

# TRANSDIGEST

Transportation & Logistics Council, Inc.

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**VOLUME XXVI, ISSUE NO. 283, SEPTEMBER 2021**

## **Fall Seminars – Register Now!**

- **Still Time to Register for Fall Seminars & Virtual Workshop!**
- **Save the Date for T&LC's 48th Annual Conference**
- **USPS Rate Increases Approved**
- **Methanol Powered Ships**
- **The Prima Facie Case for Carmack Claim**
- **States Push for Zero Emissions Vehicles**
- **New FCDC Docket**
- **More Questions & Answers**

***SOFT COVER EDITION!***

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

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## GUEST EDITORIAL

### SPOTTING OVERCHARGES IN YOUR SPOT QUOTES

By Vikki Van Vliet, Sr. Vice President of Sales & Marketing  
TransAudit

In today's ever changing market, spot quotes are more prevalent than ever and dramatically increasing shipping costs. Though spot quotes seem to be the new normal, it is important to note that existing contracted rates should apply and only in extenuating circumstances should an out of contract charge or spot quote be accepted. Controlling costs, ensuring billing and payment accuracy, and ascertaining refunds for overpayments have never been more important than today.

When ascertaining or a spot or out of contract quote, the shipper should insist that its existing fuel and accessorial schedules are adhered to and only the freight component is increased. Adherence to existing accessorial and fuel surcharge schedules will save money and ensure that cost increases are limited. In the cases where contracted accessories and fuel rates are upheld, a post audit can ensure that the resultant bill and payment accurately reflects the shippers' contracted schedules.

Can spot quotes be audited and can overcharges be recovered? Absolutely! Even today, spot quotes should be reviewed to determine if they were billed and paid as per the agreed upon terms. Often fuel and other accessorial charges are double charged when they are included in the quote, but also assessed again thereafter. Additionally, errors also occur in the payment of spot quotes resulting in even more monies being paid to the carrier beyond the initial higher spot quote.

In the simplest sense, a transportation post payment audit, regardless of analyzing contracted or out of contract transactions, is the process of reviewing and validating your freight carrier's invoices. The overarching goal of a transportation post audit is to determine if your carrier has overbilled you or has been overpaid, and all such overpayments are returned to the shipper, even for spot quotes.

With ever rising transportation costs, it is important to contain increases wherever possible and ensure that each transaction is accurately billed and paid for. This is true for contracted transactions, as well as spot quotes. Whether your bills are reviewed post payment internally or by an outside specialist, the assurance that each transaction was billed and paid correctly will go a long way towards controlling costs and improving profitability.

## ASSOCIATION NEWS

### STILL TIME TO REGISTER FOR VIRTUAL FALL SEMINARS – WHAT YOU NEED TO KNOW!

Whether you are a seasoned professional or a newcomer we all have a “Need to Know” to keep abreast of developments and sharpen our skills, so REGISTER NOW for one or more of these outstanding seminars!

#### **Freight Claims in Plain English**

Presented by Gerard F. Smith

This seminar is based on the landmark text, “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.

8 hour course being offered over 4 days

Monday October 18 - Thursday October 21, 2021, 2:00pm - 4:00pm EST

Members \$550 and Non-Members - \$650

Up Next....

#### **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 being offered 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

Members \$550 and Non-Members - \$650

**Thank you to our Sponsors!**



## **T&LC VIRTUAL WORKSHOP: FREIGHT CLAIMS Q&A – ROUND 3**

On October 13, 2021 at 1:00pm EST the Transportation & Logistics Council will offer a 90 minute “Special Edition Virtual Workshop” on questions and answers.

Our next TLC Virtual Workshop will focus on one of the most controversial issues with which claims professionals have to deal - limitations on a carrier’s liability for loss and damage to cargo. Our panel of experts will answer some of the most common questions that claims professionals have AND you will be able to ask your own questions!

- What are liability limitations and how do carriers limit their liability?
- What are the differences between domestic, international and cross-border shipments with Mexico and Canada?
- How and when do motor carrier and surface freight forwarder liability limits apply?
- How and when do air carrier and air freight forwarder liability limits apply?
- How and when do ocean carrier and NVOCC liability limits apply?
- What can be the consequences if a broker or intermediary makes the arrangements?

### **Moderator:**

Brandon Arnold, Vice President, Operations, Intelligent Logistics, LLC

### **Panelists:**

Wesley S. Chused, Attorney, Preti Flaherty Beliveau & Pachios LLP

Paul Kozacky, Attorney, Kozacky, Weitzel, McGrath, PC

Darryl Gash, Corp. Logistics Manager, Dillard's Logistics

Carrie Frisbie, Director, Cargo Claims, SEKO Logistics

For more information or to register visit [www.tlcouncil.org](http://www.tlcouncil.org) or see registration form below.

## **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

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

Diane Smid or Katie Woerner - Transportation & Logistics Council

[diane@transportlaw.com](mailto:diane@transportlaw.com)

631-549-8984

## **PLAN NOW: SAVE THE DATE – 48<sup>TH</sup> ANNUAL CONFERENCE: WILL BE LIVE**

### **Education For Transportation Professionals**

**We are GOING LIVE in 2022!** Come and join other transportation and logistics professionals at the Transportation & Logistics Council's ("TLC") 48th Annual Conference in Orlando on March 21st through 23rd at the Doubletree by Hilton Orlando at SeaWorld. Not only is it the best educational conference in the industry, but a great opportunity for networking at our Hospitality Suites and President's Reception.

Here is what we are planning for 2022: Starting with the "kickoff" on Monday morning, "The Crystal Ball", attendees will enjoy general sessions such as "Law of The Land, Law of The Jungle", the popular "Transportation Attorney Panel", "Supply Chain Security", "Loss Prevention and Mitigation of Damage" and "Freight Claims- Questions and Answers". Then there will be choices among the intensive topical workshops such as "International Trade & Transportation", "Transportation Insurance", "Brokers & 3PL's", "LTL Pricing and the NMFC" and an opportunity to "Meet the Experts".

The Council is assembling an impressive list of speakers and presenters for the educational sessions, including top experts and experienced practitioners who will give attendees practical information and advice that they can use in their everyday business.

And, for those that want an in-depth educational experience, before the Conference on Sunday, March 20th, the Council also offers three optional full-day seminars - Contracting for Transportation & Logistics Services, Freight Claims in Plain English, and Transportation, Logistics and the Law, all presented by leading transportation attorneys.

These are the kind of things TLC's Annual Conferences have focused on since it was established almost 50 years ago, and what transportation professionals really need to know about.

"Early Bird" Registration" is now open – see Registration Form attached. And watch our Website at [www.TLCouncil.org](http://www.TLCouncil.org) for updates on the 2022 Program and Hotel Arrangements.

## **NEW MEMBERS**

### **Regular Members**

#### **Bryan Nelson**

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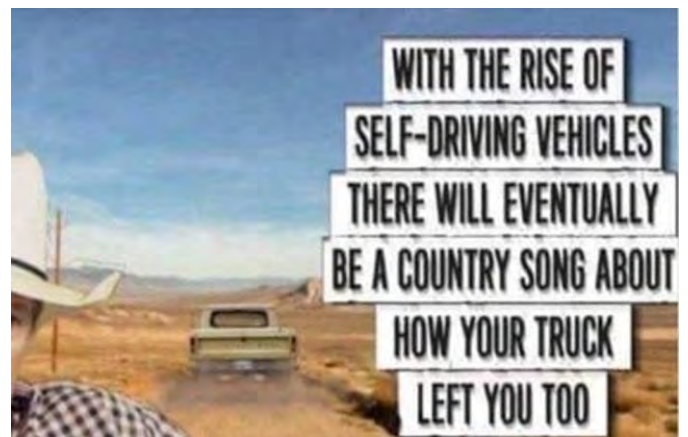
## HUMOR

Life lessons:



### Bookcase converts to coffin when needed

July 26, 2020





## INTERNATIONAL

### COVID-19 IMPACTS TO SUPPLY CHAINS

Unfortunately, as the “two weeks to flatten the curve” has now become a year and a half, the global supply chain continues to be disrupted by the ongoing COVID-19 pandemic. A reminder that Everstream Analytics provides a weekly summary of supply chain impacts due to the pandemic and that these updates are a valuable source to stay on top of international trade as the disruptions appear and fade at different locations over time.

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

## LEGISLATION

### RECORD RETENTION AND OCEAN SHIPPING

The following are from Henry Seaton’s September 2021 Regulatory and Legislative Update:

#### **FMCSA seeks feedback on Part 379 records retention requirements**

Federal Motor Carrier Safety Administration (“FMCSA”) is requesting comments by September 23 on the necessity and appropriateness of records retention requirements in Part 379 of the Federal Motor Carrier Safety Regulations (“FMCSRs”). The agency noted that Appendix A to Part 379 provides a generalized listing of retention times for records required to be prepared or compiled by certain for-hire motor carriers and brokers subject to the commercial regulations. However, only a few of the FMCSRs refer to the record-keeping requirements in Part 379, it said. FMCSA’s Federal Register notice poses several questions related to retention times and the numbers and costs of records retention. For the Federal Register notice, visit <https://www.federalregister.gov/d/2021-18169>.

#### **House bill seeks to tighten regulations on ocean shipping**

Reps. John Garamendi (D-California) and Dusty Johnson (R-South Dakota) have introduced legislation (H.R. 4996) that would represent the first major update of federal regulations concerning the ocean shipping industry in more than 20 years. The bill, which is supported by several organizations related to trucking, would require ocean carriers or marine terminal operators to certify that any detention or demurrage charges comply with federal regulations and would shift the burden of proof regarding reasonableness from the invoiced party to the ocean carrier or marine terminal operator. The bill would also authorize the Federal Maritime Commission (“FMC”) to investigate on its own initiative ocean carriers’ business practices and apply enforcement measures as appropriate. For more information on H.R. 4996, visit <https://www.congress.gov/bill/117th-congress/house-bill/4996>.

A little over a year ago, the American Trucking Associations filed a complaint with FMC alleging that the Ocean Carrier Equipment Management Association and 11 ocean carriers have overcharged motor carriers and their customers for intermodal container chassis at ports and inland terminals throughout the U.S. Adjudication of that complaint is slowly working its way through the FMC process. For the ATA complaint and other documents related to the proceeding, visit <https://www2.fmc.gov/readingroom/proceeding/20-14>.

## MOTOR

### FMCSA CONSUMER COMPLAINT DATABASE

On September 3, 2021 the Federal Motor Carrier Safety Administration (“FMCSA”) published a notice and request for comments in the Federal Register regarding its:

plan to submit the Renewal Information Collection Request (“ICR”) described below to the Office of Management and Budget (“OMB”) for its review and approval and invites public comment. This renewal collection of information is for the National Consumer Complaint Database (“NCCDB”), which is an online interface allowing consumers, drivers and others to file complaints against unsafe and unscrupulous companies and/or their employees, including shippers, receivers and transportation intermediaries, depending on the type of complaint. These complaints cover a wide range of activities, including but not limited to driver harassment, coercion, movement of household goods, financial responsibility instruments for brokers and freight forwarders, Americans with Disability Act (“ADA”), Electronic Log Device (“ELD”), Medical Review Officer (“MRO”), and Substance Abuse Practitioner (“SAP”) complaints. FMCSA requests approval to renew the ICR titled “National Consumer Complaint Database” covered by OMB Control Number 2126-0067 in order to continue to collect consumer complaint information so FMCSA can use complaint data to take enforcement action, better inform FMCSA policies for safer motor carrier operations, and improve consumer protection.

Comments must be received by November 2, 2021.

Visit <https://www.federalregister.gov/d/2021-19079> to view the Federal Register notice.

## OCEAN

### NATIONAL SHIPPER ADVISORY COMMITTEE

On September 9, 2021 the Federal Maritime Commission (“FMC”) announced the membership of its newly formed National Shipper Advisory Committee.

From the press release:

The Committee is comprised of 24 members, evenly divided between those who export cargo from and those who import cargo to the United States, that will advise the Commission on policies relating to the competitiveness, reliability, integrity, and fairness of the international ocean freight delivery system.

“The current freight transportation challenges have illustrated how prescient my colleague Rebecca Dye was in recommending to Congress that it establish this Shipper Advisory Committee at the FMC. I and the other Commissioners need rapid access to the perspectives of importers and exporters on the ground dealing with the realities of ocean shipping every day. We also need them to meet and help guide our efforts and those outside the FMC to improve the system and make it easier, fairer, and more efficient to American shippers. I am truly grateful to all of those who volunteered to serve on what I know will be an invaluable committee,” said FMC Chairman Daniel B. Maffei.

Committee members will serve until December 31, 2024.



Visit <https://www.fmc.gov/fmc-announces-national-shipper-advisory-committee-membership/> to view the press release with the complete list of members.

## **FMC DEMURRAGE AND DETENTION INITIATIVES**

On September 15, 2021 the Federal Maritime Commission (“FMC”) announced its vote to move forward with two demurrage-and-detention related initiatives proposed by Commissioner Rebecca F. Dye as part of Fact Finding 29. Unlike Commissioner Dye’s other Interim Recommendations, these initiatives required formal Commission approval.

From the FMC press release”

The first initiative is to issue a policy statement on issues that affect the ability of shippers, truckers, and others to obtain reparations for conduct that violates the Shipping Act, including conduct related to demurrage and detention. The policy statement will provide guidance on the scope of the prohibition against carrier retaliation, when attorney fees may be imposed on a non-prevailing party, and who may file a complaint with the Commission alleging unreasonable conduct.

Additionally, the Commission in due course will issue an Advance Notice of Proposed Rulemaking (“ANPRM”) that will solicit public comments on two questions: first, whether the Commission should require ocean common carriers and marine terminal operators (“MTOs”) to include certain minimum information on or with demurrage and detention billings; and second, whether the Commission should require carriers and marine terminal operators to adhere to certain practices regarding the timing of demurrage and detention billings.

The Commission has also moved forward with other recommendations from FF29, including hiring additional staff for CADRS [Consumer Affairs & Dispute Resolution Services, <https://www.fmc.gov/databases-services/consumer-affairs-dispute-resolution-services/>] including one person who will be designated as the agency’s exporter advocate. The Commission will make announcements related to other recommendations as developments warrant.

Visit <https://www.fmc.gov/fmc-to-issue-guidance-on-complaint-proceedings-and-seek-comments-on-demurrage-and-detention-billings/> to view the press release.

## **MAERSK MOVES TOWARD METHANOL**

The world’s largest container shipping line is making a push to reduce its carbon footprint. On August 24, 2021 A.P. Moller-Maersk A/S announced that it has ordered eight new large ocean-going vessels capable of being operated on carbon neutral methanol rather than oil-based fuel. The new vessels will each cost \$175 million, about 10-15% more than standard vessels. Container ships typically have a lifespan of between 20 and 25 years.

The new vessels come as part of Maersk’s ongoing fleet renewal program and will replace tonnage of more than 150,000 TEU which is reaching end-of-life and leaving the Maersk managed fleet between 2020 and Q1 2024.

Visit <https://www.maersk.com/news/articles/2021/08/24/maersk-accelerates-fleet-decarbonisation> to view the press release.

## PARCEL EXPRESS

### USPS RATE ADJUSTMENTS

Last month (TRANSDIGEST #282) we reported that the United States Postal Service (“USPS”) had filed notice with the Postal Regulatory Commission (“PRC”) regarding a temporary price adjustment for key package products for the 2021 Peak Holiday Shipping Season and included the proposed changes.

On August 31, 2021 the PRC issued its order approving the temporary changes, scheduled to become effective October 3, 2021 and remain in effect until December 26, 2021.

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>

The final order approving the temporary price adjustment can be found here: [https://www.prc.gov/docs/119/119663/Order\\_5973.pdf](https://www.prc.gov/docs/119/119663/Order_5973.pdf). The price change tables are also available on the Postal Service’s Postal Explorer website at [pe.usps.com/PriceChange/Index](https://pe.usps.com/PriceChange/Index).

The Postal Service’s “Delivering for America” 10-year plan aims to reverse a projected \$160 billion in losses over the next 10 years. The Plan’s growth and efficiency initiatives will spur cash flow and savings to make \$40 billion in capital investments over the next 10 years – including approximately \$20 billion towards the Postal Service’s mail and package processing network, facility upgrades and procurement of new processing equipment.

Thanks to Tony Nuzio of ICC Logistics Services, Inc. for the heads up.

## QUESTIONS & ANSWERS

### FREIGHT CLAIMS – ALL ABOUT SEALS

By: George Carl Pezold

**Question:** We are a broker. We are finding more customers requiring language regarding broken seals.

There is no language concerning seals in Carmack; Title 21 of the Code of Federal Regulations (“CFR”) or in Food Safety Modernization Act (“FSMA”) of 2011. In reading these laws and regulations, the term “unsanitary conditions” appears to be open to a wide range of interpretation.

In reading your article regarding Food Safety - Broken or Missing Seals you discuss language that the shipper wants in the contract vs. language the carrier wants in the contract.

We (as a broker) want to work with the shippers to address this language so as to protect ourselves and our carriers in the case of an incorrect seal number, seal break, or no seal ever being put on the trailer.

There are many shippers that give the seal to the driver and send them on their way, effectively washing their hands of the responsibility. Since this is not a normal function of the driver, some drivers just either forget or do not fully understand the need for the seal to be on the trailer when they arrive at the receiver. Many drivers padlock their trailers and consider that ‘sealed’. When the driver arrives at the consignee and the trailer is not properly sealed, it is rejected, even though there is a padlock, and the driver has the seal still in his possession (albeit unused).

I have seen seal numbers written on the bill of lading (“BOL”) by the shipper with numbers transposed or missing; or the entirely wrong seal number written because the shipping clerk wrote the seal number on the wrong BOL. How can you prove this is a shipper error and the carrier is not liable?

Is it advantageous (or even possible) on the part of the broker/carrier to put more pressure on the shipper by adding additional verbiage to the contract? Will the large food shippers/receivers even consider additional verbiage that will hold them accountable for applying/noting the seal? There are many situations that can happen where the seal would break but the doors were never opened to expose the goods inside to ‘unsanitary conditions.’

Below are some examples:

- Shipper must seal trailer and note seal number on the BOL with shipper and carrier initials at time of shipment.
- If multiple stops, shipper must supply all seals.
- In the case that the seal is broken or shows signs of tampering because the carrier added a lock to the trailer on top of the seal. Carrier would not be liable for loss/damage.
- In the case of an unforeseen circumstance (i.e. trailer breakdown/maintenance) – Carrier will call for authorization to break the seal and provide a new seal number to the Shipper prior to commencing with shipment.
- Shipper must have burden of proof as imposed by Carmack prior to rejecting an entire shipment or filing a cargo claim against the carrier for loss.

Do you have any suggestions of verbiage that would be effective in helping carriers to:

1. Not have entire loads rejected because the seal was not intact.
2. Prove there is no contamination to the goods arriving without the seal intact.

**Answer:** This is an excellent question.

It is a common practice for shipper contracts to include language to the effect that a broken or missing seal at destination may, without further evidence of actual damage, allow rejection of the load as a total loss without any obligation to salvage or otherwise mitigate damages.

It is our experience that when such language is included in a shipper contract (whether a shipper-broker or a shipper-carrier contract) there is often no room for negotiation – the shipper’s position is “take it or leave it”.

Also, even though it may not be a party to the shipper’s contract, the consignee or customer often has its own similar policy about seals and rejection of loads with broken or missing seals.

As you know, brokers usually find themselves “in the middle” when broken or missing seals and consignee rejections arise. The question is - what can the broker do to minimize or avoid disputes and conflicts?

#### Dealing with Shippers:

- Have your own broker-customer contract with appropriate language regarding seals
- Offer suggested language to include in the shipper’s contract, or as an addendum that specifically covers seals and seal procedures

- In the absence of a formal agreement, include your seal terms and conditions by reference into your rate quotation/confirmation to the customer

Dealing with Carriers:

- Enter into written broker-carrier contracts with all carriers before tendering any shipments
- Include language reflecting your typical customer contractual provisions and/or requirements relating to broken or missing seals
- Make sure that both the shipper and consignee seal policies are clearly explained to your carriers and their drivers
- In the absence of a formal broker-carrier agreement, include your seal terms, conditions and procedures by reference into your rate confirmation with the carrier

**Recommendations and Suggested Procedures:** We receive a lot of questions involving shipper's seals. Here are some recommendations and procedures for typical sealed "Shipper Load & Count" shipments (where driver is unable or not permitted to observe count and condition of the product).

At time of shipment:

- Only high quality seals should be used (tamper proof, etc.)
- Seals should be properly attached upon completion of loading by the shipper's employee, not the carrier's driver
- Seal number(s) should be recorded on the bill of lading or shipping document
- If there are multiple stop-offs, driver should be provided with additional seals and instructions to have the consignee attach a new seal upon partial unloading and note the new seal on the bill of lading or shipping document
- Drivers should be clearly instructed not to break or remove seals at any time, unless required by governmental authority, accident or equipment breakdown, at which time carrier should request instructions from shipper for replacing seals
- In the event a driver is required to break or remove the seal for any reason, the driver should be instructed to inspect the shipment to determine if there is any damage and confirm the count.

At time of delivery:

- Seal numbers should be checked against the shipper's seal numbers; seals, doors, locks, etc. should be inspected for possible tampering
- Only the consignee should be permitted to break or remove a seal
- Any observable discrepancies (damage, shortage, load shift, etc.) should be promptly recorded and pictures taken, and documented
- Deviations from route, unusual delays or events should be documented
- If possible, the product should be unloaded and inspected by an independent inspector or quality control employee for any evidence of shortage, damage to packaging, contamination, presence of foreign substances, etc. and a report made.
- If the shipment is rejected without unloading and inspection, shipper and consignee should promptly be notified and disposition instructions should be requested (salvage, return to shipper, etc.)

Upon Return to Shipper (or third-party for disposition):

- Time is of the essence and this should be done as quickly as possible
- Upon return the product should be unloaded and inspected by an independent inspector or quality control employee for any evidence of shortage, damage to packaging, contamination, presence of foreign substances, etc. and a report made.
- Based on the inspection a determination should be made as to whether the product is fit for human consumption and/or its intended purpose, salvaged or destroyed, with the reasons for such determination.

## **CARRIERS – WHAT TO DO WITH EXTRA PRODUCT?**

**Question:** Shipper placed extra pallet of product on trailer which was then refused by receiver. Broker attempted to contact their customer to see what they will like done with load. It has been 6 hours and customer still has not responded and will likely not respond until next day. What is the carrier responsibility in this situation and how long is carrier is expected to hold load?

**Answer:** Situations vary, but there are some generally recommended rules that may answer your question. If the shipment moved under a typical Uniform Straight Bill of Lading, Section 4 of the terms and conditions would apply. This section reads as follows:

Sec. 4.

(a) If the property is stopped and held in transit upon request of the shipper, owner or party entitled to make such request, or the consignee refuses the shipment tendered for delivery by carrier or if carrier is unable to deliver the shipment, because of fault or mistake of the consignor or consignee, the carrier's liability shall then become that of a warehouseman. Carrier shall promptly attempt to provide notice, by telephonic or electronic communication as provided on the face of the bill of lading, if so indicated, to the shipper or the party, if any, designated to receive notice on this bill of lading. Storage charges, based on carrier's tariff, shall start no sooner than the next business day following the attempted notification. Storage may be, at the carrier's option, in any location that provides reasonable protection against loss or damage. The carrier may place the shipment in public storage at the owner's expense and without liability to the carrier.

(b) If the carrier does not receive disposition instructions within 24 hours of the time of carrier's attempted first notification, carrier will issue a second and final notification by telephonic or electronic communication. Such notice shall advise that if carrier does not receive disposition instructions within five (5) days of that notification, carrier has the right to offer the shipment for sale, and carrier may sell the property under such circumstances as may be authorized by law. The amount received from the sale will be applied first to the carrier's invoice for transportation, storage and other lawful charges, including those incurred by the carrier in selling the goods. The owner will be responsible for the balance of any charges not covered by the sale of the goods. If there is a balance remaining after all charges and expenses owing to the carrier are paid, such balance will be paid to the owner of the property sold, subject to a claim and proof of ownership

(c) When perishable goods cannot be delivered and disposition instructions are not given within a reasonable time, the carrier may dispose of the property in a manner that the carrier deems best serves its disposition.

## RAIL

### KANSAS CITY SOUTHERN TO MERGE WITH CANADIAN PACIFIC

Despite indicating last month that it was not interested in merging with Canadian Pacific Railway (“CP”) and that it intended to proceed with a deal with Canadian National Railway (“CN”), on September 15, 2021 Kansas City Southern (“KCS”) announced that it was terminating its pending merger with CN and that it would merge with CP.

For more information, visit <https://www.kcsouthern.com/media/news/news-releases/kansas-city-southern-terminates-canadian-national-railway-merger-agreement-and-is-entering-into-merger-agreement-with-canadian-pacific-railway> to view the KCS press release.

## RECENT COURT CASE

### PLAINTIFF MUST ESTABLISH PRIMA FACIE CASE FOR CARMACK CLAIM

The U.S. District Court for the Middle District of Florida issued a decision after a bench trial on a cargo claim holding the carrier was not liable for damages.

In this case, a shipment of beef was picked up in Georgia by defendant Titan Trans Corporation (“Titan”) and delivered to a Cargill, Inc. facility in Wisconsin for processing. The plaintiff, Scotlynn USA Division, Inc. (“Scotlynn”), is a broker and while a broker is not usually a party to loss or damage claims, Scotlynn and Titan had a Broker-Carrier agreement that specifically provided that the carrier would be liable for loss to a shipment as follows:

Carrier shall be responsible for the proper care and handling of freight moving under this Agreement, and shall be liable to Broker and Broker’s Customers for the full actual loss, damage, or injury to property occurring while in the custody, possession or under the control of Carrier, its employees, or its contractors and agents. For purposes of this Agreement, the term “full actual loss” shall mean the value of the cargo as determined by Shipper.

The load of beef was allegedly damaged enroute when some of the cardboard containers (called combos) in which the beef was packaged tipped over inside the trailer during transportation. The consignee refused the shipment.

Scotlynn paid its customer (the shipper of the beef) for the claimed damage, received an assignment of the shipper’s rights to sue Titan, and then sued Titan under the Carmack Amendment.

Scotlynn’s claim under the Carmack Amendment failed for several reasons. First, Scotlynn failed to produce any reliable evidence of the dollar damage to the beef as of the date the beef was delivered. There was no evidence that the





inner plastic lining was punctured or that the beef was exposed. The combos simply shifted forward. There was never an inspection by a food safety expert.

Second, the evidence showed that the shipper loaded the beef on Titan's trailer and was therefore responsible for the load shifting that allegedly caused damage to the beef. During the trial it was determined that the cargo was loaded by the shipper, the driver was not allowed on the loading dock or in the trailer during the process and that the driver only looked into the trailer briefly as the doors were closed and sealed after pulling away from the dock.

Third, the beef had salvage value at time of delivery, but Scotlynn failed to timely pursue salvage opportunities. This was the result of a combination of factors, including miscommunication between the parties, the shelf life of the product, and that the driver had to take a break due to hours-of-service rules.

As a result the above, Scotlynn, who had already paid the shipper, was unable to collect anything from the carrier.

There are several lessons to be learned from this case. The detailed decision provides guidance on the full cycle of issues in a suit for cargo loss, including taking responsibility for loading and securing of cargo, handling the rejection of a shipment, inspecting and assessing damages, and mitigating damages. In order to prevail, a plaintiff must be able to establish a prima facie case as required by the Carmack Amendment. It must prove all three: (1) it delivered the goods to the motor carrier in good condition; (2) the goods were delivered in a damaged condition; and (3) the amount or value of the damage to the goods.

In addition, if you load and secure the cargo, you may be responsible for any resulting damage and you must make realistic and timely efforts to mitigate any damage.

If you are a broker, depending on the facts and circumstances of the situation, you should closely review such claims before pursuing them in court. While it may make sense to pay the shipper's claim to retain the shipper's business, it may not be wise to pursue the claim in court. Further, brokers may have an obligation to take precautions to receive salvage value for freight rejected by a consignee.

*Scotlynn USA Divisions, Inc. v. Titan Trans Corp.*, 2021 WL 3704087 (8/20/21) available online at <https://docs.justia.com/cases/federal/district-courts/florida/flmdce/2:2018cv00521/352971/155>

## TECHNOLOGY

### ZERO EMISSIONS

The push for electric vehicles got a boost on Wednesday, September 8, 2021 when New York Governor Kathy Hochul signed a bill amending the state's environmental conservation law that would ban the sale of all gas-powered vehicles in the state by 2035. Last year, California governor Gavin Newsom signed an executive order that is similar in that it would also ban the sale of new gas-powered passenger cars and trucks starting in 2035 as well as requiring all new medium-duty and heavy-duty vehicles to be zero-emission by 2045.

According to the September 8, 2021 announcement from New York:

The Governor signed legislation (A.4302/S.2758), setting a goal for all new passenger cars and trucks sold in New York State to be zero-emissions by 2035. In addition, the Governor directed the Department of Environmental Conservation to release a proposed regulation that would significantly reduce air pollution from trucks. If adopted, the regulation would accelerate zero-

emission truck sales, resulting in improved air quality statewide and in particular those communities disproportionately impacted by transportation-related pollution. The actions announced today in advance of Climate Week 2021 support New York's ambitious goal of reducing greenhouse gas emissions by 85 percent by 2050, as outlined in the Climate Leadership and Community Protection Act, or CLCPA.

“New York is implementing the nation’s most aggressive plan to reduce the greenhouse gas emissions affecting our climate and to reach our ambitious goals, we must reduce emissions from the transportation sector, currently the largest source of the state's climate pollution,” **Governor Hochul said**. “The new law and regulation mark a critical milestone in our efforts and will further advance the transition to clean electric vehicles, while helping to reduce emissions in communities that have been overburdened by pollution from cars and trucks for decades.”

Under the new law, new off-road vehicles and equipment sold in New York are targeted to be zero-emissions by 2035, and new medium-duty and heavy-duty vehicles by 2045. The law also requires the development of a zero-emissions vehicle development strategy by 2023, which will be led by the New York State Energy Research and Development Authority (NYSERDA) to expedite the implementation of the State policies and programs necessary to achieve the law's new goals.

Visit <https://www.governor.ny.gov/news/advance-climate-week-2021-governor-hochul-announces-new-actions-make-new-yorks-transportation> to view the full announcement.

Visit <https://www.gov.ca.gov/2020/09/23/governor-newsom-announces-california-will-phase-out-gasoline-powered-cars-drastically-reduce-demand-for-fossil-fuel-in-californias-fight-against-climate-change/> to view last year’s announcement from Governor Newsom.

Visit <https://www.nysenate.gov/legislation/bills/2021/a4302> to view the New York legislation and its history.

## CCPAC NEWS

### CCPAC NEWS:

#### **2 CCPAC Regional Director Positions Open**

The Certified Claim Professional Accreditation Council (“CCPAC”) currently has 2 Regional Director positions open:

Region 5 – Great Lakes (MN, WI, Upper Peninsula Michigan)

Region 8 – Mid-Western Region (IA, KS, MO, NE, ND, SD)

Interested candidates for these volunteer part-time positions should live in one of the States listed for the Region and must be a CCP. The estimated time commitment is approximately 1 hour per month. Candidates should email their work resumes to [director@ccpac.com](mailto:director@ccpac.com) for consideration.

#### **Transportation Arbitration Board (“TAB”) Has Positions Open for Shipper Arbitrators**

These are part-time volunteer positions (1-2 hours per month). Candidates should email their work resume to the Administrator at [wallycd3@gmail.com](mailto:wallycd3@gmail.com). Arbitrators need to be Certified Claims Professionals (“CCPs”) and should contact the Administrator for additional information or to apply.

**CCP Exam Is Here Now On-Line 24/7 at [www.ccpac.com](http://www.ccpac.com).**

You have asked for it and now you have got it! The CCP Exam is now available on-line, any day, any time, 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 at your office, home, etc. You can access the CCP Exam Portal by clicking on the “Certification” tab on the Home page, scroll down the page and 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 instructions 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.

**COMING SOON**

The acclaimed CCP Exam Primer Course (the 6 hour course will be split into 4 - 1½ Hour segments) and will be available later this year on-line, 24/7. The Board of Directors has approved the project, which is now in the design stage.

**LIVE CARGO CLAIM CONFERENCE – Mark Your Calendar Now**

A live CCP Exam Primer Course and live CCP Exam will be held in Orlando, Florida in 2022. The live CCP Exam Primer Course, will be offered Sunday, March 20, 2022, preceding the Transportation & Logistics Council, Inc.’s (“T&LC”) 48<sup>th</sup> Annual Conference. The live CCP Exam, will be held Wednesday afternoon, March 23, 2022, following the 12 Noon close of the Conference.

Additional information and registration will be available on-line this Fall at [www.ccpac.com](http://www.ccpac.com).

The T&LC Annual Conference will be held March 21-23, 2022, at Doubletree by Hilton Orlando at Sea World Orlando, 1000 International Drive, Orlando, FL. Additional information and reservations will be available on the T&LC website (<https://www.tlccouncil.org/>).

**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.

**Not A Member? Join Today at [www.ccpac.com](http://www.ccpac.com)**

Established in 1981, Certified Claims Professional Accreditation Council (CCPAC) is a nonprofit organization comprised of transportation professionals with manufacturers, shippers, freight forwarders, brokers, logistics, insurance, law firms and transportation carriers including air, ocean, truck and rail. CCPAC seeks to raise the professional standards of individuals who specialize in the administration and negotiation of cargo claims. Specifically, CCPAC gives recognition to those who have acquired the necessary degree of experience, education, expertise and have successfully passed the CCP Certification Exam covering domestic and international cargo liability and to warrant acknowledgment of their professional stature. Only those who have passed the CCP Exam and maintain continuing education requirements may use the “CCP” professional designation following their name.

For further announcements visit [www.ccpac.com](http://www.ccpac.com) for general information and membership in CCPAC or email [director@ccpac.com](mailto:director@ccpac.com)

CCPAC also has the following online presence:

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

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

LinkedIn Group: [www.linkedin.com/groups/4883719/](http://www.linkedin.com/groups/4883719/)

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

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

## CLASSIFICATION

### NEW FCDC DOCKET 2021-3

The Freight Classification Development Council (“FCDC”) will conduct its next public meeting to consider proposals for amending the National Motor Freight Classification (“NMFC”) in Docket 2021-3 on Tuesday, October 5, 2021. COVID-19 health safety guidelines will be followed. The meeting will be held at The Westin Alexandria Old Town, 400 Courthouse Square, Alexandria, Virginia 22314, commencing at 10:30 am Eastern Time. For information on how to attend, please contact Colleen Airgood, Meeting Coordinator, at [airgood@nmfta.org](mailto:airgood@nmfta.org) or 703-859-3924.

Anyone having an interest in a proposal listed in this docket may attend the meeting on October 5, 2021 and/or submit a written statement. Written statements may be submitted by mail or email, and they must be received by the FCDC no later than 5:00 pm Eastern Time, Wednesday, September 29, 2021.

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

### FREIGHT CLASSIFICATION DEVELOPMENT COUNCIL DOCKET 2021-3

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Shippers whose traffic may be affected by proposed changes should review the proposals and respond accordingly. Visit [http://www.nmfta.org/Dockets/Docket%202021-3/2021\\_3.pdf](http://www.nmfta.org/Dockets/Docket%202021-3/2021_3.pdf) to review the complete Docket online.

The FCDC's procedures as well as other information on the FCDC and the National Motor Freight Traffic Association are available online at [www.nmfta.org](http://www.nmfta.org).

Amendments to the National Motor Freight Classification resulting from the proposals in this docket will be published in a supplement to the NMFC. The supplement is scheduled to be issued on November 4, 2021, with an effective date of December 4, 2021.

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

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

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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# The Transportation & Logistics Council, Inc.

Phone: (631) 549-8984

120 Main Street, Huntington, NY 11743

Fax: (631) 549-8962

E-Mail: [diane@transportlaw.com](mailto:diane@transportlaw.com)

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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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- **Multiple Subscriber** (non-voting additional representatives of a **Regular Member** firm); and
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Wednesday October 13, 2021 - 1:00pm - 2:30pm EST	MEMBER		NON-MEMBER	
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A separate **REGISTRATION FORM** is required for each person registering

CONFERENCE REGISTRATION FEE:	<i>Early Bird Special</i> On or Before Dec. 20, 2021	After December 20, 2021
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CONTRACTING FOR TRANSPORTATION & LOGISTICS SERVICES Includes "Seminar Manual"	<input type="checkbox"/> \$520	<input type="checkbox"/> \$595
TRANSPORTATION, LOGISTICS AND THE LAW Includes "Seminar Manual"	<input type="checkbox"/> \$520	<input type="checkbox"/> \$595
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## Transportation & Logistics Q&A in Plain English – Book XI

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