

TRANSPORTATION & LOGISTICS COUNCIL, INC.
43RD ANNUAL CONFERENCE – HENDERSON, NEVADA

GENERAL SESSION II: LAW OF THE LAND V. LAW OF THE JUNGLE

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Into the Jungle:

IDENTITY THEFT OF A MOTOR CARRIER: WHO IS RESPONSIBLE?

Question #1: What investigation, if any, is a broker required to conduct prior to selecting a motor carrier?

Factual Situation: A broker in Chicago retains a motor carrier from Illinois to pick up 4 loads of nuts from the shipper (the manufacturer) at its location in California, for delivery in Arizona. The loads were valued at \$250,000 each. The broker advertised the loads on a broker load board. A carrier (later determined to be a thief) that it had not used before contacted the broker. The broker obtained via fax a Certificate of Insurance, contact name and numbers, and checked the motor carrier on the FMCSA website. The broker and the shipper had not entered into a "long form" contract, only a one page "Customer Confirmation" was used. After pick-up, the nuts were never seen again.

The shipper claims breach of contract, alleging alternatively a written, oral, and/or implied contract, negligence, and negligent selection.

Question #2: Can some or all of the liability be attributed to a shipper, or can the shipper's conduct be considered the cause of the loss instead of the broker's conduct?

Additional Facts: The shipper had previously been the victim of identity theft – where thieves posing as motor carriers picked up loads, never to be seen again. This is why they stopped retaining motor carriers directly as they wanted a broker to take that responsibility. The shipper did not tell the broker that it had been the victim of theft. The shipper did not obtain require identification from the driver, a copy of the driver's license, or record the license plate number or VIN of the vehicle.

Question #3: What is the potential liability of the actual motor carrier, whose identity was taken?

Alternate Additional Facts:

The real motor carrier had no knowledge of the identity theft, carefully protected its company information and documents, and had no connection to the thief.

The real motor carrier was sloppy with its paperwork and failed to keep its company information private or protected, allowing someone (either employee, former employee, or stranger) to obtain company letterhead, previously used insurance certificates, and passwords used for the FMCSA website, which the thief used to change the company information so when the broker verified the information, it all checked out.

An employee of the real motor carrier improperly obtained company information that was used to create the fake motor carrier and steal the loads.

Question #4: Whose insurance policy would potentially cover the loss, and what type of policy? Cargo policies? General Liability? Contingent Cargo liability?

FOOD PRODUCTS ARE THEY SALVAGEABLE

Question #1 In all 4 cases my insured is the trucking company (carrier).

Claim #1 – Cargo is Graham crackers (value \$37,000). The container fell over onto its side at very low speed. The shipper is concerned that too many of the crackers are broken to ship. They are still sorting the cases and inspecting the contents.

Claim #2 – Cargo is dry Pasta (I am told the value is about \$14,000). The container fell over on its side into a ditch. The top of the container opened and a small number of cases were ejected from the container. The “dirty” cases were restacked with the “clean” cases and the shipper now claims that the entire load could be “contaminated” and they will not accept any of the cargo back. They will not release any of the cargo for salvage.

Claim #3 – Cargo is medical supplies (Sterile water, plastic bags and IV injection connectors). The container was stolen and recovered about 4 weeks later. The cargo is 99% untouched and still has the inflatable bags in place. We assume the thief didn’t know what he was stealing and abandoned the trailer. The shipper will not even test the cargo to see if it’s contaminated. They want to destroy the whole load (\$30,000). They will also not release the cargo for salvage.

Claim #4 - Cargo is Non-Dairy Creamer (23.5 oz. plastic bottles, 12 bottles per cardboard case, \$24,000). The trailer overturned and the cargo was ejected. The cases were picked up and moved to a warehouse. The shipper claims that this “food” grade product came in contact with the ground and must be destroyed. They will not release the cargo for salvage and will not accept the load for inspection.

In all 4 claims the cargo appears to have little if any actual damage. But with Food and Medical the shippers love to give me crazy scenarios of what “might” have happened or what “might” happen if they sell the cargo. Also in these 4 cases the shipper will not release the cargo for its salvage value, due to Brand Name and liability issues.

Who has the burden of proof?

Do I need to prove the cargo is safe or do they need to prove it is contaminated?

I want to call the FDA on the pasta claim, but I don’t know if it is worth the battle.

Are there independent experts I can call to inspect and test products like this?

My main concern is the legal liability of my insured (carrier). If I get salvage bids on the cargo and the shipper still refuses to release the cargo or deduct the salvage bid from the claim, is the carrier liable for more than the actual damage (invoice minus salvage)?

Is this a valid statement?

“food and related products, any legitimate question as to quality, possible contamination or adulteration would generally justify destruction of the product, without salvage or an allowance for salvage”

Question #2: My foodservice distributor contracted with a carrier to pick up a frozen load at one of my supplier locations.

- In route to the distribution center (“DC”), the driver of the load was arrested for drug possession and the truck and trailer impounded. Officials from the DEA inspected the truck and the trailer. They did find evidence of drugs in the truck, but no evidence was found in the trailer.
- The truck was towed to a local frozen carrier’s location where it was locked in the yard. The following day, that carrier notified my distributor of the incident and requested a new carrier for transloading the product and transport to the DC. At the impound lot, additional fuel was added to ensure the refrigeration unit was running without disruption.
- When the product arrived at the DC, the temperature readings of the product were within specification. The seal on the trailer that was broken by the DEA for inspection was replaced, as well as the seal that was broken at transload.
- The brand has rejected the load based on the driver not maintaining control over the load at all times during transit. I think that the DEA inspection is the secondary concern.
- The larger concern that they have is that the facility where the transload occurred has not been qualified by the brand’s Quality Assurance group. Does my distributor have a valid claim with the carrier?

QUESTION # 5 SHIPPER LOAD & COUNT (“SL&C”)

Question #1

- I was told that if a shipper ships under the Shipper Load & Count (“SL&C”) notation that the carrier has no liability regarding damage to the product.
- We shipped a truckload of product and the carrier admitted that he was cut off and had to slam on his brakes to avoid an accident, and all of the product shifted to the nose of the trailer and was severely damaged.
- The carrier claims that since the bill stated SL&C he has no liability.
- **Question #2**
- Our company has a vendor that only tenders their freight shipper load & count (“SL&C”) on full loads. Normally our consolidator schedules the pick-up of the goods with one of their contracted carriers. Upon pick-up at the shipper/vendor the driver **is not asked to acknowledge** that the trailer is sealed and to put the seal number on the shipping documents so that the receiving entity can verify the seal is intact.

- Recently one of our distribution centers (“DC”) received one of these SL&C shipments with significant carton shortages. The bill of lading (“B/L”) shows this was tendered as SL&C. When the shipment was received at our consolidator they broke down the load and counted all the freight.
- The shortages were found by the consolidator and noted on the B/L. The consolidator also notified the shipper of the shortages. The problem is nowhere along the way have any notations been made that the seal was intact by either the pick-up carrier or consolidator. The shipper/vendor is demanding payment on their short invoices.
- Normally we do not file claims on SL&C shipments if our consolidator has counted the shortages and notified the shipper. Because this loss is so significant and high in value the vendor is seeking payment, so our DC filed a carrier claim. Our consolidator filed the claim with the pick-up carrier, which declined as the driver did not sign or acknowledge a particular seal number and cannot be held responsible.
- Should the pick-up carrier be liable since they didn’t take proper seal notations at pick-up?

Question #3

- We have a "Customer/Carrier Loading Requirements Policy" that requires drivers to count on live loads. It also states: "Drivers who sign bills of lading should not attempt to write in "SLC" when signing their bills. Our bills clearly read "SLDC" and any attempts to change this by writing it on the bill of lading will be nullified."
- However, drivers have written in "SLC" on live loaded trailers and carriers are refusing to pay claims for discrepancies.
- We are currently reprinting bills and having the drivers to sign them again without writing in "SLC" next to their signature. Our bills are clearly marked "SLDC" and should leave no room for doubt.
- What recourse do we have with those claims where the driver has signed a "live loaded" trailer as "SLC", but the bill is clearly marked "SLDC"? The drivers have had access to the trailer, but the carriers are refusing to accept responsibility for delivery discrepancies.

MEASURE OF DAMAGES

Question #1 :

- We are a manufacturer in the Midwest area. One of our contracted LTL carriers had damaged one of our shipments. The shipment was notated as damaged upon receipt and an inspector was sent to the consignee to provide a written report of his findings.
- Upon filing of the claim, we, the shipper, had filed for the delivery invoice and not the manufacturers cost of that shipment. The carrier stated that they were only

obligated to pay for the manufacturing cost (no overhead or lost sales). (Freight charges would be deducted).

- My boss would not allow me to divulge our manufacturing cost as this is confidential information that may be leaked out to the customer. How can I convince my boss that this is/is not within federal regulations?
- Question Where goods have been sold to a customer, and are lost or destroyed in transit, is the proper measure of damages the invoice price to the customer, the "manufacturing cost" or "replacement cost".

Another way to look at it is to assume that the consignee had risk of loss in transit (FOB origin). so, the consignee-purchaser would still be obligated to pay for the goods at the invoice price, even though they were lost or destroyed in transit.

So why would the measure of damages be any different just because the shipper files the claim?

Question #2:

- I'm at loggerheads with a carrier over our right to file less-than-truckload ("LTL") freight claims for full invoice value, sales tax and applicable freight costs. Some carriers accept these claims, others absolutely demand to only pay manufacturing cost price. Carrier argument is: The basis for payment for freight loss or damage claims is the actual injury to the goods, not consequential, indirect or speculative damages.
- Carriers state that to allow a shipper to make a profit on goods that are lost or damaged in transit would be to allow the shipper more than simple indemnity, since the shipper would be making profit on two sales rather than one.

Question #3

- We filed a freight claim against a motor carrier for an interstate shipment of steel pipe that was involved in an accident. The motor carrier has taken full responsibility for the loss.
- However, the motor carrier is refusing to pay additional cost, over and above the invoice amount, of the steel pipe that was damaged beyond repair.
- For us to replace the material, we were forced to pay a higher price for the material from the mill. The carrier has refused to pay the additional \$5,000.00 to replace this shipment because he is under the assumption all he needs to do is pay for what he has damaged.
- According to my research, the carrier is obligated to pay the replacement cost, which will put us in the position we would have enjoyed had there been no loss.
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Question #4

- A claim has been filed for a shortage of 3 case of syrup.
- Shipment in question moved from the manufacturers plant to its warehouse. In presenting this clam the manufacturer charged us, the carrier, for the selling price to

his customers. We believe we should pay the manufacturers price of the goods, that is, the cost of the price of the manufacturer. Are we, right?

ELECTRONIC LOGGING DEVICES (ELDs.)

- On March 13, 2014, the Federal Motor Carrier Safety Administration made it mandatory for commercial trucks and buses to install electronic logging devices (ELDs.) The benefits of these devices are a reduction in paper logs, increased visibility between drivers and dispatchers, and enforcement of hours-of-service rules. The [FMCSA](#) also predicts that this change will save the industry \$1 billion every year.
- A similar proposal was enforced back in 2011, which was halted in 2012 after a federal court deemed that the ELDs were being used to harass drivers; a problem that the FMCSA has been trying to address while closing the gap between trucking and technology.
- The goal of ELDs in trucking is firstly to improve safety and secondly to improve efficiency. ELDs have other capabilities beyond electronic logging of hours; they can also record data about drivers and vehicles, such as [automated reporting on driver speeding](#), idling and hard braking.
- Carriers already have a difficult time gaining and retaining qualified drivers. In one [poll](#), 37% of drivers said upon the mandate of ELDs, they would retire or find another line of work.
- What is your opinion of the ELD mandate?