoji), and other relevant intelligence markers such as hashtags and live feeds
- Review the various service offerings of service providers and vendors.
- Handouts on concepts and investigative techniques will be made available.

Link to [Registration Form](#)

Cynthia Hetherington is the founder and president of Hetherington Group, a cyber investigations consulting and training firm. With over two decades of expertise, Ms. Hetherington is a leader in due diligence, corporate intelligence, and cyber investigations. She is the author of three books on cyber investigations and conducts training programs for investigators, security and military intelligence professionals, and federal, state, and local agencies on best practices.

Ms. Hetherington shares her experiences and expertise as a speaker at events and conferences across the U.S. and has frequently participated in the Council's Annual Conferences.



## **T&LC SPONSORSHIP OPPORTUNITIES**

You can help the Transportation & Logistics Council grow, succeed & fulfill its educational mission by sponsoring our Virtual Workshops!

### **Gold - \$1000**

- Your logo on our website with a link
- Your logo included in all advertising emails
- Your company listed in our monthly TRANSDIGEST

### **Silver - \$750**

- Your logo on our website with a link
- Your logo included in all advertising emails

### **Bronze - \$500**

- Your logo included in all advertising emails

Sponsorships are for 5 TLC Virtual Workshops. Sponsors will also be announced during the live seminar.

Link to [Sponsorship Form](#)

Or for more information contact:

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## **NEW MEMBER – REGULAR MEMBER**

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## HUMOR

Cats – because last month we did dogs and the cats demanded equal time



How to make your cat look more active.





and because it is Christmas



## AIR

### INDUSTRY IN DURESS

The airline industry has suffered significantly due to the worldwide pandemic. According to the International Air Transport Association (“IATA”) the industry has suffered total losses in 2020 of \$118 billion and demand is down 61% versus 2019.

While it appeared during the Fall that demand was increasing, the recent surge in cases and now news of a new, more contagious strain being reported in the United Kingdom (“U.K.”) is putting increased stress on an already suffering industry as countries initiate bans on air travel from the U.K.

Questions of what it will take to get people flying again have yet to be resolved. Vacation travelers need to feel comfortable being in an enclosed space with numerous unrelated people for a period of hours, and businesses that have adapted to remote work and conferencing need to feel the need to send personnel to conduct in-person business.

The airlines have tried to accommodate travelers using various approaches, including spacing, sanitation, and testing of passengers. Also, as vaccines become available, the issue of requiring proof of vaccination for travel has been debated.

The World Travel and Tourism Council (“WTTC”) has expressed its opposition to mandatory proof of vaccination as a condition for travel. The WTTC believes requiring proof of inoculation would cause irreparable harm to the struggling sector, in part because the first people to get shots, the elderly and vulnerable, are the least likely to travel. Instead, the WTTC wants to see more thorough pre-departure testing.

In order to certify test results and minimize the risk of fraud, the CommonTrust Network, a Swiss non-profit backed by the World Economic Forum is rolling out a digital health system called CommonPass. The IATA is also working on its own, similar mobile app, called TravelPass.

CommonPass (<https://commonpass.org/>) lets individuals access their lab results and vaccination records, and consent to have that information used to validate their COVID status without revealing any other

underlying personal health information. Lab results and vaccination records can be accessed through existing health data systems, national or local registries or personal digital health records and can be held securely and privately on their phones.

The CommonPass platform assesses whether the individual's lab test results or vaccination records (1) come from a trusted source, and (2) satisfy the health screening requirements of the country they want to enter. CommonPass delivers a simple yes/no answer as to whether the individual meets the current entry criteria, but the underlying health information stays in the individual's control.

According to the WTTC, it is not just the airlines that are at risk, but millions of related jobs in tourism, supply and support that are in jeopardy.

## **TOXIC AIR**

An interesting article published December 17, 2020 in the Los Angeles Times discusses the issue of toxic fumes in aircraft that can have deleterious effects on passengers, pilots and flight crew. The problem is related to how air is provided to the cabin in modern pressurized jet aircraft.

From the article:

The air you breathe on airplanes comes directly from the jet engines. Known as bleed air, it is safe, unless there is a mechanical issue — a faulty seal, for instance. When that happens, heated jet engine oil can leak into the air supply, potentially releasing toxic gases into the plane.

For decades, the airline industry and its regulators have known about these incidents — called fume events — and have maintained that they are rare and that the toxic chemical levels are too low to pose serious health risks.

While these events are not all that common, they do occur and in the era before the pandemic, “about five flights a day in the U.S. experienced a fume event, according to an academic study of aviation records.” The problem is that no government agency tracks fume events or how often people become sick or impaired.

And people have become impaired:

Pilots and flight attendants have reported an array of health problems, including eye irritation and coughing, as well as more serious long-term conditions: tremors, memory problems, brain damage and other illnesses that have kept them out of work for months and sometimes ended their careers, according to airport and aviation records, workers' compensation filings, court papers and other documents.

Regulators and industry have been aware of this issue for decades. The largest union of cabin crews, the Association of Flight Attendants, has called for the Federal Aviation Administration (“FAA”) to take action on fume events for more than 25 years. In 2003 Congress ordered a study of toxic chemical levels in such events, however the airlines have refused to let flight attendants carry air samplers aboard and the FAA never followed up.

It should be noted, according to the article, that federal authorities have never attributed any commercial airplane crashes to fume events.

Visit <https://www.latimes.com/projects/toxic-chemicals-planes-covid-19-travel-woes/> for more details and to view the entire article.

## BROKERS

### PROPOSED CHANGES IN BROKER REGULATIONS

by Henry E. Seaton, Esq., Seaton & Husk, L.P.  
Regulatory Update - December 2020

Of interest are dueling petitions filed by the Transportation Intermediaries Association (“TIA”) and Owner Operator Independent Drivers Association (“OOIDA”) dealing with the longstanding broker regulations, 49 C.F.R. 371. OOIDA, in response to what it contends are egregious brokerage commissions, wants more transparency in broker commissions and markups. TIA, on the other hand, seeks to eliminate as outdated portions of the broker regulations which require brokers to keep trust accounting showing the billing of freight charges and the transmission of net carrier payments.

From the carrier perspective, it is important that the broker be generally recognized as the agent for a customer and that the accounting regulations remain as an enforcement tool to prevent fraud and misapplication of freight charges by brokers. Too often, brokers treat their gross invoices as factorable receivables that provide them free cash flow that can be diverted from the carriers which their customers intended to pay.

The broker regulations the TIA seeks to omit are important for tracing and accountability. In one current case, an alleged broker that claimed to have FMCSA authority filed a bankruptcy petition showing it owed over 3,000 carriers. Yet it effectively claimed that “the dog ate our records” and we have no money left to pay creditors.

Other intermediaries including stockbrokers, real estate brokers, and yes, even lawyers, are expected to facilitate transactions by receiving and paying transactional charges in trust. The broker regulations in 49 C.F.R. 371.3 plus the federal self-help statute, which gives carriers recourse to brokers’ principals for violating these regulations, are important checks on the misappropriation of funds.

In this context, the idea that the carrier is extending credit to the broker alone and could be considered a mere general unsecured creditor should be rejected. Buyers and sellers of real estate, insurance and stock do not have to make credit decisions based on the balance sheets of the realtor, the stockbroker, or the insurance agent. It is anti-competitive to think that abolishing or changing the existing rules would somehow not prejudice small carriers and small brokers if every spot market load requires a broker credit workup.

TIA’s request to rescind 49 C.F.R. 371.3 substantially undermines motor carrier rights to ensure proper application of freight charges and avoid broker misapplication of freight charges, which is contrary to well established case law. See *Parker Motor Freight, Inc. v. Fifth Third Bank*, 116 F.3d 1137 (6<sup>th</sup> Cir. 1997). It would be best to leave the broker regulations alone.

Finally, TIA is right, though, with respect to so-called “dispatch services.” Even if they do not bill and collect freight charges, they meet the definition of brokers and can hardly be heard to complain about the cost of the bond or the difficulty in complying with the broker regulations, particularly when they otherwise claim to be unregulated entities with the power to choose to make arrangements for transportation on behalf of multiple carriers.

The Federal Motor Carrier Safety Administration (“FMCSA”) is accepting comments until January 25, 2021 on the TIA’s petition for rulemaking discussed above concerning the rights of parties to a brokered transaction to review the records of the transaction and on TIA’s request that the agency issue regulatory guidance concerning dispatch services. TIA argues that transparency in broker transactions is provided through other means in today’s marketplace and that regulatory guidance would ensure that interested parties



can distinguish between a dispatch service and an authorized broker. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-25307>.

In its petition, TIA said the proposed modifications and clarifications “would eliminate an outdated regulation that dates back to 1980 that is not applicable to the current marketplace.” FMCSA currently is inviting comments on separate petitions for rulemaking that would require brokers to distribute routinely the records required by 371.3. TIA also is asking FMCSA to develop guidance “on what constitutes a legitimate ‘dispatch service’ and remove unethical and unscrupulous actors from the marketplace.” TIA said it believed that there are many illegal dispatch services that are operating illegally as unlicensed brokers and that FMCSA should prohibit these companies from offering such a service without a license.

TIA’s petition responds in large part to a proceeding that sought comment until November 18 on separate petitions for rulemaking filed by the Owner-Operator Independent Drivers Association (“OOIDA”) and the Small Business in Transportation Coalition (SBTC) to tighten the requirements on property brokers for the reporting of transactions. For more information, including comments submitted, visit <https://www.regulations.gov/docket?D=FMCSA-2020-0150>.

## LOGISTICS

### THE 2021 LOGISTICS BUDGETING CHALLENGE

by Tony Nuzio, ICC Logistics Services, Inc.

So the nightmare of 2020 is almost over, at least as far as the calendar is concerned. However, the negative effects of 2020 on supply chain and logistics budgets will be around long after we turn the calendar to January, 2021. And, what lies ahead in 2021 just might be more challenging than 2020 was.

Covid-19 has certainly thrown a monkey wrench into just about every company’s supply chain and logistics budgeting process in 2020. The challenge going forward is to prepare budgets that will be more in line with what companies actually anticipate their expenditures will be for the coming year.

So, what are the additional challenges these budget forecasters will face in 2021? Let’s take a look.

1. **There’s a New Sheriff in Town** – First and foremost is the fact that there will be a new administration in Washington. While we’ve heard limited details of what we might expect to see from this new administration, no one really knows exactly what lies ahead. What effect will this new administration’s policies have on current and future government regulations affecting the transportation and logistics industry? What impact will any of the administration’s policies have on interest rates, import tariffs, taxes and the economy overall? Too soon to tell for sure, but we can expect there will be an impact on US businesses.
2. **Covid-19 Vaccines** – What impact will the distribution of the Covid-19 vaccines add to the already overburdened parcel network and on the overall capacity constraints shippers have been, and are still dealing with here in Peak Season-2020? You can bet that capacity issues will not be getting better anytime soon. Also, when will FedEx and UPS reinstate their Guaranteed Service Refund programs? Shippers not only lost their ability to hold these carriers to the carrier’s published service standards, they also lost a ton of money by not being able to file for refunds for late delivered packages.
3. **Back to Work Considerations** – Do we really know when companies will be allowed to fully reopen their businesses? The fact is the impact we have already felt from a variety of lockdowns has

created a devastating burden for many small businesses. How many of these businesses will ultimately fail and how does that impact other businesses that supply these businesses? There will definitely be a trickle-down effect that businesses will feel in 2021, how deep those effects will be remains to be seen.

4. **Re-Shoring 102** – There was a lot of discussion earlier this year about global supply chains negatively affecting just about every business. Many companies discussed the need to bring their supply chains closer to home to help ensure a continuous flow of goods to meet their customer's demands. Ocean rates have gone through the roof and there is every reason to believe they are not going to drop anytime soon. So, is this the time to think about changing to more “local” suppliers to support businesses? Is it even possible after the many years of reliance on China and other Far East sources of supply?

So supply chain and logistics executives and their “Bean Counter” partners throughout their organizations will have many new challenges to deal with in budgeting for 2021. Not only trying to come up with realistic budget numbers, but more importantly, sticking to those realistic budgets for the coming year.

## LOGISTICS CYBERATTACKS

As if just dealing with the complexities of logistics is not enough, the freight transportation sector has been the recent target of cyberattacks. On Wednesday, December 16 it was reported that Forward Air, a trucking and air freight logistics company based out of Tennessee, suffered a cyberattack the previous day that forced them to take their systems offline to prevent the attack's spread.

While never a good time, the timing of the Forward Air outage is particularly difficult, causing delays during the holiday shipping rush. Although cargo is still moving, it is backing up as freight forwarders and airlines are scrambling to locate freight, book loads and find other ways to communicate with Forward Air as well as their own customers in the absence of electronic connectivity.

This is not an isolated problem. It has also been reported that Central Freight Lines fell victim to a cyberattack on Monday, 12/21. These cyberattacks — mostly involving ransomware — are increasing in the freight transportation sector. Other logistics companies that have been targeted in the past two years include Cardinal Logistics, Mediterranean Shipping Co., Maersk Line and Toll Group.

Business is hard enough on its own without having to deal with the intentional disruption caused by cyberattacks. While not all cyberattacks can be prevented, there are certain common methods that are used to infect systems with malware, with the most common being phishing emails; file sharing; infected file downloads and the exploitation of software vulnerabilities. Companies need to practice cyber security.

It has not been publicized how Forward Air got infected, but its recent cyberattack has been attributed to a new ransomware operation known as Hades. Hades ransomware is a file-locking cyber threat that is made to extort money by encrypting data on victims' computers and forcing them into buying a necessary decryption tool. Not only does Hades encrypt files on the targeted network, but it also steals them, allowing the perpetrators to threaten to publish the files.

However, it is not recommended that payment be made, as ransom money could be used to spread their created ransomware further and to research new, more efficient ways to distribute it.

Despite what the perpetrators say, it can be possible to remove malware and recover data.

Visit <https://www.2-spyware.com/remove-hades-ransomware.html> for more information on the Hades ransomware and other computer viruses

## MOTOR

### BTS POCKET GUIDE

The U.S. Department of Transportation's Bureau of Transportation Statistics ("BTS") publishes an annual *BTS Pocket Guide to Transportation*. This is a popular, quick reference guide that provides transportation statistics at your fingertips. It provides key information and highlights major trends on the U.S. transportation system.

The *Pocket Guide* is available in both a web and mobile app. It includes dynamic data updates to highlight the latest statistics, enhanced navigation, and shareable data to social media and email.

For more information, visit <https://www.bts.gov/browse-statistical-products-and-data/pocket-guide-transportation/pocket-guide-transportation>

### FMCSA FINAL RULE ON THIRD PARTY CDL TESTERS

On December 17, 2020 the U.S. Department of Transportation's Federal Motor Carrier Safety Administration ("FMCSA") announced its final rule to streamline the process for men and women interested in entering the trucking workforce. From the press release:

The new rule will allow states to permit a third-party skills test examiner to administer the Commercial Driver's License (CDL) skills test to applicants to whom the examiner has also provided skills training.

"During the COVID-19 public health emergency truckers have been American heroes—and the Department is committed to helping our economy by reducing unnecessary barriers for those interested in obtaining jobs in the trucking industry," said U.S. Secretary of Transportation Elaine L. Chao.

Federal rules previously prohibited a third-party CDL skills instructor who is also authorized by the state to administer the CDL skills test from performing both the instruction and the qualifying testing for the same CDL applicant. The final rule announced today eliminates that restriction and permits states, at their discretion, to allow qualified third-party skills trainers to also conduct the skills testing for the same individual. This new rule is designed to alleviate testing delays and eliminate needless inconvenience and expense to the CDL applicant—without compromising safety.

The rule change is effective 60 days from publication in the Federal Register.

To view a copy of the final rule, visit: <https://www.fmcsa.dot.gov/registration/commercial-drivers-license/third-party-commercial-drivers-license-testers>

Visit <https://www.fmcsa.dot.gov/newsroom/us-department-transportation-issues-final-rule-streamline-process-aspiring-truck-and-bus> to view the press release

### FMCSA DRUG CLEARINGHOUSE

The U.S. Department of Transportation's Federal Motor Carrier Safety Administration's ("FMCSA") Drug & Alcohol Clearinghouse publishes a monthly summary report. According to the November report, as of December 1, 2020 there has been a total of 50,831 violations since the beginning of the 2020, of which

49,732 (98%) were for drugs and 1,099 (2%) were for alcohol. Of the 50,627 positive drug tests during that period, just over half (26,620) were for marijuana, followed by cocaine (7,280), methamphetamine (4,709), amphetamine (4,477), and then various opiates and other drugs.

The report also includes information on the “return-to-duty” (“RTD”) process. According to the report:

if a driver has a drug and alcohol program violation recorded against him or her in the Clearinghouse, that driver must be removed from safety-sensitive functions, including operating a commercial motor vehicle, until he or she has completed a RTD process. Select milestones of a driver’s RTD process are recorded in the Clearinghouse.

The report also includes a table that provides a snapshot of the number of drivers who had an open or resolved RTD process in the Clearinghouse as of December 1, 2020. Of perhaps some concern is that of 47,137 drivers with at least one violation, 41,802 remain in prohibited status, 32,125 have not even started the RTD process and only 5,335 have successfully completed the RTD process.

So far, just over 1.6 million accounts have been registered, consisting of almost 1.5 million drivers and some 176,311 employers (including 57,306 owner-operators), amongst others. Of the just under 3 million queries conducted, almost 1.3 million were for pre-employment checks and the rest were annual queries of drivers currently employed (called limited queries).

All employers who are subject to the regulations should note that they have to conduct the limited queries of their driving pool by January 5, 2021 in order to make sure none of their employees have any drug violations.

Learn more about the Clearinghouse at <https://clearinghouse.fmcsa.dot.gov/Learn> and visit <https://clearinghouse.fmcsa.dot.gov/Resource/Index/monthly-report-Nov2020> to view the November report.

## **DRIVER CLASSIFICATION**

The recent driver classification battle has been centered in California, and involves the passage last year of Assembly Bill 5 (“AB5”) and the passage of Proposition 22 (“Prop22”) on Election Day. While trucking has been operating under a federal court imposed exemption from AB5 pending results of the litigation challenging the law, a California state-level appellate court bucked the federal court ruling and said that AB5 does apply to motor carrier employers. However, the federal court injunction against AB5 will remain in place regardless of what the state court says until that litigation is resolved.

With the passage of Prop22, which allows app-based companies to continue to classify drivers as independent contractors, it also provides a handful of benefits to gig workers — such as health care stipends, a minimum wage for some employees, and expense reimbursements. Now it appears that, at least for Uber users in California, there will be a cost for these “perks” to drivers. On Uber’s ride hailing app and food delivery service (Uber Eats), there is a new fee – the California Driver Benefits Fee (which applies only to rides and deliveries in the state). It is not yet clear how much the fee will add, but Uber sent an email to users about the new benefits for drivers stating: “You’ll see a new California Driver Benefits Fee added to each ride or delivery to help make these benefits and protections possible.”

Nothing is free and ultimately it is the customer that has to pay.

## INTERIM FINAL RULE CLARIFIES DEFINITION OF AGRICULTURAL COMMODITY

by Henry E. Seaton, Esq., Seaton & Husk, L.P.  
Regulatory Update - December 2020

The Federal Motor Carrier Safety Administration (“FMCSA”) has issued an interim final rule (“IFR”) that clarifies the definition of the terms “any agricultural commodity,” “livestock,” and “non-processed food,” as the terms are used in the definition of “agricultural commodity” under the hours-of-service regulations. For details, visit <https://www.federalregister.gov/d/2020-25971>. The IFR is effective December 9.

The definitions are important because under current regulations, drivers transporting agricultural commodities, including livestock, from the source of the commodities to a location within 150 air miles of the source, during harvest and planting seasons as defined by each state, are exempt from the HOS requirements. Also, the mandatory 30-minute rest break does not apply to drivers transporting livestock in interstate commerce while the livestock are on the commercial motor vehicle.

## COVID LITIGATION

Less-than-truckload (“LTL”) motor carrier Estes Express is one of the many employers facing COVID related disputes or claims, estimated to be more than 1,200 and growing. In the Estes suit, a dockworker said that in late April, he learned that two of his co-workers had contracted COVID and were not able to work because of that. However, possible infection of their work site appears to have been an issue. As a result, the dockworker asked that he not be required to come to work “while his co-workers remained contagious,” according to the suit filed in U.S. District Court for the Northern District of Illinois.

His supervisor at Estes denied that request and ordered the plaintiff to return to work the next day. The dockworker did go back to work on April 29, but he also requested to work just eight hours “to minimize risk from the first shift employees because of his exposure the day before to the infected employees,” according to the suit. When he came to work on April 30 he was told to leave the premises. Although he is only seeking \$75,000, plus costs, when you multiply these types of suits the amount becomes significant.

While this suit was brought in federal district court, the whole question of proper venue for COVID related claims becomes relevant. Should they be resolved in courts, the administrative process of the Occupational Safety & Health Administration, or before Workers Compensation boards?

As the suits multiply, there have also been efforts to provide some forms of immunity to employers and businesses. To date, no federal relief has been enacted (there were attempts to include it in the current relief package), but as of September 1, 2020 more than a dozen states had passed protective legislation of their own.

Absent some broad federal guidance/legislation, this is a matter that will years to sort out.

Visit <https://www.americanbar.org/groups/litigation/committees/trial-practice/articles/2020/immunity-from-liability-covid-19-trial-lawyers/> for an overview on the situation from the American Bar Association.

The law firm of Barnes & Thornburg LLP has created a “COVID-19 Related Workplace Litigation Tracker” that is available online at <https://btlaw.com/en/insights/publications/covid-19-related-workplace-litigation-tracker>. They are tracking litigation across the country that is alleging violations of a wide variety of state and federal employment laws and regulations, and analyzing trends.

Another firm, Hunton Andrews Kurth, has also created a tracker that breaks down COVID claims by category, and shows over 6,800 complaints of all types across the country. It is available online at <https://www.huntonak.com/en/covid-19-tracker.html>.



## OCEAN

### OCEAN FREIGHT GRI DEJA VU

Another month, another round of general rate increases (“GRIs”). Last month (November) reported how there had been two GRIs announced for cargo imported from Asia ports of loading going to U.S.A, Canada and Mexico ports according to a November 3, 2020 notice by Tony Nuzio of ICC Logistics Services, Inc.

Now, again, Tony is reporting another two GRIs announced in December for ocean shipments from various Asia ports to North America as follows:

According to a December 3, 2020 announcement from Tony Nuzio:

Well, if anyone thought rising ocean freight rates would stabilize at the end of 2020’s Peak Shipping Season, think again. A new round of General Rate Increases is scheduled to go into effect on January 1, 2021. The new increases will affect 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 – January 1, 2021**

**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’s obvious that increased ocean freight rates will continue well into 2021 with no end in sight, thereby creating great challenges for importers as they try to create meaningful and realistic budgets for 2021.

Then, on December 15, 2020, Tony published the following additional GRIs:

North American Importers have to feel like there is no end on sight when it comes to Ocean Freight increases here in 2020. Yes, a new 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. This is the second General Rate Increase for the month of December, 2020. Guess it’s a way of saying “Happy Holidays!”

**The proposed increases are as follows:**

**General Rate Increase – December 15, 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’**

This continues to be a rapidly evolving environment and stakeholders need to pay attention and be proactive to stay on top of the situation. These GRIs are in stark contrast to the westbound rates with the resulting container imbalance coming under scrutiny of the Federal Maritime Commission (“FMC”).

## CONTAINER CONGESTION

As noted above, eastbound container rates are in stark contrast to westbound rates, with the resulting imbalance causing congestion and export difficulties. Carriers have a clear commercial incentive to prioritize U.S. import loads over export shipments, as eastbound rates from China to the U.S. West Coast are nearly 7.5 times the westbound rate. Additionally, the cost of moving a loaded export container from the interior U.S. to the West Coast can add more than \$1,000 to the ocean rate.

As a result, it appears some carriers are refusing export bookings so they can ship empty containers back to Asia faster to be refilled with higher-paying U.S. imports from Asia. This has left some U.S. exporters, particularly of lower-paying agricultural commodities, struggling to move their products.

In late November, the Federal Maritime Commission (“FMC”) announced it would launch a formal investigation into carriers’ role in congestion, with two of the FMC Commissioners warning container lines they may be violating their obligation under U.S. Shipping Act of 1984 to provide service to exporters by refusing bookings and failing to reposition containers in the U.S. interior.

Visit <https://www.fmc.gov/fact-finding-29-advice-to-the-trade/> to view the FMC update and visit <https://www2.fmc.gov/readingroom/documents/35459> to view the supplemental order.

## LOST CONTAINERS

On November 30, 2020 the Japanese-flagged containership MV ONE Apus suffered a massive cargo loss in the Pacific Ocean. Enroute from China to Long Beach, California, the 14,052 TEU [twenty-foot equivalent unit] container ship built in 2019 encountered gale-force winds and large swells around 1,600 nautical miles northwest of Hawaii. As a result, some 1,900 or more containers were lost or damaged, including perhaps over 60 containers that may contain hazardous materials.



After the accident, the ship sailed to the Port of Kobe, Japan to be offloaded, inspected and repaired as necessary.

Just for perspective, according to the World Shipping Council, an average of 1,382 containers were lost at sea per year between 2008 and 2019.



Visit <https://www.shippingandfreightresource.com/one-apus-container-stack-collapse-update-10th-dec/> for more details and pictures.

## PARCEL EXPRESS

### FEDEx SURCHARGE UPDATE

By Tony Nuzio, ICC Logistics Services, Inc.

FedEx has announced several new surcharges that will be implemented in separate stages.

First, on December 28, 2020, some previously implemented surcharges will actually be reduced. FedEx Express international parcel and freight shipments originating in Europe and MEISA will decrease.

Secondly, starting on January 18, 2021, and until further notice, FedEx will continue to implement peak surcharges on SmartPost and Oversize shipments, as well as shipments requiring Additional Handling.

And finally, FedEx advises that due to disruptions in the global supply chain caused by COVID-19, they will implement surcharges on all FedEx Express international parcel and freight shipments beginning April 6, 2021.

Below please find FedEx' official notice of these surcharges as well as links to the actual surcharge fees.

FedEx continues to keep commerce moving and delivering critical shipments to homes during the COVID-19 pandemic.

The impact of the virus continues to generate a surge in volume, and we are experiencing extremely high demand for capacity and increased operating costs across our network this holiday peak season. We anticipate volume to continue to surge into the new year.

We wanted to let you know that effective Jan. 18, 2021 until further notice, we will continue to implement peak surcharges on SmartPost and Oversize shipments, as well as shipments requiring Additional Handling. Surcharge details can be found [here](#). These surcharges will allow

us to continue providing our customers with the best possible service during this challenging time.

Also, as you may be aware, due to disruptions in the global supply chain caused by COVID-19, we announced a surcharge on all FedEx Express international parcel and freight shipments beginning April 6.

Air cargo capacity remains limited, and we are incurring incremental costs as we continue to adjust our international networks to best deliver much-needed goods and services in this constrained environment.

Due to shifting dynamics in the marketplace, beginning Dec. 28, the surcharge amount for some FedEx Express international parcel and freight shipments originating in Europe and MEISA will decrease. Updated amounts can be found [here](#).

## QUESTIONS & ANSWERS

by George Carl Pezold, Esq.

### FREIGHT TERMS – USING INCOTERMS ON DOMESTIC SHIPMENTS

**Question:** On domestic shipments, our company is asking customers to put ExWorks on all their purchase orders (“POs”). I thought this term was only used for international shipments.

They are trying to make sure we are not held responsible for anything once it leaves our dock. I can’t seem to find a definitive answer to this anywhere.

My question is, what is the correct term on a customer’s PO for domestic shipments – less-than-truckload (“LTL”), UPS, FedEx, etc. - so that we are not liable for anything once it leaves our dock? These are sometimes sent collect, sometimes “Prepay and Add”. Is ExWorks the correct term for domestic shipments?

**Answer:** “ExWorks” is an Incoterm. Incoterms are the official rules for international trade terms, developed under the International Chamber of Commerce, and adopted by the U.N. Commission on International Trade Law. They are generally required for all international (export/import) transactions.

The Uniform Commercial Code (“UCC”), on the other hand, has been adopted and is the law in all 50 states in the U.S. Domestic trade is normally governed by the UCC and in the event of disputes, courts will apply the provisions of the UCC and established court decisions interpreting the UCC.

While there are many similarities between Incoterms and the UCC, there are also substantive differences. Thus, it is still the best practice to use the UCC terms of sale for domestic transactions.

The UCC does not use the language “transfer of title” and instead speaks in terms of the right of possession and when delivery takes place when specific terms of sale are used.

Thus, under an “FOB origin” or “FOB Factory” sale, delivery to the buyer normally takes place when the goods are tendered to a carrier by the seller, and risk of loss in transit is then transferred to the buyer.

I would note that freight payment terms such as “prepaid, collect, or prepay and add” do not govern risk of loss or damage in transit.

UCC Sections 2-319 and 2-320 are available online at <https://www.law.cornell.edu/ucc/2/2-319> and <https://www.law.cornell.edu/ucc/2/2-320> respectively. The Incoterms description of EXW is available online at <https://www.incotermsexplained.com/the-incoterms-rules/the-eleven-rules-in-brief/ex-works/>.

## CCPAC NEWS

### CCPAC HEADLINE NEWS, DECEMBER 2020

The Officers and Board of Directors of the Certified Claims Professional Accreditation Council (“CCPAC”) wishes to extend a cheerful Holiday Greeting to all during the Season of Joy and Thanksgiving and for a Healthy and Prosperous New Year.

The next Certified Claims Professional (“CCP”) Exam is tentatively scheduled to be held on March 31, 2021. This is a timed exam that will begin promptly at 12:30PM and conclude at 3:30 PM EST. The written exam will be taken by each candidate at their location and they will need to login to an Exam Podcast for special instructions on when to begin and end the exam by a Virtual Proctor in a LED Format.

The next CCP Exam Primer Class is tentatively scheduled for 4 - 1 ½ hour sessions each Wednesday beginning March 3, March 10, March 17 and March 24, 2021 from 12:30 PM to 2:00 PM EST on-line in a Virtual Instructor – LED Format. Additional information including exam fees, preparation materials and registration to attend the class and/or the exam or both are posted on our website [www.ccpac.com](http://www.ccpac.com) Home Page under Headline News section.

Candidates planning on participation in either the Class and/or the Exam must apply and pre-qualify. To do so, Candidates will need to download and complete the CCP Exam Application and Calculation of Points Forms and email to [director@ccpac.com](mailto:director@ccpac.com) or mail to CCPAC Exam, P. O. Box 550922, Jacksonville, FL 32255-0922. Once CCPAC receives and approves the candidates’ application, it will then be necessary for the candidate to complete the on-line Registration and pay the required fee(s) with a major credit card, or register on-line and opt to pay with a check by mail.

ALL CCP’s and CCPAC Associate Members are reminded that to maintain their membership in “Active” status, annual dues and membership are due now and through the first quarter of 2021. Membership is 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, 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](http://www.ccpac.com) for general information and membership in CCPAC or email [director@ccpac.com](mailto:director@ccpac.com).



CCPAC also has the following online presence:

FaceBook: [www.facebook.com/certifiedclaimsprofessional](http://www.facebook.com/certifiedclaimsprofessional)

FaceBook Blog: [www.facebook.com/groups/410414592821010/](http://www.facebook.com/groups/410414592821010/)

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Twitter: [twitter.com/ccpac\\_1](https://twitter.com/ccpac_1)

Website [www.ccpac.com](http://www.ccpac.com)

## CLASSIFICATION

### FUTURE COMMODITY CLASSIFICATION STANDARDS BOARD (“CCSB”) DOCKETS

	<b>Docket 2021-1</b>	<b>Docket 2021-2</b>
Docket Closing Date	November 25, 2020	April 8, 2021
Docket Issue Date	January 7, 2021	May 6, 2021
Deadline for Written Submissions and to Become a Party of Record	January 29, 2021	May 27, 2021
CCSB Meeting Date	February 9, 2021	June 8, 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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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"

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## Freight Claims in Plain English (4<sup>th</sup> Ed.)

The hard-cover edition of Freight Claims in Plain English (4<sup>th</sup> 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.*

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