

TRANSPORTATION & LOGISTICS **Council, Inc.**

GEORGE CARL PEZOLD, Executive Director
RAYMOND A. SELVAGGIO, General Counsel

May 20, 2015

Joel L. Ringer, Chairman
Commodity Classification Standard Board
1001 North Fairfax Street, Suite 600
Alexandria, VA 22314

Re: NMFC - Procedures Governing Filing of Duplicate Payment Claims

Dear Mr. Ringer:

I am the Executive Director of the Transportation & Logistics Council, Inc., a not-for-profit organization of some 300 shippers and receivers of freight nationwide.

The Council is in receipt of a copy of the letter dated May 2, 2015 from Gilbert C. Williams of Williams & Associates to William Mascaro, Vice Chairman of the Commodity Classification Standards Board, together with Mr. Mascaro's e-mail replies to Mr. Williams (copies attached).

According to Mr. Mascaro, the letter from Mr. Williams has been submitted to the NMFTA for consideration at its June 1, 2015 meeting. Submitted herewith are comments on behalf of the Council and its members regarding the 180-day time limit referred to in Mr. Williams' letter.

1. Item 300300, Application, states:

These procedures, which conform to the regulations of the Federal Motor Carrier Safety Administration, are limited in their application to the processing of claims for overcharges, duplicate payments or over collection for the transportation of property in interstate or foreign commerce by motor carriers of household goods, motor carriers participating in the transportation of property in the noncontiguous trade, and freight forwarders subject to 49 USC, Subtitle IV, Part B, that are participants in the National Motor Freight Classification."

A NOT-FOR-PROFIT CORPORATION DEDICATED TO SERVING THE INTERESTS OF THE SHIPPING COMMUNITY
THROUGH EDUCATION AND REPRESENTATION IN ISSUES RELATING TO THE TRANSPORTATION OF GOODS

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Item 300310 defines Duplicate Payments as follows: "(c) Duplicate Payments. Means two or more payments for the transportation of the same shipment."

Item 300320 states in relevant part: "(a) All claims must be filed within 180 days from receipt of the original invoice..."

2. Item 300500, Application, states:

These procedures govern the processing of billing disputes involving the transportation of property in interstate or foreign commerce by motor vehicle that are participants in the National Motor Freight Classification.

For procedures relating to overcharge claims, and unidentified or duplicate payments involving the transportation of property in interstate or foreign commerce by motor carriers of household goods, motor carriers participating in the noncontiguous trade, or freight forwarders subject to 49 USC, Subtitle IV, Part B, see Item 300300".

Although not the clearest of language, it would appear that even if a carrier is a "participant" in the Classification, Items 300500 through 300530 would not apply to shipments involving household goods, or noncontiguous trade.

The procedures in Items 300500 through 300530 apply to "Billing Disputes" which are defined as ". . . a dispute over the charges or fees originally or subsequently billed by the shipper", and which reflects the statutory language in 49 USC 13710(a)(3)(B). These procedures do not mention "duplicate payments" and presumably are intended to apply to shipper claims for "overcharges".

3. Regardless of whether the 180 day time limit applies only to household goods or noncontiguous trade, the Council believes that it is important to avoid any confusion and to distinguish between claims for "duplicate payments" as opposed to claims involving "billing disputes".

The relevant statutory provisions are at 49 USC Sec. 13710. Additional billing and collecting practices:

(3) BILLING DISPUTES-

(B) INITIATED BY SHIPPERS- If a shipper seeks to contest the charges originally billed or additional charges subsequently billed, the shipper may request that the Board determine whether the charges billed must be paid. A shipper must contest the original bill or subsequent bill within 180 days of receipt of the bill in order to have the right to contest such charges.

It is clear from the language of the statute that a claim to recover a duplicate payment is not a "billing dispute". Billing disputes contest the amount of the bill or invoice. Typically these are extension errors, misclassifications, weight errors, services that were not requested or provided (lift gate, residential delivery, etc.) that are discovered upon an audit of freight bills.

A duplicate payment is a payment made in error, typically because the carrier sent a duplicate freight bill, which was inadvertently paid. There is no time limit specified for filing a duplicate payment claim in the statute or in the FMCSA (formerly ICC) regulations at 49 CFR Part 378 - Procedures Governing the Processing, Investigation, and Disposition of Overcharge, Duplicate Payment, or Over collection Claims.

The "180 day rule" in 49 USC 13710 is not applicable since it only applies when the shipper seeks to contest "charges originally billed or additional charges subsequently billed".

The federal statute of limitations dealing with an action by a shipper to recover "overcharges" from a carrier, 49 U.S.C. 14705(b), does not apply to the recovery of duplicate payments. Such actions are governed by applicable State law. See *Duplicate Payments of Freight Charges*, No. 36062, 350 I.C.C. 513 (August 4, 1975); see also *Interstate Commerce Commission v. Long Transportation Co., Inc.*, 479 F.Supp. 844 (N.D. Ill. 1978).

Since there is no applicable federal statute of limitations, the applicable State statute of limitations for that type of action would apply. For example in New York, a duplicate payment claim would probably fall into the category of "Money Paid by Mistake", which has a six (6) year statute of limitations. See CPLR 213-6

As the court observed in *National Bank of Canada v. Artex Industries, Inc.*, 627 F.Supp. 610 (S.D.N.Y. 1986):

Under New York law "a party who has made a mistaken payment to another based upon a unilateral mistake of fact may recover the payment unless the payee has changed his position to his detriment in reliance upon the mistaken payment." *Bank Saderat Iran v. Amin Beydown, Inc.*, 555 F.Supp. 770, 773 (S.D.N.Y. 1983); see also *Bank Leumi Trust Co. of New York v. Bally's Park Place, Inc.*, 528 F.Supp. 349, 354 (S.D.N.Y. 1981); *Liberty Mutual Ins. Co. v. Newman*, 92 App.Div.2d 613, 459 N.Y.S.2d 806, 808 (1983); *Manufacturers Trust Co. v. Diamond*, 17 Misc.2d 909, 186 N.Y.S.2d 917, 919 (Sup. 1959). Artex does not contest that NBC paid Artex by mistake. (Answer, p 7.) On that fact alone, absent a valid affirmative defense, NBC is entitled to the return of the mistaken payment.

Thus, at least in New York, a shipper would have six (6) years to bring a court action to recover on a duplicate payment claim, and there is no condition precedent for the filing of a claim for duplicate payments within any specified time period.

4. Shipments of household goods and those involved in noncontiguous domestic trade are not the largest segment of interstate and foreign commerce, but they are a significant portion.

For the reasons set forth above, the Council requests that Items 300300 through 300380 of the Classification be corrected to make it clear that the 180-day filing requirement applies only to "billing disputes" and NOT to "duplicate payments".

Respectfully submitted,

A handwritten signature in black ink that reads "George Carl Pezold". The signature is written in a cursive style with a large initial "G".

George Carl Pezold
Executive Director

ATTACHMENTS

From: Gil Williams [<mailto:gilw@waionline.com>]
Sent: Tuesday, April 21, 2015 6:41 AM
To: 'ringer@nmfta.org'
Subject: NMF 100-AO

Mr. Ringer

Supplement 1 to this publication made changes to the process for handling loss/damage claims and filing and collection of overcharges many changes but most important:

1. Reducing from 15 days to 5 days the time for providing notice of concealed damage.
2. Providing 180 days for the filing and collection of claims for duplicate payment.

I am old enough to have appeared when your group was the National Classification Board. Still follow all of your Dockets. In doing so it would appear you did not follow your published procedures and rules. Your most recent one is dated March 2, 2015. Article 1 (d) states, "Each proposal shall be docketed, and the Chairman of the CCSB shall place proposals on the first available docket for public hearing". I cannot find that you followed this Procedure.

Rule 10 of your published Procedures, Changes Without Docketing does not apply. Even if you thought it did it also states, "Advance Notice of such changes shall be provided in the Docket Bulletin and posted on the NMFTA's web site. It appears that was not done.

You need to take immediate action to suspend the provisions of Supplement 1 outlined above. In doing so any future action must eliminate mention of time limits for filing of claims for duplicate payment and collection of freight charges. Note the attachment and the term "overcharges" is interpreted to exclude duplicate payment of freight charges.

Thank you

Gil Williams
President
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From: William Mascaro [mailto:William.Mascaro@nmfta.org]
Sent: Thursday, April 23, 2015 8:36 AM
To: gilw@waionline.com
Cc: Joel Ringer
Subject: NMF 100-AO

Mr. Williams,

This is in response to your email to Joel Ringer regarding changes published in Supplement 1 to NMF 100-AO. Your inquiry was forwarded to me for a response.

The claims procedures were initially published in the NMFC as a convenience to participating carriers and other users of the classification and they have never been, and are not currently, subject to docketing procedures. Accordingly, they are beyond the purview of the CCSB.

The revisions published in Supplement 1 to NMF 100-AO stem from a comprehensive review of the claims procedures published in the NMFC and are intended to reflect current language and technology while complying with the regulations of the Federal Motor Carrier Safety Administration (FMCSA). No change is made to the legal requirements for filing claims as set forth in the FMCSA's regulations.

Regarding item 300135, with the current and accepted business use of fax, email, text messaging, and other forms of electronic communication, it was concluded that the former 15-day notification period unduly delayed notice to the carrier that a claim for concealed damage existed, and did not provide the carrier with a reasonable opportunity to verify that the damage occurred during transit, and not at some point after delivery to the consignee or receiver. Accordingly, Sections (d), (e), (f), (g) and (h) were revised and are intended to work together to provide guidance, where the carrier chooses to use the provisions, on claims involving concealed damage.

Regarding the 180 day period for filing claims involving overcharges or unidentified or duplicate payments in item 300320, that is not new and was not part of the change to the provision effected in Supplement 1. Rather, language was removed that allowed for claims to be filed electronically when agreed to by the carrier and shipper involved. The 180 day reference first appeared in Supplement 4 to NMF 100-AL, effective December 1, 2012.

If you have specific comments regarding the claims procedures, please submit them to my attention and I will forward them to the National Motor Freight Traffic Association for consideration at their June 1, 2015 meeting.

Regards,

William Mascaro
Vice Chairman
Commodity Classification Standards Board
1001 N. Fairfax St., Suite 600
Alexandria, VA 22314
703-838-1834

WA
Williams & Associates Inc.
TRANSPORTATION CONSULTANTS

REQUEST FOR CHANGE TO NMFC RULES

May 2, 2015

Mr. Williams Mascaro
Vice Chairman
Commodity Classification Standard Board
1001 N. Fairfax St., Suite 600
Alexandria, VA 22314

RE: NMF 100-AG, Supplement 1

Mr. Mascaro

Thank you for your email dated April 23, 2015 and your last paragraph suggesting if I have specific comment regarding the claims procedures that I should submit them and it will be considered at the June 2015 meeting.

My request will be directed to the rule which states one has only 180 days to submit a request for refund of a duplicate payment and that you consider it to be an overcharge. That position needs to be corrected because it is in conflict with the decision of the Interstate Commerce Decision, No. 36062. 350 I.C.C. 513 (1975). It also overlooks the principle of "Money had and received" which is governed by Section 3 of the Uniform Commercial Code. This goes back to English Law and carried forward to Common Law. If you need any case law in addition to that named in the ICC decision I would refer you to these cases:

- *Bingham v. Cabot* 3 U.S. 19 (Dall.) (1795)
- *Kershaw v. Kirkpatrick* [1878] UKPC 4
- *Sinclair v. Brougham* [1914] AC 398
- *Jackson v. Horizon Holidays Ltd* [1975] 1 WLR 1468
- *Lipkin Gorman v. Karpnale Ltd* [1991] 2 AC 548
- *The Mikhail Lermontov* [1990] 1 Lloyd's Rep 579
- *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] UKHL 12
- *Phillip Collins Ltd v. Davis* [2000] 3 All ER 808

NMFTA publishes this and people think it is the law, it is not. One cannot overlook what I have outlined above. There is no legal basis for establishment of regulations setting time limits. Our firm is active in the practice of filing and collected overcharge claims. We also since 1978 have had two employees filing and collecting loss/damage claims and our clients have an interest in the change regarding the time limits for concealed damage claims but since we do not ship or receive freight we would not have standing and therefore will not offer comments on this.

Thanks you and if you have questions let me know.

Submitted by: Gilbert C. Williams

From: William Mascaro
Sent: Tuesday, May 05, 2015 3:10 PM
To: Gil Williams
Cc: Bagileo, John R.; Joel Ringer; Paul Levine
Subject: RE: Request for Change

Mr. Williams,

In my earlier email I mistakenly referenced undercharges when I meant to reference overcharges.

Please accept my apologies for the error.

Regards,

William Mascaro
Vice Chairman
Commodity Classification Standards Board
1001 N. Fairfax St., Suite 600
Alexandria, VA 22314
703-838-1834

-----Original Message-----

From: William Mascaro
Sent: Tuesday, May 05, 2015 3:32 PM
To: 'Gil Williams'
Cc: Bagileo, John R.; Joel Ringer; Paul Levine
Subject: RE: Request for Change

Mr. Williams,

Thank you for your letter of May 2, 2015. It will be forwarded to the NMFTA for consideration at their June 1, 2015 meeting.

I would also like to point out that in my April 23rd response, I never said that a duplicate payment is an undercharge. The NMFC provides separate procedures, not regulations, for the processing of both. Filing and processing undercharges are addressed in item 300320 while billing disputes are addressed in item 300520.

Regards

William Mascaro
Vice Chairman
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1001 N. Fairfax St., Suite 600
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