

TRANSDIGEST

Transportation & Logistics Council, Inc.

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Plan Now for T&LC 47th Annual Conference

- **Register Now for Fall Seminar Series**
- **Global Supply Chain Disruptions: Get Your Shopping Done Now**
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- **More Questions & Answers: Delay Claims**

SOFT COVER EDITION!

FREIGHT CLAIMS IN PLAIN ENGLISH (4TH ED.)

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GUEST EDITORIAL

SHIPPER (CONSIGNEE) OF CHOICE

By Chae Pak, Sr. Director Logistics NA, Arkema, Inc.

Anyone in the transportation industry knows that for at least the past 14 months, trucking demand has outpaced trucking supply. The large stimulus packages coupled with consumer spending shifts from travel & services to retail & durable goods have definitely created the increased transportation demand. Record numbers of imported containers have backlogged US ports on both coasts. As demand hit record highs, the supply seemed to hit the bottom. During the pandemic, a much smaller number of commercial driver's licenses were issued, many drivers have not returned to work, and the Drug and Alcohol Clearinghouse went in to effect. Additionally, due to the disruption in supply chains patterns, carriers across modes struggled with optimization taking even more capacity out the market. It is important now more than ever to be the shipper (and consignee) of choice in order to find capacity.

Well what does that mean to be the shipper of choice? I think ultimately, it means collaborating with your carriers to allow them to become more efficient with their drivers and assets. While economics is important, it is not the sole primary driver for most carriers. They look for network fit, driver experience at origin/destination, consistency, efficiency and visibility.

Here are some of my thoughts on becoming a shipper of choice:

1. Partnership – move carrier relationship from transactional to relational at all levels (commercial down to dispatch).
2. Communicate – Proactively have daily/weekly conversations with key carriers to inform them of changes in schedules and volume.
3. Efficiency – Can you speed up the loading and unloading process? Check-in and documentation process? Minimize detention times.
4. Drivers – Do you treat drivers like part of the team?
5. Flexibility – Extend loading/unloading times, give carriers a bigger window to arrive.

Finally, just **ASK!!!** Have the conversations with your carriers as to what their needs are and what you (or your customers) can do better. Just having a conversation with a dispatcher or terminal manager, you may uncover a simple solution or fix that better situates you as a shipper of choice. This could be as simple as the timing of when the driver receives the paperwork or the timing of when the carrier receives the tenders. Each

carrier (and even terminals within the same company) may be looking for different things so by just asking, you may become their “shipper of choice”.

ASSOCIATION NEWS

PLAN NOW: SAVE THE DATE – 47TH ANNUAL CONFERENCE

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

REGISTER 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 21st & Thursday, September 23rd – 1:00pm – 2:30pm EST

Tuesday, September 28th & Thursday, September 30th – 1:00pm – 2:30pm EST

\$425 Member/\$525 non-Member

Freight Claims In Plain English

Presented by: Gerard F. Smith

Based on the popular 4th Edition of *Freight Claims in Plain English*, authored by George Carl Pezold & William J. Augello, which is often referred to as the “Bible” on freight claims. 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.

Whomever 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 18th through Thursday, October 21st - 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 26th & Thursday, October 28th - 2:00pm - 4:00pm EST

Tuesday, November 2nd & Thursday, November 4th - 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:

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- 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

See Fall Seminar Sponsorship form attached below or for more information contact:

Diane Smid or Katie Woerner - Transportation & Logistics Council

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631-549-8984

HUMOR

Automobiles and cat:





When Knight Rider ended,
Kitt fell on hard times.
He developed a meth habit,
moved to Oklahoma and is dating
a stripper named Tiffany



INTERNATIONAL

COVID-19 IMPACTS TO SUPPLY CHAINS

Last month we reported on Everstream Analytics weekly summary of supply chain impacts due to the ongoing COVID-19 pandemic (thanks to Tony Nuzio of ICC Logistics). Insofar as the pandemic is not going away and instead appears to be resurging in various areas around the globe, these updates are a valuable source to stay on top of international trade.

Below is the weekly summary from August 17, 2021:

- Operations at the Meidong Container Terminal at Ningbo Port in **China** have been suspended since August 11 due to a COVID-19 outbreak, forcing major shipping lines to omit or divert services to other ports.
- **New Zealand** has entered a three-day nationwide lockdown from August 17, after a new case of COVID-19 was detected. In Auckland and the Coromandel Peninsula, the lockdown will last until at least August 24.
- In **Iran**, authorities imposed a two-week movement restriction and a five-day lockdown from August 15. Trucks transporting goods and emergency vehicles are exempt.
- In **Georgia**, COVID-19 restrictions have been tightened until at least September 4, including the suspension of public transport and strict hygiene and social distancing measures that apply to operating businesses.
- In the **Philippines**, authorities have extended the restrictions and night-time curfew for Manila until at least August 31.
- The state of alert and related regulations to combat the spread of COVID-19 will remain in place in **Romania** until at least September 10.
- In 29 **Thai** provinces, authorities have extended restriction measures, including a ban on dine-in services, a curb on inter-provincial travel, and a night curfew from 21:00 to 04:00 local time until August 31.
- The level 2 epidemic alert and related restrictions in **Taiwan** will remain in place until at least August 31.
- **Australian** authorities imposed a three-day COVID-19 lockdown in the Greater Darwin and Katherine areas between August 16 and 18.

Visit <https://www.everstream.ai/risk-center/covid-19-resource-center/> for the latest report.

DO YOUR CHRISTMAS SHOPPING NOW!

This is the message being sent as the disruption to global supply chains is getting worse. At a foreign policy address to business leaders, Vice President Harris suggested that parents should consider getting Christmas presents now, because of ongoing supply chain issues.*

An August 23, 2021 CNN Business article by Hanna Ziady goes into more detail on how the shipping crisis is getting worse and what it means for holiday shopping.† From the conclusion of the article:

August already?? September is practically next week. Time to pick out a Halloween costume and start your Christmas shopping. Happy New Year, everybody.

* <https://www.dailymail.co.uk/news/article-9920843/Harris-offer-vision-Indo-Pacific-major-speech.html>

† <https://www.cnn.com/2021/08/23/business/global-supply-chains-christmas-shipping/index.html>

For consumers, the supply chain crunch is likely to mean higher prices. Hasbro, for example, is increasing prices to offset rising freight and commodities costs. The company is projecting that its ocean freight expenses will be on average 4 to 4 times higher this year than last, according to chief financial officer Deborah Thomas.

Shoppers should also brace for longer than normal delivery times and may need to have several different gift ideas up their sleeves.

“As we’ve been forecasting for months, shoppers are going to see some bare shelves at the holidays,” said Biesterfeld [CEO of C.H. Robinson]. “And if you buy most of your presents online, get it done early. Delivery time may be four to six weeks.”

LEGISLATION

HIGHWAY & INFRASTRUCTURE BILLS

Recent federal legislative proposals stand to have significant impacts on infrastructure and transportation, and various interests have been expressing their support or opposition. The House surface transportation reauthorization bill, INVEST in America Act, H.R. 3684, was passed on July 1, 2021 and passed in the Senate on August 10, 2021 with some changes. It is now back before the House. A separate, much larger, infrastructure bill is also being considered.

A few of the more contentious provisions in these proposals include:

Insurance: An increase of minimum motor carrier liability insurance from \$750,000 to \$2,000,000 for bodily injury is opposed by the Owner-Operator Independent Drivers Association (“OOIDA”) and supported by various safety groups.

Young Drivers: Included in highway reauthorization bill is a new apprenticeship pilot program for under 21-year-old drivers that seeks to increase the carrier selection pool. This is a huge issue in the supply chain as the driver shortage continues to hamper transportation. It is strongly supported by the Transportation Intermediaries Association (“TIA”) and opposed by some highway safety groups, concerned that “commercial motor vehicle (“CMV”) drivers under the age of 19 are four times more likely to be involved in fatal crashes, and CMV drivers between the ages of 19-20 are six times more likely to be involved in fatal crashes than all truck drivers.”*

Vehicle Mile Tax: A Vehicle Mile Tax (“VMT”) has been floated for many years as an alternative to generate funds for the Highway Trust Fund (“HTF”). With revenues coming primarily from fuel taxes, the HTF has faced shortages as vehicle fuel economy has improved and the use of electric vehicles (“EVs”) increases. And the proportion of EVs is expected to increase, particularly as this administration is proposing that 50% of new cars sold be EVs by 2030.

Included in the 2,702-page Infrastructure bill is Section 13002, titled “National motor vehicle per-mile user fee pilot.” This would create a pilot program to study the feasibility of taxing drivers based on their annual mileage rather than at the pump. According to the bill, the “objectives of the pilot program are to test the design, acceptance, implementation, and financial sustainability of a national motor vehicle per-mile user

* <https://saferoads.org/2021/07/30/action-alert-improvements-needed-to-senate-infrastructure-bill/>

fee, to address the need for additional revenue for surface transportation infrastructure and a national motor vehicle per-mile user fee.”

The idea behind this tax isn't without merit. The federal fuel tax has remained stagnant at 18.4 cents per gallon since 1993, and it hasn't been adjusted to account for more fuel-efficient vehicles, nor for inflation, which would place the tax at around 34 cents per gallon today. As alternatively powered vehicles like electric cars make up more of what's on the road today, drivers of fossil-fueled cars will pay a disproportionate amount of taxes to use the same asphalt.

The use of a VMT is a particularly contentious issue as some experts say VMT is regressive and unfairly targets rural and suburban residents who must drive greater distances, and would effectively raise taxes on citizens making less than \$400,000/year, the President's “red line” for tax hikes. In addition, the collection of mileage data raises privacy concerns as there is no provision for how the government would collect the mileage data or how it would be secured.

Apart from this federal proposal, some states are opting to investigate if a VMT would make more sense than paying at the pump. Pennsylvania, which has the highest fuel tax in the nation at 58.7 cents per gallon, recently began discussions on whether or not an 8.1-cent-per-mile tax was appropriate—this would translate into more than \$2 per gallon of gasoline based on the average fuel economy of a brand new car.*

While there is no question that there needs to be adequate funding for the HTF, finding an effective and fair mechanism appears to be elusive.

MOTOR

DRIVER CLASSIFICATION

The ongoing saga of driver classification and California's AB 5 took another turn on Friday, August 20, 2021 when a California state Superior Court judge invalidated Proposition 22, the 2020 ballot proposition that allowed Uber, Lyft, DoorDash, Instacart and other app-based businesses to classify their workers as independent contractors.

In a lawsuit brought by Service Employees International Union and several drivers, Alameda County Superior Court Judge Frank Roesch ruled that Proposition 22 is unconstitutional and unenforceable. The judge's ruling was based, in part, on the fact that Proposition 22 infringed on the power of the Legislature explicitly granted by the state Constitution to regulate compensation for workers' injuries.

In addition, the judge ruled that by including language aimed at preventing drivers from unionizing, the ballot measure also violates a constitutional provision that requires laws and initiatives to be limited to a single subject.

Since a ballot initiative cannot be amended after it is passed by voters, any unconstitutional provision renders it unenforceable.

The ruling comes at a time when the companies are battling efforts in Massachusetts and other states to classify their workers as employees rather than independent contractors.

* <https://taxfoundation.org/pennsylvania-considers-equivalent-2-per-gallon-gas-tax/>

Ride-hailing company Uber vowed to appeal and at this time it is not clear whether there will be a stay pending appeal.

Visit <https://ca-times.brightspotcdn.com/c5/f5/7bba477c4a839d1edd9f5b5a75e9/prop-22-alameda-superior-ct.%208-20-21.pdf> to view the Superior Court decision.

FMCSA’S OVERSIGHT OF CDL COMPLIANCE CALLED INTO QUESTION

The Department of Transportation Office of Inspector General (“OIG”), in an audit of Federal Motor Carrier Safety Administration’s (“FMCSA”) oversight of states’ actions to disqualify commercial drivers when warranted, found that the agency has gaps and other challenges in this area.

According to OIG’s report, states did not transmit electronic conviction notifications in a timely fashion 17% of the time, including 18% of 2,182 major offenses and 17% of 23,628 serious traffic violations. OIG also estimates that 11% of 2,182 major violations were not posted to driver records in a timely fashion, and 2% of the 23,628 serious traffic violations weren’t posted at all. OIG made the following seven recommendations to strengthen the agency’s oversight, which FMCSA agreed to undertake.

- Improving requirements for states to record, track and maintain paper-based convictions.
- Finalizing and implementing standardized operating procedures for conducting annual program reviews.
- Modifying the annual program review checklist.
- Finalizing/implementing a standard operating procedure for determining when a state is not making a good faith effort to mitigate compliance issues, and when to impose sanctions on noncompliant states.
- Completing FMCSA’s review of the State Compliance Records Enterprise system.
- Implementing improvements for managing states’ compliance issues and developing and implementing a process to segregate non-CDL holder convictions from all CDL Information System reports.
- Developing and implementing a plan for coordinating with the American Association of Motor Vehicle Administrators to mitigate risks when states transition to new software systems.

https://www.oig.dot.gov/sites/default/files/FMCSA%20Oversight%20of%20CDL%20Disqualification%20Process%20Final%20Report_07-14-21.pdf?utm_medium=email&utm_source=govdelivery.

OCEAN

DETENTION & DEMURRAGE PRACTICES

According to a press release posted August 4, 2021, the Federal Maritime Commission has launched an expedited inquiry into the timing and legal sufficiency of ocean carrier practices with respect to certain surcharges. From the press release:

Eight ocean carriers are being asked to provide the Commission’s Bureau of Enforcement (BoE) with details about congestion or related surcharges they have implemented or announced.

BoE has given the ocean carriers until August 13, 2021, to provide details that confirm any surcharges were instituted properly and in accordance with legal and regulatory obligations.

This action was taken in response to communications received by the Commission from multiple parties reporting that ocean carriers are improperly implementing surcharges. The companies contacted are CMA CGM, Hapag-Lloyd, HMM, Matson, MSC, OOCL, SM Line; and Zim. Each ocean carrier was identified as having recently implemented or announced congestion or related surcharges.

Ocean carriers are subject to specific requirements related to tariff changes or rate increases, including providing a 30-day notice to shippers and ensuring that published tariffs are clear and definite.

In reviewing ocean carrier responses, the Commission will determine if surcharges were implemented following proper notice; if the purpose of the surcharge was clearly defined; if it is clear what event or condition triggers the surcharge; and is it clear what event or condition has been identified that would terminate the surcharge. The Commission can initiate enforcement actions for improperly established tariffs.

Visit <https://www.fmc.gov/commission-questions-shipping-lines-about-surcharges/> to view the release.

OCEAN FREIGHT RATES ON THE RISE AGAIN!

by Tony Nuzio, ICC Logistics Services, Inc.

This should come as no surprise to any company whose business relies on imports from Asia to North America. Once again the ocean carriers operating in this service lane have announced the following increases.

Effective September 1, 2021 General Rate Increase (GRI) has been filed for all cargo imported from Asia ports of loading, to U.S.A., Canada, and Mexico ports/ramps of discharge.

The proposed increases are as follows:

General Rate Increase – September 1, 2021

USD 1,800 / 20'

USD 2,000 / 40'

USD 2,250 / 40' HQ

USD 2,250 / 40' Reefer

USD 2,532 / 45'

USD 3,200 / 53'

We are fairly sure that similar General Rate Increases will take place at least into the first quarter of 2022. The factors that could change all of this of course would be a slow-down of the US economy as a result of new Covid-19 infections caused by the Delta and other variants, and/or continued increases in inflation that could ultimately cause a recession. Only time will tell.

PARCEL EXPRESS

USPS ANNOUNCES TEMPORARY RATE ADJUSTMENTS

On August 10, 2021 the United States Postal Service (“USPS”) filed notice with the Postal Regulatory Commission (“PRC”) regarding a temporary price adjustment for key package products for the 2021 Peak Holiday Shipping Season. According to the announcement:

This temporary rate adjustment is similar to one imposed in 2020 that anticipated heightened peak-season package and shipping demand, which typically results in extra handling costs.

The planned Peak-Season Pricing, which was approved by the Governors of the Postal Service on Aug. 5, 2021 would affect prices on commercial and retail domestic competitive parcels, such as Priority Mail Express (PME), Priority Mail (PM), First-Class Package Service (FCPS), Parcel Select, USPS Retail Ground, and Parcel Return Service. International products would be unaffected. Pending favorable review by the PRC, the temporary rates would go into effect at 12:00 a.m., Central Time, on Oct. 3, 2021, and remain in place until 12:00 a.m., Central Time, Dec. 26, 2021.

The planned price changes include:

Priority Mail, Priority Mail Express, Parcel Select Ground and USPS Retail Ground:

- \$0.75 increase for PM and PME Flat Rate Boxes and Envelopes.
- \$0.25 increase for Zones 1-4, 0-10 lbs.
- \$0.75 increase for Zones 5-9, 0-10 lbs.
- \$1.50 increase for Zones 1-4, 11-20 lbs.
- \$3.00 increase for Zones 5-9, 11-20lbs.
- \$2.50 increase for Zones 1-4, 21-70 lbs.
- \$5.00 increase for Zones 5-9, 21-70 lbs.

Product	Current	Planned Increase
Parcel Select Destination Delivery Unit DDU	Starts at \$3.30	No Change
Parcel Select Lightweight (DDU)	Starts at \$2.15	No Change
FCPS Commercial	Starts at \$3.01	.30 Cents
FCPS Retail	Starts at \$4.00	.30 Cents
Parcel Select Lightweight DSCF and DNDC	Starts at \$2.55	\$1.00
Parcel Select DSCF	Starts at \$4.84	\$1.00
Parcel Select DNDC	Starts at \$6.85	\$1.00
Parcel Return Service	Starts at \$3.21	\$1.00

A full list of commercial and retail pricing can be found on the Postal Service's Postal Explorer website <https://pe.usps.com/text/dmm300/Notice123.htm>

Visit <https://about.usps.com/newsroom/national-releases/2021/0810-usps-announces-proposed-temporary-rate-adjustments-for-2021-peak-holiday-season.htm> to view the full announcement.

MORE PARCEL INCREASES AHEAD

by Tony Nuzio, ICC Logistics Services, Inc.

As recently reported by [Multi Channel Merchant](#), and without a lot of fanfare and advanced notice to their shipper customers, UPS is ending a freeze on earned discount tiers based on large shipping volume drops caused by COVID-19 lockdowns. This change will apparently cause some UPS parcel shippers to experience increases in the 10% to 30% range, especially if those shippers experienced a drop of two or three tiers within their current contracts.

According to the Multi Channel Merchant [article](#), the initial freeze went into effect last April, based on 52-week rolling average volumes as of early March, 2020, just as the lockdowns were going into effect. UPS took it off around the weekend of July 10-11, catching many shippers by surprise.

UPS' freeze, and a similar freeze from FedEx had provided a form of relief from the onslaught of peak surcharges from both major carriers over the past 16 months. It's uncertain at this point if FedEx had also ended its freeze.

"I can tell you I was not on a freeze because I dropped a tier last year, and this upsets me," said the VP of operations for an apparel retailer. "My UPS rep told me they did freeze tiers for specific customers who were detrimentally impacted by the COVID shutdown, whatever that means."

Examples he was given were things like book companies supplying schools or live event ticket companies. "She did confirm that it was based on a review of very specific customers, but I didn't get an answer as to why they were included and I wasn't," he said. "If I follow her logic even though I dropped a tier for a while my drop in volume wasn't enough to look at."

Another, a director of transportation for a sporting goods retailer, said he had heard of the freeze but it was a non-issue for him "as our earned discount actually improved as business took off during COVID." A third, a VP of transportation for a subscription CPG [consumer packaged goods] retailer that ships with UPS, said he hadn't heard of the freeze but noted "any shipper executive who asked for this or had it offered to them should have made preparations for the time this would end."

"We instituted a process as a temporary goodwill gesture to help customers who would otherwise have experienced a drop in incentive levels as result of the pandemic," said UPS spokesman Matthew O'Connor, referring to the freeze. "We have recently returned to the normal terms of our agreements."

"FedEx has been operating at peak levels since last March and has been working closely with our customers to help them navigate this new normal accelerated by the COVID-19 pandemic," said FedEx spokesman Chris Allen. "We have worked proactively with our retail customers to minimize the effects of unpredictable shipping volumes."

Our advice to all parcel shippers; there is no better time than the present to analyze their current contracts as we enter Peak Shipping Season 2021. Does their current contract provide them with the ideal pricing they need to remain profitable as business ebbs and flows in this continuing Covid-19 business environment? And, the best way to ensure that the contract analysis is sound and accurate is to rely on an independent Third Party to benchmark all parcel pricing contracts to allow them to sleep well at night, every night.

QUESTIONS & ANSWERS

DELAY CLAIMS

By: George Carl Pezold

We often get questions about delay claims and whether damages can be recovered. The simple answer is “Sometimes” but it depends on the individual facts and circumstances in each case.

A carrier is required by law to deliver with reasonable dispatch”. There is no question that delay can cause actual damage, and if so, such damage may be recoverable. As the Supreme Court said in *New York, P. & N. R. Co. v. Peninsula Produce Exch. of Maryland*, 240 U.S. 34 (1916):

...It is said that there is a different responsibility on the part of the carrier with respect to delay from that which exists where there is a failure to carry safely. But the difference is with respect to the measure of the carrier's obligation; the duty to transport with reasonable dispatch is none the less an integral part of the normal undertaking of the carrier.

Reasonable dispatch is defined by the courts as "the usual and customary time for similar shipments between the same origin and destination".

In any case involving delay there are some basic questions to consider:

- Was the shipment delivered with reasonable dispatch (or by a specified date and time)?
- Were there actual damages caused by the delay?
- What kind of damages and in what amount?
- Were they foreseeable (“general damages”) at the time the shipment was made (or prior to delivery)?
- If they were not foreseeable (“special or consequential damages”), did the carrier have actual or constructive notice of the possible consequences and the type and amount of damages if the shipment was delayed?

General Damages

An example where the court held that the shipper was entitled to general damages for a delay is *Paper Magic Group, Inc. v. J.B. Hunt Transport, Inc.*, 2001 WL 1003052 (E.D.Pa. Aug. 29, 2001), affirmed, 318 F.3d 458 (3rd Cir. 2003).

Paper Magic involved a delayed shipment of boxed Christmas cards. J.B. Hunt had picked up the shipment on October 16, 1998 at Paper Magic’s facility in Danville, PA. The shipment was to be delivered to Target Stores in Oconomowoc, WI. Typically, such a shipment would have a transit time of two or three days. Unbeknownst to any of the parties, the shipment had been misplaced by Hunt. On February 5, 1999, almost four months after the shipment was picked up, Hunt found the shipment sitting at its Chicago, IL terminal. Both Paper Magic and Target refused to accept delivery of the shipment because Christmas had passed and the shipment was now worthless to both. Thereafter, Paper Magic filed a claim for \$130,080.48, which represented the invoice value of the Christmas cards. Hunt was able to salvage the Christmas cards for \$49,645.96 and offered this salvage value to Paper Magic as full and final settlement of the claim. Paper Magic refused this offer.

The district court ruled that Hunt’s four-month delay in delivering the Christmas cards was essentially a “non-delivery.” The appellate court agreed and determined that Paper Magic was entitled to recover its full invoice price. The issue on appeal was whether Paper Magic was seeking special or general damages. General damages are those that are reasonably foreseeable in an action for breach of contract, whereas special

damages are not. After briefly recapping the case law lineage of special versus general damages, the Third Circuit held that:

Paper Magic is not seeking special damages. It is not seeking recovery for its loss of use, its lost future profits, or its additional labor. Instead, it is seeking actual damages: the loss in value of the shipment due to Hunt's delay. We do not think that the District Court erred in concluding that Hunt can be charged with foreseeing that a four-month delay would cause harm to Paper Magic. A carrier has reason to believe that a delay of four months will substantially diminish a shipment's value, particularly when the shipper, with whom the carrier has an ongoing business relationship, is in the business of producing seasonal paper goods. 318 F.3d at 462.

Special Damages

An example where the court found that the damages claimed were special damages, but held that the shipper was entitled to recover was *Marjan International Corp. v. V.K. Putman, Inc.*, 1993 WL 541204 (S.D. N.Y. 1993).

Marjan involved a shipment of oriental rugs that was intended for an auction in Tacoma, Washington. The shipment was delayed, missed the auction, and the rugs ultimately returned to the shipper in New York, with two valuable rugs missing. The plaintiff claimed for the value of the missing rugs, plus the expenses of sending its employees to Tacoma for the auction (wages, air fare and hotel accommodations), and also sued for the return of the freight charges, which the carrier had demanded before releasing the shipment upon its return to New York, see *Freight Claims in Plain English* (4th Edition) Section 7.4.9.

In awarding the plaintiff's expenses in connection with the auction, the court stated:

The court is fully satisfied that the prerequisite to recovery of special damages has been established in this case. [Supervisor Thomas] Major repeatedly and emphatically advised Putman's driver on the date of loading in New York that Marjan required delivery of the rugs to their destination no later than Friday, November 29 at 2:00 p.m., Pacific time. Major specifically informed Westfall: that the rugs were to be sold at an auction in Tacoma, and that failure to deliver on time would prevent the auction sale; that three or four Marjan employees would be flying to Tacoma with Major to receive and unload the cargo and to assist in the sale; and finally, that considerable advertising and other expenses would be incurred by Marjan in connection with the auction. Furthermore, Westfall acknowledged the urgency of prompt delivery before leaving Marjan's store in New York.

Contractual Considerations

Damages for a breach of the contract of carriage depend upon general rules of contract law and contract damages. That contract of carriage may be a bill of lading, or it may involve a formal transportation agreement between the shipper and the carrier. A few words of caution are in order.

The most common bills of lading are some version of a "uniform straight bill of lading" such as that published in the National Motor Freight Classification ("NMFC"). Typically these bills of lading contain language that says: "RECEIVED, subject to individually-determined rates or contracts that have been agreed upon in writing between the carrier and shipper, if applicable, *otherwise to the rates, classifications and rules that have been established by the carrier and are available to the shipper, on request*". In other words, in the absence of a transportation contract, the carrier's "rates, classifications rules" found in its tariffs are incorporated by reference into the contract of carriage. It should be noted that rules tariffs, particularly those published by major less-than-truckload ("LTL") carriers, may include provisions excepting or limiting claims for delay.

In addition, many larger shippers enter into “shipper-carrier” contracts with their carriers. Often carriers insist on inserting language to the effect that the carrier “shall not be liable for special or consequential damages, including but not limited to failure to deliver with reasonable dispatch, monetary penalties for service failure or lost profits”.

Thus, notwithstanding the established legal principles discussed above, shippers and their attorneys may find that collecting legitimate claims for delay can be difficult.

NOTE: For an in-depth discussion of this subject see *Freight Claims in Plain English* (4th Edition) at Section 7.0 Damages, which is available in a soft-cover edition from the Transportation & Logistics Council.

RAIL

BIDDING WAR FOR KANSAS CITY SOUTHERN

On August 10, 2021 Canadian Pacific (“CP”) announced a new proposal to acquire Kansas City Southern Railway (“KCS”) with a stock and cash transaction representing an enterprise value of about \$31 billion, which it asserted was a superior offer than that from Canadian National Railway (“CN”). On August 12, 2021 the KCS issued a news release announcing that

its Board of Directors following a careful and thorough review in consultation with outside financial and legal advisors, has unanimously determined that the unsolicited proposal received from Canadian Pacific Railway Limited (“CP”) on August 10, 2021 to acquire KCS in a cash and stock transaction does not constitute a “Company Superior Proposal” and could not reasonably be expected to lead to a “Company Superior Proposal,” as defined in KCS’ previously announced definitive merger agreement with CN.

The KCS Board went on to reaffirm its recommendation to KCS shareholders to vote in favor of its merger with CN.

Visit <https://futureforfreight.com/canadian-pacific-submits-superior-proposal-to-combine-with-kansas-city-southern/> to view CP’s announcement and visit [https://www.kcsouthern.com/pdf/press-release/KCS Board of Directors Unanimously Determines Proposal from Canadian Pacific Railway Does Not Constitute a Superior Proposal to Its Agreement with CN.pdf?language_id=1](https://www.kcsouthern.com/pdf/press-release/KCS%20Board%20of%20Directors%20Unanimously%20Determines%20Proposal%20from%20Canadian%20Pacific%20Railway%20Does%20Not%20Constitute%20a%20Superior%20Proposal%20to%20Its%20Agreement%20with%20CN.pdf?language_id=1) to view the KCS news release.

RECENT COURT CASE

NO CARMACK PREEMPTION WHEN NOT A PARTY TO BILL OF LADING

In a case that was removed from state court to federal court, the U.S. District Court for the Eastern District of Kentucky (Southern Division), the court determined that only a party entitled to recover under the Carmack Amendment will have state law claims preempted by Carmack and therefore the case was remanded back to state court.

This case involved a motorhome that was purchased by Plaintiffs (wife and since deceased husband) from Defendant Day Brothers Auto and RV Sales, LLC (“Day”) in Kentucky. Subsequent to the purchase, Plaintiff contacted Day to arrange for some warranty work on the motorhome. Unbeknownst to Plaintiff,

after Day took possession of the motorhome it decided that it was necessary to send the motorhome to the manufacturer in Indiana to complete the warranty work. Day hired Defendant Star Fleet Trucking, Inc. (“Star”) to transport the motorhome who in turn hired Defendant Dean Osborn to actually drive the motorhome to Indiana. While Osborn was driving the motorhome in Kentucky, he attempted to drive under a bridge or overpass without sufficient height clearance, damaging the motorhome.

Plaintiff filed a lawsuit in state court naming Day, Star and Osborn as defendants, seeking several state law claims including negligence and breach of contract. Of significance, Plaintiff asserted that neither she nor her husband were aware of any arrangements between the Defendants to transport the motorhome out of Kentucky to Indiana.

Defendants Star and Osborn removed the case to the federal District Court and argued that the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 14706, completely preempted Plaintiff’s state law claims because they relate to property damaged in interstate transport. These Defendants invoked the federal question jurisdiction of Carmack as the basis for removal.

Plaintiff filed a motion to remand the case back to state court, arguing amongst other things, that the Carmack Amendment does not preempt her claims because she and her husband were neither aware of nor parties to a bill of lading that existed between Day Brothers (the shipper of the motorhome) and Star Fleet (the carrier responsible for transporting the motorhome to Indiana).

In its discussion, the Court pointed out that Defendants did not demonstrate that the Court had subject matter jurisdiction under the Carmack Amendment.

49 U.S.C. § 14706(a)(1) establishes that a carrier is only “liable to the person entitled to recover under the receipt or bill of lading.” In this case, it appears undisputed that Star Fleet was the carrier responsible for transporting the motorhome to Indiana, and a bill of lading only existed between it and Day Brothers, the shipper of the motorhome. In other words, there is no indication or representation in the record that the [Plaintiffs] were a party to the bill of lading; in fact, it appears they may not have even been aware of it. Given these circumstances, the Defendants have not demonstrated that the [Plaintiffs] could have originally brought this action in federal court.

In reaching its conclusion, the District Court noted that:

defendants can only remove a civil case if this Court has subject matter jurisdiction in the first place. In other words, a civil action is only removable if the plaintiff could have originally brought the action in federal court. 28 U.S.C. § 1441(a). In the end, the Sixth Circuit has made it clear that “[t]he party seeking removal bears the burden of demonstrating that the district court has original jurisdiction” and “the removal statute should be strictly construed and all doubts resolved in favor of remand.” *Eastman v. Marine Mech. Corp.*, 438 F.3d 544, 549-550 (6th Cir. 2006) (internal quotation marks and citation omitted).

Here, since it appears undisputed that Day Brothers was the shipper of the motorhome and the [Plaintiffs] were not a party to the bill of lading, there remain doubts as to whether the Defendants have met their burden of demonstrating that this Court has federal question jurisdiction through preemption under the Carmack Amendment. As noted, all such doubts must be resolved in favor of remand. *Eastman*, 438 F.3d at 549-550. Accordingly, the Court concludes that remand is warranted.

See [*Handshoe v. Day Bros.*](#), 2021 WL 2903232

TECHNOLOGY

DOT SEEKS INFORMATION ON AI FOR INTELLIGENT TRANSPORTATION SYSTEMS

The US Department of Transportation (“DOT”) has issued a Sources Sought Notice (“SSN”) to solicit feedback from the public on deployment-ready applications that leverage artificial intelligence (“AI”) to address intelligent transportation systems (“ITS”) needs. According to the SSN, its purpose is to:

solicit feedback from public sector agencies, industry, research laboratories, academia, and other stakeholders on “deployment-ready” applications that leverage AI to address ITS needs, specifically to improve the transportation system and users’ safety, mobility, equity, accessibility, productivity, efficiency, and environmental impacts. Deployment-ready AI-enabled ITS applications are those that have been successfully prototyped and validated to address specific ITS challenges and are sufficiently mature for integration into existing ITS operations within 6 to 9 months. This notice also seeks inputs on existing capabilities in developing and deploying AI-enabled ITS applications that fall under one of the seven broad categories listed in Table 1 in Section 1.3. The DOT is particularly interested in responses to the questions listed in the appendix. This feedback will help guide DOT in shaping potential investments towards pilot deployments of ITS applications that utilize AI.

Visit <https://sam.gov/opp/10cf7c2f22a04c098e767e25eca2fdee/view#general> for more information.

WEED KILLING ROBOTS

An interesting article on the development of weed killing robots claims they can reduce pesticide use and be part of a more sustainable food system by using laser to kill weeds. While dystopian images of flying machines from Terminator zapping people may come to mind, these laser-armed robots operate only inches above the ground, destroying weeds with laser bursts.

Visit https://www.theguardian.com/environment/2021/aug/14/weedkilling-robots-farming-pesticide-use-sustainable?utm_source=pocket-newtab to view the article.

COST OF DRIVING

Can electric vehicles truly impact the cost of driving? An article (from 2019) discusses how a fleet of seven Teslas used in a shuttle service are the highest mileage Teslas in the world and are living up to the promise of cheaper vehicles with unprecedented durability compared to their conventional combustion-engine counterparts.

Read this in conjunction with the discussion of vehicle-mile-taxes discussed above.

Visit <https://getpocket.com/explore/item/electric-cars-are-changing-the-cost-of-driving> to view the article.

CCPAC NEWS

CCPAC NEWS: CCP ON-LINE EXAM IS HERE NOW !

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Great News! The CCP [Certified Claims Professional] Exam is now accessible on-line and available to anyone 24/7. This means that instead of having to travel to a designated site with only one or two opportunities per year to take the CCP Exam it is available now. You can access the CCP Exam Portal by clicking on the “Certification” tab on the Home page, select “Application to become Certified” and from there click on “Go To On-Line Exam Portal”. NOTE: Be certain that you read the certification process that takes applicants through the steps by first creating an On-Line Exam Account. Once you have completed this step you will need to complete the On-Line CCP Exam Application and Calculation of Points forms. Once your application has been submitted along with attached supporting documentation, applicants will need to wait until the CCP Exam Committee approves your application before you can proceed to purchase and take the timed CCP Exam.

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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Website www.ccpac.com

CLASSIFICATION

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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- Over 6,337 active, world-wide users

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The Transportation & Logistics Council, Inc.

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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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- Access to the **Members Only** section of the website.

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Freight Claims in Plain English

Monday, October 18 th through Thursday, October 21 st - 2:00pm - 4:00pm EST	MEMBER		NON-MEMBER	
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The hard-cover edition of Freight Claims in Plain English (4th Ed.) was out of stock, so the Council has arranged to have it reprinted in a soft-cover edition.

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

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

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