

# TRANSDIGEST

Transportation & Logistics Council, Inc.

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## **“Capacity Crunch” Virtual Workshop**

- **Fall Seminar Series**
- **Invasive Pests on the Rise**
- **New Import Tariffs Coming**
- **COVID-19 - Supply Chain Impacts**
- **Demurrage Fees**
- **Court Decision - Non-Compliance With CFR**
- **More Questions & Answers**

***SOFT COVER EDITION!***

***FREIGHT CLAIMS IN PLAIN ENGLISH (4<sup>TH</sup> ED.)***

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## ASSOCIATION NEWS

**REGISTER NOW - WHILE SPACE IS STILL AVAILABLE!**

## The Capacity Crunch – Exploring Solutions

90 Minute Special Edition Virtual Workshop  
August 4, 2021 1:00pm EST

The Capacity Crunch is with us and it is impacting all modes – truck, rail, intermodal, parcel, air and ocean. This TLC Virtual Workshop will address how it is affecting domestic and international commerce and will focus on exploring possible solutions to get your freight moving. We will also take a look at how State and Federal actions are helping (or NOT helping) the situation.

Bill Cassidy, Senior Editor of The Journal of Commerce, will moderate a panel of experts representing a major motor carrier, a third-party logistics provider, an international importer and an intermodal marketing company.

Visit [https://www.tlcouncil.org/sites/default/files/capacity\\_crunch\\_reg\\_form\\_fill.pdf](https://www.tlcouncil.org/sites/default/files/capacity_crunch_reg_form_fill.pdf) to register or see attached form.

**Special Thanks to our Gold Sponsors for the above Virtual Workshop:**

**CARGO SALVAGE CLAIMS**

**American Truck & Rail Audit, Inc.**

**NorthAmerican Transportation Association**

## PLAN NOW FOR VIRTUAL FALL SEMINAR SERIES

Once again the Transportation & Logistics Council, Inc. will present its popular, informative and in-depth seminars this fall on Transportation, Logistics and the Law; Freight Claims in Plain English; and Contracting for Transportation and Logistics Services. It's your choice – take all three or choose one or two of the following seminars. Each seminar will be held over a several day period in an interactive virtual format.

**Transportation, Logistics and the Law**

*Presented by Brent Wm. Primus, J.D.*

This course is designed for shippers, brokers, and carriers to provide a working knowledge of the laws & regulations governing the supply chain to use in their day-to-day jobs. The course also serves as a foundation for the Freight Claims in Plain English and the Contracting for Transportation and Logistics Services Fall Seminars.

The first and second day of the course will focus on motor carriers, brokers, and surface freight forwarders. Day three of the course will focus on the function of a bill of lading, with or without an individually negotiated contract in place... and the role of the National Motor Freight Classification (NMFC). The fourth day will be all about the money: freight charge payment and collection including the so-called “double payment problem”.

Registrants will be provided with 190+ pages of critical statutes, critical regulations, and an appendix containing additional materials in PDF format.

6 hour course held over 4 days

Tuesday, September 21<sup>st</sup> & Thursday, September 23<sup>rd</sup> – 1:00pm – 2:30pm EST

Tuesday, September 28<sup>th</sup> & Thursday, September 30<sup>th</sup> – 1:00pm – 2:30pm EST

\$425 Member/\$525 non-Member

**Freight Claims In Plain English**

*Presented by: Gerard F. Smith*

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

Whoever has the responsibility for dealing with freight claims, whether a manager, supervisor, or clerk, must be capable of reading, understanding, and applying different legal decisions, contracts, tariff rules, statutes, treaties, and government regulations. In addition, they must possess the attributes of an investigator, an arbitrator, a diplomat, a negotiator, and a bill collector. This course is designed to assist claims personnel at all levels obtain the basic degree of knowledge, training, and professionalism to fulfill those responsibilities.

It is hoped that this course will better prepare you to resolve claims in a more enlightened, legalistic, and professional manner, thus reducing the need for litigation to resolve such disputes.

8 hour course held over 4 days

Monday, October 18<sup>th</sup> through Thursday, October 21<sup>st</sup> - 2:00pm - 4:00pm EST

\$550 Member/\$650 non-Member

### **Contracting For Transportation & Logistics Services**

*Presented by Raymond A. Selvaggio*

An intensive program on the practical and legal aspects of contracting for transportation and logistics services.

Learn different techniques about drafting and negotiating transportation contracts, such as the “do’s” and “don’ts” of contracting.

Also included is a review of important legal principles, statutes, and regulations affecting the contracting process, as well as a "walk through," in-depth discussion of actual contract provisions, terms and conditions.

This course is for both purchasers and providers of transportation services with a focus on the contractual relationships among motor carriers, shippers, brokers and other 3PLs.

Plus attendees will have a unique opportunity to discuss their specific contracting problems and issues with a knowledgeable transportation attorney.

8 hour course held over 4 days

Tuesday, October 26<sup>th</sup> & Thursday, October 28<sup>th</sup> - 2:00pm - 4:00pm EST

Tuesday, November 2<sup>nd</sup> & Thursday, November 4<sup>th</sup> - 2:00pm - 4:00pm EST

\$550 Member/\$650 non-Member

**See the attached Registration Form for more details or visit** <https://www.tlcouncil.org/home>.

The Council would like to thank the following Fall Seminar Sponsors:



## **T&LC SPONSORSHIP OPPORTUNITIES: FALL SEMINARS & VIRTUAL WORKSHOPS**

### **Fall Seminar Series**

You can help the Transportation & Logistics Council grow, succeed & fulfill its educational mission by sponsoring our Fall Seminar Series!

Sponsorships \$750 each for the seminars and sponsors will receive the following:

- Your logo on our website with a link
- Your logo included in all advertising emails and at the beginning of the virtual seminar
- Your company named and mentioned as a sponsor during the seminar
- Your company listed in our monthly TRANSDIGEST
- One complimentary registration

### **Virtual Workshops**

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
- One complimentary registration

**Silver - \$750**

- Your logo on our website with a link
- Your logo included in all advertising emails zoom registration page, and beginning of virtual workshop
- Company named mentioned as a sponsor during the workshop
- One Complimentary registration

**Bronze - \$500**

- Your logo included in all advertising emails zoom registration page, and beginning of virtual workshop
- Company named mentioned as a sponsor during the workshop
- One Complimentary registration

Sponsorships are for 5 T&LC Virtual Workshops. Sponsors will also be announced during the live seminar. See form attached or visit [Link to Sponsorship Form](#)

For more information contact:

Diane Smid or Katie Woerner - Transportation & Logistics Council  
[diane@transportlaw.com](mailto:diane@transportlaw.com)  
631-549-8984

**SAVE THE DATE – 47<sup>TH</sup> ANNUAL CONFERENCE**

The Transportation & Logistics Council will be holding its 47<sup>th</sup> Annual Conference on March 21, 2022 to March 23, 2022 at the Doubletree by Hilton Orlando at SeaWorld. Seminars will be held on Sunday, 3/20/22. Details to follow.

**NEW MEMBERS**

**Regular Members**

**Connie Martinez**  
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606 Grand Central Blvd.  
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**Lavina Spry**  
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**Associate Member**

**Mary Warrick, CCP**  
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## HUMOR

Some visuals and thoughts to ponder

when you finally get what you want but it doesn't make you feel any better and just ruins your life more



Souvenir photo before we get fired



How fast was the ostrich running when it hit the tree?



This is a ship-shipping ship,  
shipping shipping ships.



## INTERNATIONAL

### INVASIVE PEST VIOLATIONS

It's been a while since we have discussed the problem of international trade and invasive pests. According to a recent article by Janet Nodar in the Journal of Commerce, the recent recovery in breakbulk cargo volumes has resulted in an increase in the discovery of dangerous pests in dunnage and wood packaging materials ("WPM").

According to the article:

The great frustration for cargo owners is that invasive insects are often found in WPM that has been — or at least appears to have been — treated by fumigation or heat according to global ISPM 15 [International Standards for Phytosanitary Measures No. 15] regulations, is properly stamped and documented, and therefore should be safe to use. According to Gary Lovett, a forest ecologist and senior scientist emeritus with the Cary Institute of Ecosystem Studies, shippers and importers simply cannot rely on the existing international ISPM 15 system to ensure they are using safe dunnage and WPM.

While there is some dispute regarding whether the failure is with ineffective ISPM 15 treatments or inadequate supply chain quality assurance, discovery of these dangerous wood-boring pests in imported WPM triggers harsh remedies. The fine for violations can as high as the full value of the cargo, which can be millions of dollars for project cargo charters.

ISPM 15 violations can also lead to the re-exporting of the cargo, which can range from a pallet along with the product on it, to part and full charters of high-value, schedule-sensitive project cargo. Even if only one piece of project cargo is encased in infested WPM, typically everything on that shipment's bill of lading must be re-exported.

These direct and indirect costs can be very substantial with a very real concern for who bears the burden of these costs. The article does not discuss liability or which party will get stuck with the bill. It would

appear that resulting damages would fall under the “act of the shipper” exemption to carrier liability, for failing to provide proper packaging. There is probably no damage to the product itself, so all damages would be consequential (fines, handling, delay, and/or re-export of cargo).

Are these liabilities/losses covered by an insurance policy?

Visit [https://www.joc.com/breakbulk/project-cargo/breakbulk-volume-recovery-triggers-cbp-invasive-pest-violations\\_20210719.html](https://www.joc.com/breakbulk/project-cargo/breakbulk-volume-recovery-triggers-cbp-invasive-pest-violations_20210719.html) to view the article.

## OBJECTIONS TO GLOBAL TAX PLAN

A proposed global tax plan that would create a minimum 15% corporate tax rate has received pushback from some transportation service providers. In a joint statement issued July 8, 2021 European and global forwarders’ associations have objected to what they claim is an overbroad exemption to the tax granted for “shipping services”.

According to the July 8 statement:

The global shipping industry has secured an exemption from the OECD\* proposals for a global minimum corporation tax rate of no less than 15%, which would apply to all shipping companies with a turnover above a 750-million Euro threshold. The final details of the agreement still need to be further defined, and should ensure that the definition of ‘shipping services’ eligible for the exemption focuses on vessel-related port-to-port services only, so as not to perpetuate tax evasion.

CLECAT<sup>†</sup> and FIATA<sup>‡</sup> underline that the exemption should in no way apply to other ancillary or door-to-door services in the maritime supply chain, as it would create further distortions, and would enable tax evasion schemes. CLECAT and FIATA are particularly concerned by the overly broad definition of shipping (as stated in the commentary of Article 8 of the OECD Tax Convention<sup>§</sup>) that could lead to an exemption of shipping companies’ services in the areas of freight forwarding, customs, and logistics services. This would mean that freight forwarders, logistics service providers and terminal operators would be required to pay taxes for the same activities that shipping lines could offer tax-exempt or partially tax-exempt, thereby providing incentives for carrier haulage (door-to-door transport arranged by the carrier) rather than merchant haulage. This would further distort competition in the maritime logistics supply chain and would weaken the very purpose of the new OECD proposals. In particular, it would have a detrimental impact on small and medium-sized companies (SMEs), who already suffer today from the ongoing disruptions in the maritime supply chain and the dominant position of the shipping companies, noting ongoing disruptions and calls for greater transparency in the rising charges levied by shipping lines.

The organizations request that definition of ‘shipping services’ under the exemption should be limited to vessel-related port-to-port services only and not include services which are not directly related to the ship,

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\* Organization for Economic Co-operation and Development

† European Association for Forwarding, Transport, Logistics and Customs Services

‡ International Federation of Freight Forwarders Associations

§ OECD (2017), "Commentary on Article 8", in Model Tax Convention on Income and on Capital: Condensed Version 2017, OECD Publishing, Paris, [https://doi.org/10.1787/mtc\\_cond-2017-11-en](https://doi.org/10.1787/mtc_cond-2017-11-en).

such as hinterland transport, storage, cargo handling, customs services, fiscal and insurance services, and all other ancillary services.

Visit [https://www.clecat.org/media/clecat\\_fiata\\_press-release-20210807.pdf](https://www.clecat.org/media/clecat_fiata_press-release-20210807.pdf) to view the statement.

## NEW IMPORT TARIFFS SCHEDULED

by Tony Nuzio, ICC Logistics, Inc.

The office of the United States Trade Representative (“USTR”) on June 2, 2021 announced their plan to begin imposing Section 301 tariffs on US imports from six different countries. Beginning November 29, 2021, Customs and Border Protection (“CBP”) will begin collecting duty on certain products imported from Austria, India, Italy, Spain, Turkey, and the United Kingdom.

The following is a specific list of products and categories for each country:

**Austria:** Glassware and Optical Goods

**India:** Shrimp, Basmati Rice, Bamboo Goods, Cork Products, Cigarette Paper, Jewelry, Pearls, Precious/Semiprecious Stones, and Various Furniture Items

**Italy:** Caviar, Perfumes, Handbags, Apparel, Footwear, and Eyeglass Lenses

**Spain:** Shrimp, Octopus, Handbags, Belts, Footwear, Hats, and Glassware

**Turkey:** Carpets, Linen, Building Stones, Porcelain and Ceramic Articles, and Jewelry

**United Kingdom:** Apparel, Footwear, Ceramic Goods, Jewelry, Refrigerator Products, Furniture, Toys, and Games

In an effort to ensure that all imports are being properly classified to avoid the possibly of incurring any additional financial surprises, especially at this time of skyrocketing shipping costs, all importers who will be affected by these tariff changes should immediately contact their Customs Brokers to determine the impact on their businesses.

Visit <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/june/ustr-announces-and-immediately-suspends-tariffs-section-301-digital-services-taxes-investigations> to view the USTR announcement.

## COVID-19 - IMPACTS TO SUPPLY CHAINS

by Tony Nuzio, ICC Logistics, Inc.

Everstream Analytics monitors and produces a weekly summary of supply chain impacts due to the ongoing COVID-19 pandemic. The update is provided free-of-charge to the industry.

Below is your weekly [July 20, 2021] update :

1. Vietnamese authorities imposed a two-week COVID-19 related lockdown in Mekong Delta and Ho Chi Minh City metropolis, with restrictions to be in effect from July 18.
2. Myanmar announced a nationwide COVID-19 related lockdown from July 19, while declaring public holidays from July 17 until July 25 to contain the spread of COVID-19.
3. Thailand has expanded COVID-19 restrictions that include travel curbs and a night-time curfew to three more provinces – Chonburi, Ayutthaya, and Chachoengsao – from July 20.

4. Authorities in Libya imposed restrictions that require all government agencies to reduce attendance at work to 25 percent, until at least July 25.
5. Mozambique tightens nationwide COVID-19 measures through August 17, with nightly curfew hours expanded to last between 21:00 and 04:00.
6. Chile extended its border closure measures until July 25 due to Delta variant concerns, with all existing domestic restrictions remaining in place with the extension.

Thank you to Everstream Analytics for this valuable information.

Visit <https://www.everstream.ai/risk-center/covid-19-resource-center/> to view their latest COVID-19 supply chain updates and check out their platform by visiting <https://www.everstream.ai/why-everstream/our-platform/>.

## MOTOR

### STUFF HAPPENS – WHAT NOT TO DO

This past year has seen its share of calamities and disruptions to transportation, COVID, hurricanes, floods, Suez Canal getting blocked and wildfires, just to mention a few. While the impacts from some are widespread and long-lasting, others are more local. A recent incident in Georgia is just one more reminder of how quickly adjustments must be made, and problems can be resolved.

In Georgia, on July 15, 2021 the driver of a large dump trailer travelling on I-16 tried to go under an overpass with its bed up. The impact caused one end of the GA highway 86 overpass to shift some six feet, resulting in the closure of I-16 between Savannah and Macon.



Fortunately, the Georgia Department of Transportation was able to remove the damaged overpass and reopen I-16 by the end of the next day.

### UBER FREIGHT TO ACQUIRE TRANSPPLACE

On July 22, 2021 Uber Freight announced an agreement to acquire logistics technology company Transplace from TPG Capital for \$2.25 billion.

The company said the transaction to acquire Transplace from the private equity firm would accelerate Uber Freight's path to profitability. Uber forecasts the combination will propel its Uber Freight segment to

break even by the end of 2022. The transaction will be paid in \$750 million in parent company Uber's common stock and the remainder in cash, according to the company.

<https://www.businesswire.com/news/home/20210722005602/en/Uber-Freight-to-Acquire-Transplace>.

## **STATES MUST GO ALL-ELECTRONIC ON CDL INFO EXCHANGE BY AUGUST 2024**

On July 23, 2021 the Federal Motor Carrier Safety Administration ("FMCSA") published its final rule in the Federal Register requiring state driver licensing agencies to "implement a system and practices for the exclusively electronic exchange of driver history record information through the Commercial Driver's License Information System, including the posting of convictions, withdrawals, and disqualifications."

The Final Rule was one response to the results of a self-initiated audit of the agency conducted by the Department of Transportation's ("DOT") office of Inspector General that was released on July 14, 2021.

According to the Federal Register Final Rule publication:

The rule aligns FMCSA's regulations with existing statutory requirements set forth in the Moving Ahead for Progress in the 21st Century Act (MAP21). The rule also establishes August 22, 2024, as the date by which states must be in substantial compliance with this final rule.

The DOT audit was aimed at assessing FMCSA's oversight of states' actions to disqualify commercial drivers when warranted.

The Office of Inspector General made the following seven recommendations to strengthen FMCSA's oversight:

1. Improve current requirements for States to record, track, and maintain paper-based convictions sent and received via mail by incorporating its standardized method for States to aggregate paper-based convictions to facilitate FMCSA's evaluation of State performance.
2. Finalize and implement standardized operating procedures for conducting annual program reviews and for supervisory quality control reviews of completed annual program reviews.
3. Modify the annual program review checklist to require reviewers to address key factors and determine whether:
  - a. sampled out-of-State convictions were posted to driver records within the required 10 days;
  - b. results from a review of in-State convictions and paper notifications of out-of-State convictions were documented;
  - c. sample testing was conducted of the greater of 2 percent of electronic transactions in a month or a total of five transactions, in accordance with FMCSA's 2016 policy memorandum;
  - d. States are sending convictions either electronically or via mail but not using both methods;
  - e. States begin disqualification periods on or after the date the out-of-State conviction is received; and
  - f. States that offer administrative appeals for out-of-State disqualifications and permit them to be overturned are identified.
4. Finalize and implement a standard operating procedure for determining when a State is not making a good faith effort to timely mitigate compliance issues and when to impose sanctions on noncompliant States.

5. Complete the Agency's review of the State Compliance Records Enterprise system and implement identified improvements for managing States' compliance issues.
6. Develop and implement a process to segregate non-CDL holder convictions from all Commercial Driver's License Information System reports and workbooks utilized to evaluate State's compliance with CDL regulations.
7. Develop and implement a plan for coordinating with the American Association of Motor Vehicle Administrators to mitigate risks when States transition to new software systems.

According to the report, FMCSA concurred with all seven recommendations and the DOT considers "all recommendations as resolved but open pending completion of the planned actions."

Visit <https://www.federalregister.gov/documents/2021/07/23/2021-15693/commercial-drivers-license-standards-requirements-and-penalties-exclusively-electronic-exchange-of> to view the Final Rule and visit [https://www.oig.dot.gov/sites/default/files/FMCSA%20Oversight%20of%20CDL%20Disqualification%20Process%20Final%20Report\\_07-14-21.pdf](https://www.oig.dot.gov/sites/default/files/FMCSA%20Oversight%20of%20CDL%20Disqualification%20Process%20Final%20Report_07-14-21.pdf) to view the audit report.

## OCEAN

### EVER GIVEN FREE AT LAST

Some 106 days after getting stuck in the Suez Canal on March 23, 2021, the Ever Given was able to proceed and leave the Suez Canal on July 7, 2021. The blockage of the canal by the Ever Given lasted for six days in March and cost some \$5 billion a day in world trade. After being unstuck, the ship was "arrested" by Egyptian authorities and held in the Great Bitter Lake pending a settlement of claims by the Suez Canal Authority ("SCA") for damages.

The SCA initially demanded more than \$900 million for the salvage operation to free the Ever Given and other losses, which it later lowered to \$550 million. The Ever Given's owners and insurers had disputed its detention and the compensation claim and ultimately the parties reached a settlement for an undisclosed amount, allowing the vessel to proceed.

The over 1300 foot vessel was loaded with about 18,300 containers. Cargo owners will finally be able to receive their product, over three months late.

### FMC TO AUDIT DETENTION & DEMURRAGE PRACTICES

On July 20, 2021 the Federal Maritime Commission ("FMC") posted the following:

The Federal Maritime Commission has established a new audit program and dedicated audit team to assess carrier compliance with the Agency's rule on detention and demurrage as well as to provide additional information beneficial to the regular monitoring of the marketplace for ocean cargo services.

The "Vessel-Operating Common Carrier Audit Program" was established Monday at the direction of Chairman Daniel B. Maffei and launched immediately.

The Audit Program will analyze the top nine carriers by market share for compliance with the Commission rule interpreting 46 USC 41102(c) as it applies to detention and demurrage practices in the United States. The Commission will work with companies to address their

application of the rule and clarify any questions or ambiguities. Information supplied by carriers may be used to establish industry best practices.

Other focus areas of the audit process may include practices of companies related to billing, appeals procedures, penalties assessed by the lines, and any other restrictive practices.

“The Federal Maritime Commission is committed to making certain the law is followed and that shippers do not suffer from unfair disadvantages. The work of the audit team will enable the Commission to monitor trends in demurrage and detention practices and revenue, as well as to establish ongoing dialog between staff and carriers on challenges facing the supply chain. Of course, if the audit team uncovers prohibited activities, the Commission will take appropriate action. Furthermore, the information gathered by the audit process might lead to changes in FMC regulations and industry guidance if warranted,” said Chairman Maffei.

The Audit Program will begin with an information request establishing a database of quarterly reports allowing the Commission to assess how detention and demurrage is administered. Responses will be followed by individual interviews with the carriers. Each of the nine largest carriers by market share will be audited irrespective of whether a formal or informal complaint has been filed at the Commission.

Lucille Marvin, the Commission’s Managing Director, will lead both the audit program and the audit team, which will initially be comprised of existing Commission employees.

Visit <https://www.fmc.gov/fmc-establishes-ocean-carriers-audit-program/> to view announcement.

## QUESTIONS & ANSWERS

### CARRIERS – FREIGHT FORWARDER VERSUS BROKER

**Question:** If a freight forwarder is the carrier of record and the actual hauler isn’t, why do so many companies choose to go the broker route? What are the benefits of being a broker versus a freight forwarder?

If a freight forwarder is subject to the same liability as a motor carrier for loss or damage under the Carmack Amendment, then why aren’t they required to carry cargo or primary insurance to get authority like a carrier? Is there a requirement that a freight forwarder have any trucks?

**Answer:** There are significant legal differences between the role and the obligations of a broker and a freight forwarder.

To begin, here are the statutory definitions set forth in the Interstate Commerce Act at 49 U.S.C.13101:

#### 49 U.S.C. SEC. 13102. DEFINITIONS

In this part, the following definitions shall apply:

(2) **BROKER-** The term “broker” means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.

(3) **CARRIER-** The term “carrier” means a motor carrier, a water carrier, and a freight forwarder.

\*\*\*\*\*

(8) FREIGHT FORWARDER- The term “freight forwarder” means a person holding itself out to the general public (other than as a pipeline, rail, motor, or water carrier) to provide transportation of property for compensation and in the ordinary course of its business--

(A) assembles and consolidates, or provides for assembling and consolidating, shipments and performs or provides for break-bulk and distribution operations of the shipments;

(B) assumes responsibility for the transportation from the place of receipt to the place of destination; and

(C) uses for any part of the transportation a carrier subject to jurisdiction under this subtitle. The term does not include a person using transportation of an air carrier subject to part A of subtitle VII.

A broker IS NOT a carrier. Its function is to “arrange” for transportation as an independent contractor or intermediary; it does not issue a bill of lading, and is not subject to the Carmack Amendment (49 U.S.C. 14706), which governs liability for loss or damage in transit. Brokers can arrange for the transportation of truckload or less-than-truckload shipments.

A freight forwarder IS a carrier. It is required to issue a bill of lading for shipments that it receives for transportation, and is subject to the same liability as a motor carrier for loss or damage under the Carmack Amendment. In addition, the statute essentially contemplates that the forwarder will receive less-than-truckload shipments, assemble and consolidate them, and then use the services of a long-haul carrier to transport the consolidated shipment to destination, where it will be broken down and delivered. Technically, a freight forwarder may not merely “broker” full truckload shipments, although some of them do so.

There really is no “benefit” to being a broker vs. being a freight forwarder. Whether you should have operating authority as a broker or as a freight forwarder depends on the actual services that you will be providing.

Neither freight forwarders nor motor carriers are any longer required to carry mandatory cargo liability insurance. The requirement to file a BMC-32 endorsement was eliminated by the Federal Motor Carrier Safety Administration a few years ago.

Both freight forwarders and motor carriers must have public liability (bodily injury/property damage “BI/PD”) insurance if they operate large trucks (10,000 lbs or more). If the freight forwarder does not operate large trucks, it doesn’t have to comply with the insurance requirement.

I don’t think there is any legal requirement for a freight forwarder to have any trucks of their own, though many do have their own trucks, and some use small vans, etc. for pickup and delivery.

## CONTRACTS – PROTECTING FOOD PACKAGING SHIPMENTS

**Question:** As a shipper of packaging for the food industry, our customers require our products to be delivered without hazardous or odiferous products within the same trailer. In many cases this is possible, however what laws or regulations from the Department of Transportation or the Food & Drug Administration are in place to provide food protection while in transit?

What means of defense does a shipper have when our products are delivered next to a skid of fertilizer or skid of garlic?

The real issue we have is our less-than-truckload (“LTL”) carriers, the largest ones in the industry, have come to us and said, “we can’t sign up for anything but what the CFR regs state.” They will not allow our

no co-loading language with hazardous or odiferous product language in the contract. We've seen a swing in the LTL market in the last 4-5 months with 3 of our most significant LTL carriers saying the same thing. No question here, just curious if you're hearing that from any of your other clients.... this is what we're seeing.

**Answer:** There are some federal regulations that prohibit the transportation of foodstuffs in the same vehicle with certain poisonous substances, see, e.g., 49 CFR Section 177.841. However, they do not specifically deal with possible contamination by odors from non-poisonous substances.

On the other hand, there is no question that foods or food-related products like food packaging materials could be damaged and become unsuitable for their intended use if they were to absorb any strong or foul odors. Assuming that the carrier has notice that the goods are foods or food-related products and/or intended for human consumption, it should have a duty to provide suitable equipment and to protect the goods against contamination by odors, and should be liable for the damage. The problem is that the carrier will usually decline these claims on the grounds that there is no actual damage to the goods, or that there a duty to "mitigate the loss".

We usually include specific provisions in our shipper-carrier contracts for shippers of foods and food-related products that cover this situation and make it clear that the shipper has the right to determine whether goods that may have been contaminated or are otherwise unsuitable for their intended use can be destroyed without salvage, etc.

## **FREIGHT CHARGES – APPLICATION OF CLASSIFICATION**

**Question:** Our customer submitted a purchase order ("PO") with direction to populate the bill of lading with class 70 freight. We have always used class 100 because that is what the National Motor Freight Classification ("NMFC") guide states for pressure gauges - this is what we manufacture and ship.

We put class 100 on the bill of lading and 2 years after the fact our customer wants to collect on ALL freight because we did not follow his PO instructions. Do we not have a legal responsibility to accurately classify the freight, regardless of what a customer puts on their PO?

**Answer:** I assume that you did not have a contract with your carriers that provided for an exception rating, FAK rate, etc. that would have allowed you to ship these goods at Class 70.

First, if the shipments had been misdescribed as Class 70, and the carrier had discovered this, it would have been entitled to collect the additional freight charges for the correct classification, see e.g. *A.I.G. Uruguay v. AAA Cooper Transp.*, 334 F.3d 997 (11<sup>th</sup> Cir. 2003).

Second, the "Bills of Lading Act" at 49 U.S.C. 80116 makes it a federal crime if a person "(2) knowingly or with intent to defraud - (A) falsely makes, alters, or copies a bill of lading..."

In addition, the court decisions say that the bill of lading is a "contract of carriage", and there are many states in which willfully misstating information on any contract is a statutory violation.

Assuming that your customer was aware of the proper classification, I don't see how they could possibly have a claim against your company for stating the correct classification on the bills of lading.

## RAIL

### RAIL DEMURRAGE BILLING QUESTIONED

In July 22, 2021 letter to the seven Class I railroads, the Federal Railroad Administration (“FRA”) Chairman requested that they explain their policies and practices for demurrage charges, acknowledging pleas from shippers to intervene as intermodal containers pile up at inland rail ramps and accrue storage fees.

According to the letter:

In order to better understand the magnitude of the current container congestion and the framework for the associated demurrage fees, I am seeking information from each of the Class I railroads regarding policies and practices with respect to the assessment of demurrage fees on intermodal containers.

At your earliest opportunity, please provide the following specific detailed information for your top ten intermodal terminals in the United States by volume: (1) the number of “free days” allowed for container storage before demurrage fees begin to accrue; (2) the daily fee schedule after any free days expire; (3) any increase or decrease in such demurrage fees and free time since January 2021; (4) any fee “caps” that are currently in place and how long those caps are expected to remain in place; (5) whether receivers are being permitted to provide their own chassis to retrieve their containers; (6) a description of efforts made, if any, to reduce storage charges where delay is not within the control of the shipper or receiver; and (7) the average daily volume of stored containers, broken out by month from July 2020 to the most recent month for which data is available. Of particular importance, please describe your policies and practices of assessing storage charges, including the circumstances under which relief can be granted or charges can be excused, and whether charges are imposed even when the receiver is powerless to avoid a delay in retrieving a container.

Visit <https://prod.stb.gov/wp-content/uploads/BNSF-Final-RR-Intermodal-Letter-July-2021.pdf> to view a copy of the FRA letter.

## RECENT COURT CASE

### NO CLAIM AGAINST CARRIER FOR FAILING TO MITIGATE DAMAGES

In a May 27, 2021 decision, the Northern District of Illinois held that 49 CFR § 370.11, which obligates a carrier to salvage cargo, did not create an independent cause of action when the cargo owner claimed that the motor carrier did not properly salvage the cargo after the loss.

This case involved a shipment of specialized fire extinguishers that suffered damage during a cross-country journey. Plaintiff Nexus Alarm & Suppression (“Nexus”) filed a claim under the Carmack Amendment, 49 U.S.C. § 14706, a federal statute that provides an exclusive federal remedy for damage to goods in interstate commerce, and a separate claim under 49 C.F.R. § 370.11, a regulation promulgated under the Carmack Amendment. This decision involves only the C.F.R. claim.

The 49 C.F.R. § 370.11 claim is based on a regulation which describes a carrier’s responsibility to salvage goods that are rejected after suffering damage in transit. Nexus alleges that the regulation created a duty to give notice before salvaging the fire extinguishers, and a duty to salvage them for fair market value.

Nexus claims that defendant MGL Logistics (“MGL”) breached those duties by failing to provide notice and selling them for \$78,000. The total claim was for \$746,491.60.

The issue under consideration was whether there was a private right of action under the regulation. The court noted that while the Carmack statute clearly provided a private right of action, there was no such provision under 370.11.

The court outlined a few basic principles about when a regulation is enforceable. First, only Congress, and not the judiciary or Executive branch can create new federal causes of action. Second, Congress can create private rights of action to enforce regulations as well as statutes, but they must do it in an explicit manner. Third, Congress can do that expressly or by implication.

Ultimately, if Congress did not intend to create a private cause of action, “a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.”

In reviewing this regulation, the court noted that Nexus failed to provide any textual basis in Carmack or the regulation to conclude that Congress intended a private right of action under the regulation. In fact, the Court noted that Nexus’s argument that Congress created a private right of action to enforce the statute actually cuts against Nexus in that because “Congress explicitly created a private cause of action to enforce the statute, and it elected not to expressly include a private cause of action to enforce associated regulations. Congress drew a line, and it is not the role of this Court to sketch a new one.”

As a result of the above, the Court dismissed the claim based on 49 CFR § 370.11.

*Nexus Alarm & Suppression, Inc. v. MG Logistics, Inc.*, available online at <https://law.justia.com/cases/federal/district-courts/illinois/ilndce/1:2020cv06043/392154/24/>.

## CCPAC NEWS

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#### MEMBER RENEWAL AND ANNUAL DUES NOW DUE FOR ALL CCP’s AND ASSOCIATE MEMBERS

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 600249, Jacksonville, FL 32260.

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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.

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<b>CLASSIFICATION</b>
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## **FCDC 2021-2 DOCKET DISPOSITION**

On June 11, 2021 the Freight Classification Development Council (“FCDC”) published its Notice of Disposition resulting from the public meeting held on June 8, 2021.

Dispositions resulting in amendments to the National Motor Freight Classification (“NMFC”) will be published in a supplement to the NMFC. The supplement was scheduled to be issued on July 8, 2021, with an effective date of August 7, 2021.

Visit [http://www.nmfta.org/Dockets/Docket%202021-2/2021\\_2\\_Disposition.pdf](http://www.nmfta.org/Dockets/Docket%202021-2/2021_2_Disposition.pdf) to view the dispositions.

## **FUTURE FREIGHT CLASSIFICATION DEVELOPMENT COUNCIL (“FCDC”) DATES**

Additional future meeting dates and locations are currently scheduled as follows:

October 5, 2021	Westin Alexandria Old Town, Alexandria VA
February 8, 2022	Omni Royal Orleans, New Orleans LA
June 14, 2022	Westin Portland Harborview, Portland ME
October 18, 2022	Hilton Alexandria Old Town, Alexandria VA

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

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

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**Transportation, Logistics & the Law**

Tuesday, September 21st & Thursday, September 23 <sup>rd</sup> – 1:00pm – 2:30pm EST Tuesday, September 28 <sup>th</sup> & Thursday, September 30 <sup>th</sup> – 1:00pm – 2:30pm EST	MEMBER		NON-MEMBER	
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Monday, October 18 <sup>th</sup> through Thursday, October 21 <sup>st</sup> - 2:00pm - 4:00pm EST	MEMBER		NON-MEMBER	
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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.

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"*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.

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