TRANSDIGEST

Transportation & Logistics Council, Inc.

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VOLUME XXIII, ISSUE NO. 245, JULY 2018

Register Now for Fall Seminars!

- **Labor Shortages - Truck Drivers, Airline Pilots**
- **FMCSA to Test New CSA Data Model**
- **ELD Update**
- **Glider Kit Truck Regulations**
- **FMC Final NVOCC Rule**
- **What the UPS/Teamsters Deal Means for Shippers**
- **Court Rules in Favor of Carrier Tariff Arbitration Clause**
- **More Q&A's**

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Published by the TRANSPORTATION & LOGISTICS COUNCIL, INC.

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GUEST EDITORIAL

HIRING IN A TIGHT LABOR MARKET

By Aaron Schmidt
Branch Manager, NFI Industries

Much attention has been paid recently to the tight capacity market that is currently impacting the transportation industry. However, there is a "capacity crunch" in another market that affects shippers, receivers, brokers, trucking companies alike - the extremely tight labor market.

We hear many employers talking about how they are struggling to find and retain quality talent. The national unemployment rate has been hovering around 4% and we certainly have felt the effects of the driver shortage that has been an ongoing issue for the trucking industry and will continue to be an issue for the foreseeable future. But it's not just the drivers who are in short supply, it's in almost all areas of the industry from drivers to dispatchers, to office workers, to sales and maintenance. So, what can companies do to find and retain the talent they need to keep their businesses competitive? Unfortunately, there isn't a magic bullet to solve the problem, but there are some steps to take that can help.

1 – Don't just post open positions on the job boards! You need to get out and spread your message with social media, referrals, personal connections, general networking, and any other channels you have at your disposal. The post and pray method is dead.

2 - Build a strong bench of talent by evaluating your current employees and determining which ones could be trained for promotion. It's less costly than hiring externally and it's also a great way to build loyalty and promote retention. You can also create a reliable talent pipeline with training opportunities like internships, apprenticeships, or associate programs.

3 - Make your company stand out as a desirable place to work. Address specific candidate concerns such as relevant work, collaborative culture, opportunities for growth and promotion, and community involvement. It's also important to understand market compensation trends so you can put together an attractive compensation package.

Hiring and retaining good talent takes more than just finding the right candidate. It takes some self-reflection by the company to create an environment where people love to work and enjoy spending their days. That is the reality of today's talent market, and if you don't take the time to recognize your own needs to attract the right talent, your business may be short staffed.

ASSOCIATION NEWS

REGISTER NOW FOR FALL SEMINARS!

The Transportation & Logistics Council, Inc. is pleased to announce that it will be sponsoring three extremely informative, full-day seminars this Fall on Freight Claims, Contracting, and Transportation Law. It's your choice – take all three or choose one or two of the following seminars. They will be held at Lennox International in Richardson, Texas on October 1-3; Columbia Sportswear in Portland, Oregon on October 15-17; and AFN, LLC in Nile, Illinois on November 12-14. See the attached Registration Form for more details.

FREIGHT CLAIMS IN PLAIN ENGLISH
Presented by Gerard F. Smith, Esq.

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 carrier liability for loss and damage to freight in transit, bills of lading, burdens of proof, defenses, damages, limitations of liability, time limits, liability of freight forwarders, intermediaries, warehousemen, air and ocean carriers.

This course is highly recommended for both beginners in the field of freight claims as well as experienced claims professionals. Also, seminar attendees will receive a copy of the 2-volume CD along with their registration.

Seminar Held On:

Monday October 1st - Richardson, Texas
Monday October 15th - Portland, Oregon
Monday November 12th - Niles, Illinois

CONTRACTING FOR TRANSPORTATION & LOGISTICS SERVICES
Presented by Raymond A. Selvaggio, Esq.

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.

Seminar Held On:

Tuesday October 2nd - Richardson, Texas
Tuesday October 16th - Portland, Oregon
Tuesday November 13th - Niles, Illinois

TRANSPORTATION, LOGISTICS & THE LAW
Presented by Brent Wm. Primus, JD

This one-of-a-kind seminar is intended for the persons actually doing the work to be able to identify and minimize legal and financial risks in their day-to-day responsibilities. The course is designed to provide a basic working knowledge of the laws and regulations governing the supply chain and the relationships between the players -- shippers, carriers, and intermediaries.

Registration includes a 150+ page Course Handbook. The course handbook provides vital information you need for protecting revenues for your organization AND for your own individual professional growth.

Presentation topics will include:

- Motor Carriers, Brokers, and Surface Freight Forwarders: What is the difference and why does it matter?
- Update on FSMA - the Food Safety Modernization Act
- Latest on Vicarious Liability for highway accidents
- Bills of Lading and Contracts in a Nut Shell

Detailed agenda will be determined based on legal and industry developments between now and the time of the seminar.

Seminar Held On:

Wednesday October 3rd - Richardson, Texas
Wednesday October 17th - Portland, Oregon
Wednesday November 14th - Niles, Illinois

NEW MEMBERS

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AIR

AIRLINE PILOT SHORTAGE

Not only are we facing a driver and labor shortage as discussed in Aaron Schmidt's Guest Editorial above, but the airline industry is also facing a shortage of qualified pilots. According to a recent article by Peter Gall in *The Conversation*, "the national security of the United States relies on a healthy airline industry. That requires modern reliable airplanes -- and highly skilled pilots to operate them. However, the United States has a shortage of pilots right now, particularly at the regional airline levels."

The author notes how this problem is a result of the confluence of several issues: increasing demand for air travel, hence more pilots; reduction in trained pilots provided by the military; number of existing pilots

approaching mandatory retirement age; and the relative reduction in pilot pay and benefits, particularly for new pilots.

Visit https://www.cnn.com/travel/article/airline-pilot-shortage-united-states/index.html to view the article.

MOTOR

FMCSA TO TEST NEW CSA DATA MODEL

According to a June 2018 "Corrective Action Plan Report to Congress":

> Section 5221 of the Fixing America's Surface Transportation ("FAST") Act required the National Research Council of the National Academy of Sciences ("NAS") to conduct a correlation study of the Federal Motor Carrier Safety Administration's ("FMCSA") Compliance, Safety, Accountability ("CSA") program and Safety Measurement System ("SMS"). The SMS is FMCSA's algorithm for identifying patterns of non-compliance and prioritizing motor carriers for interventions. The FMCSA is prohibited from publishing percentiles and alerts on the SMS website for motor carriers transporting property until the Correlation Study is complete, and all reporting and certification requirements under section 5221 of the FAST Act are satisfied.

There have been many problems and complaints regarding the FMCSA's CSA program and SMS, and as a result the future of the SMS will be based on a new statistical model being developed by FMCSA. The new model as outlined in the corrective action plan report will be tested September 2018 in a small scale Item Response Theory ("IRT") model as recommended by the NAS. In April 2019 the will run a full scale IRT model and expect to evaluate the results and effectiveness of the full-scale model June 2019.

The FMCSA said it is planning a public forum to discuss data issues and availability.

Visit https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/mission/policy/407251/nas-correlation-study-corrective-action-plan-enclosure-final-june-2018.pdf to view the report.

ELD UPDATE

On July 3, 2018 the Owner-Operator Independent Drivers Association ("OOIDA") announced that the Federal Motor Carrier Safety Administration ("FMCSA") had denied its Electronic Logging Device ("ELD") exemption request for "small transportation trucking business[es]".

OOIDA expressed disappointment with the FMCSA's response, particularly in light of the exemptions being granted to other organizations and businesses.

One of the primary concerns raised by OOIDA in its request was the issue of self-certification of ELD vendors. The FMCSA has stated that they do not know if the self-certified ELD's listed on their website fulfill the regulatory requirements of the rule. OOIDA had asked for a five-year exemption to provide necessary time for ELD manufacturers to be fully vetted by the FMCSA, which would alleviate small-business carriers' concerns about purchasing devices that could damage their vehicles electronic control modules or be hacked.

According to the OOIDA's July 3, 2018 press release:

> The ELD mandate is estimated to cost impacted stakeholders more than $2 billion annually, making it one of the most expensive federal transportation rulemakings over the last decade. It

> is a massive unfunded mandate that provides no safety, economic, or productivity benefits for most ensnared by the mandate.
>
> Commercial truck drivers are restricted to a limited number of working and driving hours under current regulations. The FMCSA's mandate requires that truck drivers use ELDs to track their driving and non-driving activities even though such devices can only track movement and location of a vehicle. OOIDA contends that requiring electronic monitoring devices on commercial vehicles does not advance safety since they are no more reliable than paper logbooks for recording compliance with hours-of-service regulations.

Although this decision further reduces any chances for opponents to overturn or delay the ELD mandate, there are other ongoing efforts including an exemption petition from the Small Business Transportation Council ("SBTC") and some legislative proposals.

The SBTC petition asks the FMCSA to exempt all truck operators with fewer than 50 employees from the mandate, including, but not limited to, individual owner-operators. This petition would exempt the vast majority of US truckers and motor carriers from the ELD mandate.

On the legislative front, one bill introduced in the House is the Small Carrier Electronic Logging Device Exemption Act, which targets fleets of up to 10 trucks. That bill's sponsors, Rep. Greg Gianforte, R-MT, and Rep. Collin Peterson, D-MN, also introduced the Agricultural Business Electronic Logging Device Exemption Act, which would exempt all agricultural businesses from having to use ELDs to log truck driver hours.

Visit https://www.ooida.com/MediaCenter/PressReleases/pressrelease.asp?prid=473 to view the OOIDA press release and search on https://www.congress.gov/ for the legislation.

GLIDER KIT TRUCK REGULATION

We previously reported (TRANSDIGEST ##s 239 & 240) on the issue of "glider kit trucks" (heavy trucks that are built by pairing a new chassis with an older diesel engine and powertrain and so are not required to meet newer emission standards).

Just prior to his departure as Environmental Protection Agency ("EPA") Administrator, Scott Pruitt announced that the EPA would not enforce an Obama administration rule that imposed a cap of 300 new glider trucks a year until 2019. Environmental groups filed lawsuits to make the EPA uphold the limit and on July 18, 2018 a three-judge panel for the U.S. Court of Appeals for the District of Columbia issued a decision temporarily blocking the EPA's decision not to enforce the limit.

On July 26, 2018 the Andrew R. Wheeler, the EPA's Acting Administrator, issued a memo reversing the EPA's position, stating that blocking enforcement of the glider kit trucks provision in the 2016 Obama administration's Phase 2 Greenhouse Gas Heavy Truck Rule is "not in the public interest."

To view the EPA memorandum, visit https://www.epa.gov/sites/production/files/2018-07/documents/memo_re_withdrawal_of_conditional_naa_regarding_small_manufacturers_of_glider_vehicles_07-26-2018.pdf.

DRIVER SHORTAGE

On July 6, 2018 the Federal Motor Carrier Safety Administration ("FMCSA") published two items in the Federal Register related to allowing persons between the ages of 18 and 21 with military driving experience to operate commercial motor vehicles ("CMVs") in interstate commerce.

The first, a Notice and request for comments regards a FMCSA proposal for:

> a 3-year period of information collection to determine whether the safety outcomes (to include crashes, moving violations, inspection violations, and safety critical events as available) of drivers under the age of 21 with military experience in the operation of heavy vehicles (i.e., ``covered drivers'') participating in interstate commerce are similar to the safety outcomes of commercial motor vehicle drivers (CMV) drivers between the ages of 21 and 24 operating freight-carrying CMVs, and how training and experience impact the safety of the 18- to 20-year-old driving population.

The second, a Notice outlines the FMCSA's proposed pilot program to allow a limited number of individuals ages 18, 19, and 20 to operate CMVs in interstate commerce, if they have received specified heavy-vehicle driver training while in military service and were hired by a participating motor carrier.

Visit https://www.gpo.gov/fdsys/pkg/FR-2018-07-06/pdf/2018-14025.pdf to view the Federal Register Notice regarding the pilot program and https://www.gpo.gov/fdsys/pkg/FR-2018-07-06/pdf/2018-14028.pdf to view the Notice and request for comments regarding the proposed data collection.

OCEAN

FMC FINAL RULE ON NVOCC SERVICE AND RATE ARRANGEMENTS

On July 19, 2018 the Federal Maritime Commission ("FMC") issued its "Amendments to Regulations Governing NVOCC [non-vessel operating common carrier] Negotiated Rate Arrangements and NVOCC Service Arrangements". The goal of the regulatory changes are to modernize, update and reduce regulatory burdens. The final rule is effective August 22, 2018.

From the Executive Summary:

> The Commission is amending its rules at 46 CFR part 531 governing NVOCC Service Arrangements ("NSA") to remove the NSA filing and publication requirements. The Commission also is amending its rules at 46 CFR part 532 to permit NVOCC Negotiated Rate Arrangements ("NRA") to be amended at any time and to allow the inclusion of non-rate economic terms. In addition, an NVOCC may provide for the shipper's acceptance of the NRA by booking a shipment thereunder, subject to the NVOCC incorporating a prominent written notice to such effect in each NRA or amendment. In addition, the Commission is including clarifying language in part 532 to reflect the current treatment of third-party, pass-through assessorial charges and the enforceability of NRAs.

Visit https://www.fmc.gov/assets/1/Documents/17-10_fnl_rl.pdf to view the final rule.

ILA AND USMX MASTER CONTRACT

Last month we reported that the United States Maritime Alliance, Ltd. ("USMX") (representing maritime employers in ports from Maine to Texas) and the International Longshoremen's Association, AFL-CIO ("ILA") had reached a tentative agreement on a new six-year Master Contract. Now the parties at the East Coast's largest port, the Port of New York and New Jersey, have reached a local agreement. The ILA wants all such local agreements to be completed before the master contract expires September 30, 2018 and the Master Agreement gets ratified.

PROPER CARGO DECLARATION

The problem of misdeclared weights of cargo containers was addressed with the implementation of cargo weighing rules beginning July 1, 2016. While misdeclared weights are readily determinable, the same can not be said for contents. The industry is now seeking to address the issue of misdeclared contents.

The recent attention to misdeclared contents was prompted by a deadly fire on the Maersk Honam that killed five of 27 crew members. Ship fires, which occur at an average of one every 60 days, have been blamed on the failure of shippers to properly declare dangerous container contents (the actual cause of the Maersk Honam fire has not yet been determined). Proper declaration allows carriers to mitigate the risk to crews, cargoes and ships by not stowing dangerous goods cargoes near crew accommodation quarters, near the engine room, or in below-deck spaces that are resistant to firefighting,

Unfortunately, unlike weights, without opening the container and conducting a search, it is not generally possible to determine whether contents have been properly declared (or packaged), and there is always a financial incentive to mislead. In part because it can take so long, years, to possibly determine the cause of a mishap, it is not clear whether stricter rules will actually be of any benefit.

Shippers already have to sign a legal document, the dangerous goods declaration/container packing certificate, and parties seeking to gain a financial advantage by misdeclaring contents are unlikely to be influenced by stricter rules.

NYC ANNOUNCES FREIGHT MODERNIZATION PLAN

On July 16, 2018 the de Blasio administration, along with federal, state and local elected officials, and industry stakeholders announced “Freight NYC”, a $100 million plan to overhaul the city’s aging freight distribution systems. The plan’s goal is to increase maritime and rail freight transportation within the city's boroughs, reducing congestion from trucking and creating new jobs in longshore and vessel operations.

New York currently handles about 90 percent of its freight by truck, and it would like to increase the portion handled by waterborne and rail services. The city believes the plan could create 5,000 new jobs and eliminate about 40 million truck miles a year from the city's aging freeways.

From the July 16, 2018 press release:

> Our City depends on crucial but aging marine, rail and highway infrastructure and relies upon trucks to move nearly 90% of freight. As the City’s population continues to grow and consumers increasingly demand near-instant deliveries, local freight volumes will grow an estimated 68% by 2045, further choking traffic and impeding commerce. This challenge is particularly acute in the “last mile” of distribution, in which trucks bring goods from port facilities and central warehouses, often located in neighboring states like New Jersey, to consumers over city streets and arteries.
>
> “Freight NYC is one of the most ambitious re-imaginings of how 8.5 million New Yorkers – and the tens of millions more in our region – share, sell, and buy the goods that keep our economy thriving,” said **Deputy Mayor for Housing and Economic Development Alicia Glen**. “It will modernize our shipping sector, strengthen our economy, and improve the air we breathe.”
>
> . . .
>
> Last year alone, traffic congestion cost the local economy $862M, hurting local businesses and impeding commerce. Through Freight NYC, the de Blasio Administration and its partners are acting to protect the environment, traffic systems, and regional economy in the decades to come.

In addition to investing in existing maritime and rail assets, the City will work with private partners to build new modern distribution, transload, and warehousing facilities, and to promote and incentivize the use of environmentally-friendly green trucks for last mile delivery. In total, Freight NYC will remove 15,000 vehicles' worth of CO2 per year, ultimately helping to improve air quality and reduce asthma rates.

The Freight NYC plan leverages three key strategies to modernize and strengthen the City's freight distribution industry for the 21st-century:

1. Investing in Multimodal Infrastructure

Working with the Port Authority of NY & NJ, the City will invest in marine terminals and barging operations, and support the modernization and expansion of rail lines and freight facilities, creating approximately 900 jobs. Highlights of these efforts include:

- Developing a barge terminal to serve the Hunts Point Food Distribution Center in the Bronx, allowing produce and other food products to reach Hunts Point by water, rather than by truck.
- Constructing a barge terminal at the South Brooklyn Marine Terminal in Sunset Park to connect Brooklyn's consumer base to the new barge network.
- Reactivating underutilized rail lines by constructing new transload facilities within the existing rights-of-way and new passing lanes to alleviate track congestion.

2. Creating New Freight Distribution Hubs

Through public-private partnerships, the City will develop new distribution, warehousing and transload facilities to meet increasing demand. This will help ensure the City can sustain the demands of its growing population, while creating secondary pathways to move goods in the event of adverse climate impact and other major disruptions. Highlights of these efforts include:

- On July 20th, NYCEDC will release a request for proposal (RFP) for a private partner to build an Urban Distribution Center at the Brooklyn Army Terminal that is at least 500,000 square feet, estimated to create 500 jobs in Sunset Park.
- NYCEDC will release an RFP next week for a 4-acre site near JFK Airport to develop an air cargo and distribution facility that will help meet the needs of current businesses while ensuring the efficient flow of airport goods and maintaining JFK's position as a leading international freight destination.

3. Promoting the Use of Clean Trucks, Reinforcing 2015 Clean Fleet Goals

The City, led by the New York City Department of Transportation, will encourage the deployment of cutting-edge and emission-free trucks on city streets for last mile delivery, which will help advance the Mayor's goal of reducing 80% of gas emissions by 2050. Highlights of these efforts include:

- Supporting the expansion of the NYCDOTs Hunts Point Clean Trucks Program to other truck hubs and Industrial Business Zones. The program offers a rebate to applicants that replace, retrofit, or retire older, heavy-polluting diesel trucks
- Supporting the development of clean fuel infrastructure in freight hubs, including sites for compressed natural gas and electric charging, while promoting truck safety measures to help meet NYCDOT's Vision Zero goals.

- Piloting initiatives for tenants in City-owned properties to green their own supply chains through logistics consolidation, carbon-neutral shipping, and use of clean vehicles.

To view the plan, visit https://www.nycedc.com/program/freight-nyc and to view the press release, visit https://www.nycedc.com/press-release/new-york-works-de-blasio-administration-launches-freight-nyc-100m-plan-modernize-new.

PARCEL EXPRESS

UPS/TEAMSTERS TENTATIVE LABOR DEAL- WHAT IT MEANS FOR SHIPPERS

by Tony Nuzio, ICC Logistics Services, Inc.

Now that the Teamsters Union and UPS have a tentative agreement on a five year labor contract, the big question for all shippers utilizing UPS, as well as other freight carriers for that matter is, "so what's this going to cost me."

At this time of year when many transportation and logistics executives are enjoying their summer vacations, the major parcel and motor carriers are gearing up for the announcement of their annual General Rate Increases. These increases, for as long as we can remember, have averaged 6% annually. Is it possible that with a truly humming economy, ELD mandates, Hours of Service Rules, the continuing saga of driver shortages and the tremendous demand from on-line shoppers to have their packages delivered NOW, if not yesterday, that there is a real possibility that the level of carrier increases will in fact exceed 6% this year? You bet there is and we believe that may be the case for the next several years for that matter.

But this really isn't news to those transportation and logistics executives that make it their business to continually monitor and measure their freight costs. These executives, utilizing comprehensive spend data they receive from their Freight Audit and Payment companies have already realized that rate increases for certain shipment type categories has in fact exceeded 6% over the past several years. In fact, some fees for oversized packages for example, have increased over ***500%,*** and that's a fact!

What's that you say, you don't track your freight costs month by month, quarter over quarter, carrier by carrier, service level by service level? If this sounds unrealistic, you'd be shocked to learn how many companies just don't have their finger on the pulse of what's happening with their freight costs, until it's too late.

There is an old saying I'm sure we all have heard***, "you can't control what you cannot measure."*** So if a company has never performed an audit of their parcel or less-than-truckload ("LTL") freight bills for example, or never had a benchmark analysis of their shipping costs performed, how could they possibly know their freight costs are under control? How can they be assured they have the most competitive freight costs for the services offered? The truth is they can't, so they just continue to pay whatever rates and charges their carriers can get them to pay. This is certainly no way to run a business and yet that's exactly how many shippers do operate today.

Notice we didn't say ***"cheapest"*** freight costs, we said ***most competitive***. There is a strong reason for that, because "cheapest" can often times cost a company much more in the long run in terms of late deliveries, customer chargebacks, damaged freight and most importantly, loss of a customer or customers. Again, you'd be amazed at how many companies seek out the "cheapest" carriers without knowing that carrier's delivery service levels, liability limitations, etc.

So what can a shipper do to make sure they do not overpay for shipping? Here are a few suggestions.

1. First and foremost, make sure all of your freight invoices are audited prior to payment by an outside Freight Audit Company. The fees for these services are consistently much lower than what it costs companies to process freight invoices in house. And there is a tremendous added benefit that comes from the detailed financial data a company will receive from the audit firm to help it monitor and control its freight costs year after year, after year. These firms audit all carrier invoices, including parcel, LTL and Truckload, Ocean and Air International Invoices, as well as invoices from 3PL's. The cost-benefit of utilizing these services is substantial.
2. Don't stop there, even if you utilize a company to pre-audit and perhaps even pay your freight invoices, have those same invoices post-audited by a qualified Freight Invoice Post Audit Firm. These firms typically work on contingency fees based on a percentage of the recoveries they actually generate for your company; no recoveries, no fees, how's that for a deal!
3. Finally, and probably most importantly, make sure you have a Benchmark Analysis performed on your freight costs on a regular basis. Even if you consider yourself a sophisticated shipper, one who is on top of your freight expenditures, one who considers yourself a great negotiator, you can benefit from a third party benchmark analysis. It's as simple as "you don't know what you don't know." In other words, you know what you believe is the good deal for your company. What you don't know without having a benchmark analysis performed is, do you have the best deal that can be achieved for your company. This information is invaluable for all companies as it helps you to negotiate from a position of strength that will ensure you ***ALWAYS*** get the best deal for your company.

QUESTIONS & ANSWERS

By George Carl Pezold

FREIGHT CLAIMS – NMFC LIABILITY LIMIT

Question: We shipped a very expensive outdoor grill via a less-than-truckload ("LTL") carrier from the manufacturer in Downey, CA to the carrier's San Jose dock for a "Will Call" pickup. We do this on a regular basis and pick up with our truck to deliver to our customer.

On 7/2, we went to the carrier's dock to pick up the pallet and noticed the boxed pallet was damaged on the top and side. We asked the dock manager if we should open it, he said to just note it and write subject to inspection as well - we took photos.

Later that morning, we went to deliver the item and upon opening and unwrapping the grill, it was completely smashed on the top and side of the unit - destroyed. We submitted a claim and although the carrier is rejecting the claim for the amount submitted ($2853.48), they are offering $1 per pound ($361.00) for the damage. They claim due to the National Motor Freight Classification ("NMFC") code used, that amount is their maximum liability.

What can we do? It appears to have been dropped off a truck and they are not responsible?

Answer: From your description of the facts it would appear that the carrier is asserting a liability limitation in its tariff. If you used some form of the Uniform Straight Bill of Lading it probably has language (small print at the top) that incorporates the classification and tariffs of the carrier (which are available on request).

Unless this was a "used" item, it would seem that $1.00 per pound is very low. I suggest that you ask the carrier for a copy of the tariff rule that they are relying on to support their position.

FREIGHT CLAIMS – CARRIER CLAIM RATIO STATISTICS

Question: What is the industry standard regarding the number of claims per annual shipments for the carrier (full truckload and less-than-truckload) industry?

Answer: There really is no "average" number of claims. The claims ratio varies depending on the nature of the commodity, susceptibility to damage or theft, packaging, mode of transportation, etc.

Most shippers expect delivery without claims should be at least 99%.

FREIGHT CHARGES – LOAD HELD HOSTAGE BY TOW COMPANY

Question: We are a freight broker company doing business with a shipper. Shipper tendered a load to us and we contracted a third party carrier to move the load. Driver had an accident and now the entire load is held hostage by wrecker because carrier doesn't have towing insurance; therefore carrier insurance cannot pay towing bill to release the load to shipper.

Shipper is now holding all of the invoices to be paid to us that we did for them after the accident. Can they do this? Are we entitled to get paid for all of the invoices that shipper is not paying us?

Answer: There are two issues here.

First, there is a question as to whether the towing company can hold the shipper's property "hostage"

In most all states a towing company has a lien on the vehicle for its towing and storage charges and can hold the vehicle until it has been paid.

I am only familiar with the law in New York. Pursuant to Lien Law § 184(1), a garage keeper who tows, stores, repairs, maintains or otherwise furnishes services or supplies to a motor vehicle, at the request or with the consent of the owner, has a lien upon such vehicle to the extent of the sum due for the services performed. A garage keeper may maintain a lien against a vehicle where the garage keeper performed garage services or stored the vehicle with the owner's consent for an agreed upon price or, in the absence of an agreement, for a reasonable price. *General Motors Acceptance Corp. v. Anthony J. Minervini, Inc.*, 301 A.D.2d 940 (3d Dept. 2003).

As you can see, under New York law, there is authority for the towing company to assert a lien against the vehicle, but NOT against the cargo.

Second, the shipper's obligation to pay your freight charge is completely independent of any claim that it may have against the motor carrier for the loss or damage to its shipment. And, unless you have contractually agreed to assume liability for loss or damage, as a broker you have no liability for the loss or damage that occurs while the shipment is in the possession and control of the motor carrier.

The problem is that shippers often do withhold payment or set off unpaid cargo claims against freight charges owed to the broker (or the carrier).

Unfortunately, if this happens your only recourse is to bring a lawsuit against your customer to recover the agreed freight charges.

FREIGHT CLAIMS – RISK OF LOSS

Question: We sell to a major retailer. They pay the freight so our pricing is for product only. They file freight claims against their carrier, carrier denies their claim so our customer deducts from us, their vendor.

We have nothing to do with the freight. Is there a law against this practice?

Answer: The situation you describe is quite common with major retailers.

Whether you may have responsibility for loss or damage in transit does not depend on which party contracts with the carrier, or pays the freight charges.

"Risk of loss" in transit is determined by the contract between the seller and the buyer. Normally, if the sale is "FOB Origin", under the Uniform Commercial Code the risk of loss would pass to the buyer once the goods are tendered to the carrier at the seller's place of business.

However, many big retailers have provisions in their purchase orders or contracts that place the risk of loss on the seller even though the price terms are FOB Origin. Unfortunately, if you want to do business with these retailers you may have to accept these terms even though they certainly seem to be unreasonable.

FREIGHT CLAIMS – NEED TO SUBSTANTIATE DAMAGE VALUE

Question: We have a customer that ships raw metal to vendors for processing and then reships the finished product to their customer. We arranged transportation for one of their finished shipments and during transit the driver damaged the load. This customer is claiming the cost of the metal and the processing fee.

The issue we're facing though is this customer will not provide us with documentation to substantiate the metal price. They claim it is proprietary information. Can a claimant refuse to provide this information and successfully recover their loss?

Answer: As the Supreme Court stated in *Missouri Pacific Railroad Company v. Elmore & Stahl*, 377 U.S. 134 (1964), "Accordingly, under federal law, in an action to recover from a carrier for damage to a shipment, the shipper establishes his prima facie case when he shows delivery in good condition, arrival in damaged condition, and the amount of damages."

Clearly the claimant has an obligation to prove "the amount of damages". Since the claimant is only asking for "cost of the metal and the processing fee", it should provide the information to support its claim.

FREIGHT CHARGES – TIME TO PAY CHARGES

Question: I seem to remember there is a regulation requiring companies to pay freight companies for their services within 15 days. Is this true?

Answer: Many years ago the Interstate Commerce Commission ("ICC") established regulations for "Payment of Transportation Charges" which are still in existence at 49 CFR Part 377.

Part A (1967) covers "Handling of C.O.D. Shipments" and Part B (1985) covers "Extension of Credit to Shippers by Motor Common Carriers, Water Common Carriers, and Household Goods Freight Forwarders".

First, it should be understood that these regulations, if applicable at all today, would only be binding on a motor carrier and NOT on a shipper.

Section 377.203 does prescribe a "credit period" of 15 calendar days, but also says that carriers may publish different tariff rules for periods up to 30 calendar days, and it also allows carriers to publish tariff rules for collection expense charges, loss of discount, etc. or include such contract terms in a bill of lading.

However, Section 377.201 says that "These regulations do not apply to -- (1) Contract carriage operations", and many shippers enter into transportation contracts pursuant to 49 USC Section 14101 which contain payment or credit terms and conditions.

I would note that if you don't have a contract, and are using some version of the Uniform Straight Bill of Lading, it may have language incorporating the carrier's tariffs, and if so, a credit provision in the carrier's rules tariff could be binding.

FREIGHT CLAIMS – ISSUES OF IMPROPER TEMPERATURE

Question: My driver delivered pulp product. Unfortunately, when he picked the load up, he didn't know to check temperature. Shipper loaded and sealed the load, but when the driver went to make the delivery, the product was warmer then it was supposed to be, so the receiver rejected the load.

The broker sent a claim to my insurance company, which the insurance company denied because it couldn't find any reefer breakdown or issue.

The broker now wants us to pay for the load. What can or should we do? Can we pursue the shipper because they loaded warmer load?

Answer: With the limited information provided, I can only give you a general answer.

Reefer insurance only covers breakdown or mechanical malfunction of the reefer unit. It does not cover negligence of the carrier in setting the reefer.

Ordinarily the shipper of a product that requires refrigeration will put the required temperature on the bill of lading ("BOL"), and the driver is expected to set the reefer to that temperature. If the temperature was specified on the BOL, and your driver didn't set the reefer properly, which resulted in damage to the shipment, you will be responsible.

You also suggest that the product may have been hot when it was received from the shipper. This could be a defense (the "act or default of the shipper"), but even if it you could prove this, it certainly appears that there was carrier negligence.

FREIGHT CLAIMS – MEASURE OF DAMAGES – WHOLESALE OR RETAIL

Question: We have a customer that ships motorcycles to dealers. If damage occurs, the dealer (consignee) files claim for the cost of parts they would charge a customer (retail) plus labor. If the shipper filed the claim, they would file for the cost of the parts sold to the dealer (wholesale).

Why would the amount of the claim be different depending on who filed the claim? The 3PL is claiming that retail must be claimed as it is state law that they are reimbursed at a rate a customer would pay. Why would claim reimbursement to a consignee be different depending on what state they are located?

The claimant is referencing the *Polaroid v. Schuster's Express* ruling on profit. Again, the shipper ships motorcycles/ATMs to their dealers. When damage occurs the dealer files for repairs the same as if a customer brought in a motorcycle for repair (their labor plus their markup price for parts).

Does the *Polaroid* case have any bearing on this particular scenario? Is there case law that that we can reference that relates to this situation?

Answer: I assume that there is damage during transit and that the dealer purchases repair parts from the seller and repairs the motorcycle, intending to sell it to a customer.

Under federal law (Carmack Amendment) the dealer is entitled to its "actual loss", which would be the actual cost of the repair parts (the "wholesale price" it paid the seller), plus its labor. I don't see how the "retail" price (if the parts were sold separately to a customer) would be relevant.

The *Polaroid Corp. v. Schuster's Express*, 484 F.2d 349 (1st Cir. 1973), is not on point and does not support the dealer's claim.

Polaroid was a "stock to stock" transfer from the manufacturer (Polaroid) to one of its distribution warehouses, see Section 7.2.7, *Freight Claims in Plain English* (4th ed.)

Polaroid filed a claim against the motor carrier for damages, totaling $134,490.95; which represented its "dealer price", the amount that it uniformly charged to all dealers purchasing from Polaroid. The question in the case was whether Polaroid was entitled to collect the amount if would have received if the shipment had not been stolen or merely its cost of manufacturing the lost goods.

The District Court found that the goods were in great demand, nothing remaining "but to unload the goods at the distribution center and to stock and take orders for them." Since the manufacturer had earned its profit prior to the theft, the court awarded damages in the amount of $133,989.30, deducting the uncontested cost savings from the uncontested dealer price.

In affirming the decision of the lower court the Court of Appeals concluded: "The correct measure of damages, on the facts of this case, for loss of manufactured goods which are in great demand shipped by a manufacturer to his warehouse is the wholesale selling price less any cost savings."

The Polaroid case is clearly distinguishable, since the claimant is the consignee and purchaser of the parts. While the cost of repair is an appropriate measure of damages in order to "mitigate the loss", the claimant is only entitled to its actual cost for the repair parts, plus the labor needed for the repair.

FREIGHT CLAIMS – CLASSIFICATION MATTERS

Question: Our customer ships their freight in a skeleton crate. It got damaged and appears to be caused by forklift. The carrier paid the claim based on their tariff and the maximum liability is $0.10/lb. for new uncrated item. The carrier does not consider the skeleton crate a crate. Is a skeleton freight not considered a crate based on the National Motor Freight Classification ("NMFC") definition?

Answer: I would refer you to the Commodity Classification Standards Board ("CCSB"), which is responsible for the classification-related provisions of the NMFC, and ask one of their experts like Bill Mascaro or George Beck for an opinion about the "skeleton crate". Here is their contact information:

Phone: 703 838 1810
Fax: 703 683 1094
Email: ccsb@nmfta.org
Website: www.nmfta.org

RECENT COURT CASE

TARIFFS MATTER

In a recent unpublished decision, the federal District Court for the District of New Jersey dismissed the Plaintiff's complaint in favor of an arbitration clause in the carrier's tariff upon Defendant's motion.

The Plaintiff, Alfa Adhesives manufactures and ships adhesives that become unsalvageable if the temperature goes below 32 degrees Fahrenheit. Defendant motor carrier Duie Pyle, Inc. allegedly mishandled some three shipments, resulting in a total loss to Plaintiff. Plaintiff sought reimbursement for the ruined shipments and Defendant failed to respond. As a result, Plaintiff filed a complaint in the District Court

seeking damages pursuant to the Carmack Amendment (49 U.S.C. §1406). Defendant filed a motion to dismiss.

The court noted that "generally an agreement to arbitrate is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." The court also noted that federal policy favors arbitration. The specific issue before the court was whether there was actually an agreement to arbitrate.

The parties agreed that Plaintiff's Motor Freight Tariff governed their contractual relationship and that the Tariff contained an arbitration clause that stated "In handling loss and damage claims, any claim disputed by either [Defendant] or [Plaintiff] will be submitted to the Transportation Arbitration Board, National Motor Freight Council … for disposition."

The court went on to state:

> Thus, the only dispute between the parties, and the only issue for this Court to resolve on this application, is whether this arbitration clause encompasses claims under the Carmack Amendment. (See generally Def. Mov. Br.; Pl. Mov. Br.).
>
> Defendant argues that the unambiguous language of the Tariff requires this claim to be submitted to binding arbitration. (Def. Mov. Br. at 3). Plaintiff argues that the agreement between the parties cannot require Plaintiff to arbitrate its claims because the Carmack Amendment mandates that a party waiving its right under same must do so explicitly and in writing, but the Tariff generally refers to arbitration without mentioning the Carmack Amendment. (Pl. Opp. Br. at 3–4). The Court disagrees with Plaintiff.
>
> Plaintiff is correct in its assertion that Section 14101(b)(1) of the Carmack Amendment requires an express, written waiver of its rights under the Amendment. (Pl. Opp. Br. at 3) (quoting 49 U.S.C. § 14101(b)(1)). However, as Defendant correctly explains, Courts in this Circuit, along with New Jersey state courts, have held that no specific "form of words" is necessary to waive a statutory right and have the claim submitted to arbitration. See, e.g., *Nooman v. Comcast Corp.*, 2017 U.S. LEXIS 175549, at *21 (D.N.J. Oct. 23, 2017) (citing *Atalese v. U.S. Legal Servs. Grp.*, L.P., 2019 N.J. 430, 444–46 (2014) (finding that "[n]o particular form of words is necessary to accomplish a clear and unambiguous waiver of rights."); *JPMorgan Chase & Co. v. Custer*, 2016 U.S. Dist. LEXIS 31595, at *15 (D.N.J. Mar. 10, 2016) (citing *Altese*, supra), cert. denied, 135 S. Ct. 2804 (2015); see also *Moule v. UPS Co.*, 2016 U.S. Dist. LEXIS 88270, at *34 (E.D. Cal. July 7, 2016) (finding "that because the Carmack Amendment governs all disputes related to the shipment of goods" requiring an arbitration clause to "reference the Carmack Amendment would be redundant and would cause confusion rather than provide clarity."). Accordingly, claims covered by the Carmack Amendment are arbitrable even if the arbitration clause does not explicitly reference the Carmack Amendment, so long as the arbitration clause is in writing and unequivocal.
>
> In light of the foregoing, the Court must dismiss Plaintiff's Complaint and compel the parties to resolve this dispute by way of arbitration. This is because there is no dispute that the parties entered into a valid agreement and that said agreement contained a binding arbitration clause. Moreover, while the arbitration clause does not specifically reference the Carmack Amendment, said clause explicitly states that any and all claims arising out of the contractual relationship must be arbitrated. Plaintiff's claims stem directly from the alleged improper shipping of its adhesive pursuant to said contract. As such, this action may only be resolved in a manner consistent with the binding arbitration clause.

Once again, we cannot stress enough that carriers' tariffs matter, and shippers need to be aware of all the terms they include and what they mean.

Alfa Adhesive v. A. Duie Pyle, 2018 WL 2317352 (USDC D NJ May 22, 2018)

TECHNOLOGY

AUTONOMOUS VEHICLES

On July 12, 2018 the Federal Motor Carrier Safety Administration ("FMCSA") held a public listening session on "Automated Driving System ("ADS")-Equipped Commercial Motor Vehicles. A recording is available at https://www.fmcsa.dot.gov/mission/policy/public-listening-session-automated-driving-system-ads-equipped-commercial-motor.

On July 24, Ford announced the creation of "Ford Autonomous Vehicles LLC", a new organization charged with accelerating its autonomous vehicle ("AV") business to capitalize on market opportunities

From the press release:

> The company is organizing its self-driving business into Ford Autonomous Vehicles LLC, which will include Ford's self-driving systems integration, autonomous vehicle research and advanced engineering, AV transportation-as-a-service network development, user experience, business strategy and business development teams. The new LLC, which is structured to take on third party investment, will be primarily based at Ford's Corktown campus in Detroit and will hold Ford's ownership stake in Argo AI, the company's Pittsburgh-based partner for self-driving system development. Ford expects to invest $4 billion in its AV efforts through 2023, including its $1 billion investment in Argo AI.

Visit https://media.ford.com/content/fordmedia/fna/us/en/news/2018/07/24/ford-creates-ford-autonomous-vehicles-llc.html to view the press release.

Bosch proposes a cloud-based system that would provide self-driving cars with up-to-date real time information on road conditions, eventually using data provided by other cars. Utilizing GPS data and vehicle sensors, other cars in the network would be aware of the hazardous road condition and could reroute to avoid it or turn control over to a human driver.

Visit https://www.cnet.com/roadshow/news/2020-bosch-road-weather-self-driving-autonomous-car-data/ for more information.

CCPAC NEWS

CCPAC

Established in 1981, the Certified Claims Professional Accreditation Council ("CCPAC") is a transportation cargo claim accrediting organization with a global membership and is comprised of shippers, manufacturers, freight forwarders, brokers, logistics companies, insurance companies, law firms and transportation carriers including air, ocean, truck and rail and various related transportation organizations. CCPAC seeks to raise the professional standards of individuals who specialize in the administration and negotiation of cargo claims. Specifically, it seeks to give recognition to those who have acquired the necessary

degree of experience, education, expertise and who have successfully passed the CCP Certification Exam covering domestic and international cargo liability, warranting acknowledgment of their professional stature.

The next CCP Exam will be Saturday Morning, November 3, 2018, in most major cities nationwide in the USA and in Canada. Exact locations will be determined based on applications submitted. Prior application, registration and approval are required to sit for the exam. On-line registration for the November exam will be open on the website www.ccpac.com on May 15th.

Further information can be obtained by contacting John O'Dell, Executive Director of CCPAC, by phone: 904-322-0383 or email: jodell@ccpac.com or visit http://www.ccpac.com/.

CLASSIFICATION

FUTURE COMMODITY CLASSIFICATION STANDARDS BOARD ("CCSB") DOCKETS

	Docket 2018-3	Docket 2019-1
Docket Closing Date	August 16, 2018	November 29, 2018
Docket Issue Date	September 13, 2018	January 10, 2019
Deadline for Written Submissions and to Become a Party of Record	October 4, 2018	February 1, 2019
CCSB Meeting Date	October 16, 2018	February 12, 2019

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

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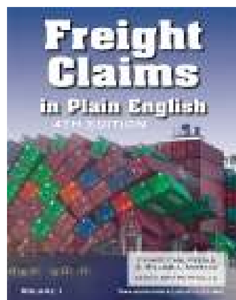

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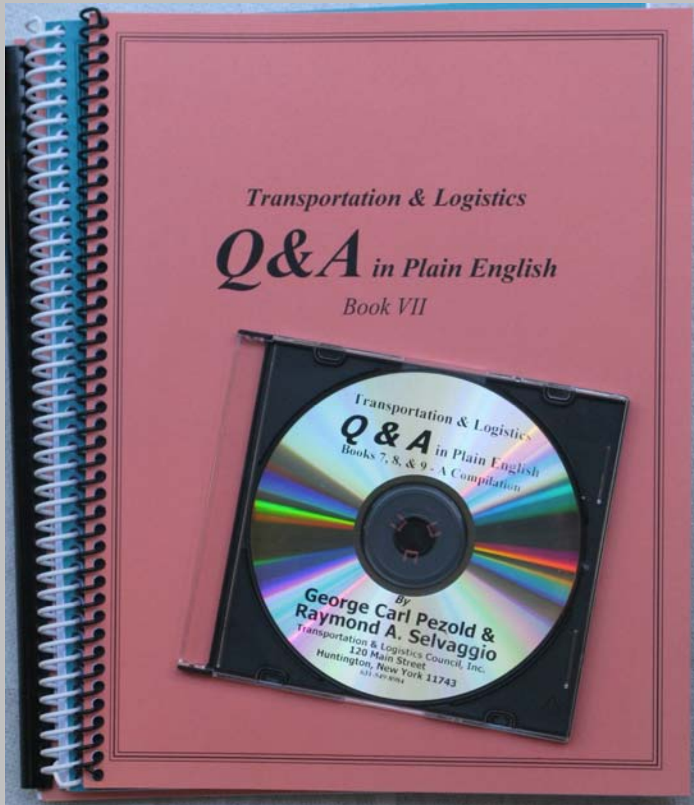

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