"Dropped Trailers" and Liability for Shortage or Damage at Destination

By George Carl Pezold

Many large retailers and distributors control their inbound freight. They arrange for the transportation, have contracts with the carriers, pay the freight charges, and require their vendors to use only their designated carriers. And often they have "drop trailer" agreements with their carriers.

The problem for many shippers is that their customers often expect (or require in their purchase agreements) that the shipper-seller assume the risk of loss in transit, even though it did not hire the carrier. And, with dropped trailers, the shipper is the party that has to file and try to collect any claims for loss or damage that are discovered or reported some time after the trailer delivered.

First, it should be remembered that notwithstanding the fact that the purchaser-consignee arranges for the transportation, the shipper does have rights and remedies under the applicable law and regulations, for example:

- Liability: Under the Carmack Amendment (49 USC 14706) a motor carrier is "liable to the person entitled to recover under the receipt or bill of lading". Since the bill of lading is the "contract of carriage" between the *shipper* and the carrier, the carrier's liability to the shipper is governed by Carmack, and not the contract between the consignee and the carrier.
- Limitation of Liability: Under Carmack, motor carriers are liable for "actual loss" to goods while in their possession and control, although they can limit their liability "to a value established by written or electronic declaration of the *shipper* or by written agreement between the carrier and *shipper*". It follows that a liability limitation in the contract between the consignee and the carrier would not be binding on the shipper.
- Time Limits: Carmack also establishes minimum time periods for the filing of claims an for bringing a law suit and states "A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section." Thus, any shorter time limits in the consignee's contract would not be binding on the shipper.
- Duty to investigate claims: Regardless of any "dropped trailer" agreement, the carrier still has a duty to investigate each claim on the merits. The Federal Motor Carrier Safety Administration ("FMCSA") claim regulations at 49 CFR Part 370 state:

  > § 370.7 Investigation of claims.
  > Prompt investigation required. Each claim filed against a carrier in the manner prescribed in this part shall be promptly and thoroughly investigated if investigation has not already been made prior to receipt of the claim.

Unfortunately, even though the shipper-seller has rights and remedies under the law, as a practical matter, with dropped trailers it can be difficult or impossible to recover legitimate claims for loss or damage for a number of reasons.

- The carrier's liability normally ends when it completes delivery and there is nothing further for the carrier to do. Unless there is obvious physical damage, broken or missing locks or seals, etc., and the carrier gets a "clear" delivery receipt when it drops the trailer it will decline the claim.
- Carriers will often take the position that liability limitations, notice requirements, time limits, or other provisions in the carrier's contract or its drop trailer agreement with the consignee govern any loss or damage claims (even though the shipper is not aware of, and is not a party to those agreements).
- The consignee does not report OS&D (over, short and damage) events promptly to the shipper, thus impairing its ability to investigate the loss, and merely deducts shortages or damage when paying the vendor's invoice weeks or months later.
- Small shortages (one pallet, a few cases missing from a pallet, etc.) are common in delivering to large retailers or distributors, but fall "under the radar" unless there a recurring pattern at a particular consignee's facility.
- Damage or shortage from a dropped trailer that is only discovered sometime after delivery is similar to a "concealed damage" situation. The claimant must prove the quantity and condition of the goods tendered to the carrier at origin, and provide competent evidence that there was in fact damage or shortage at the time the trailer was delivered (and that it did not occur after delivery). While the shipper can usually establish what was tendered at origin, it can't meet its burden of proof as to the count and condition at the time of delivery.

So what can be done about these problems?

Not all loss or damage is the fault or responsibility of the carrier. For example, shortages can occur in three ways: the goods were not loaded on the trailer at origin, or they were lost during transit, or they were stolen after the trailer was delivered to the consignee.

However, when there is a legitimate reason to believe that the carrier is liable for shortage or damage, the consignee should have an obligation to cooperate with the shipper with details about how and when it was discovered, and for receiving reports or other evidence that the shortage or damage actually existed when the trailer was delivered, and not afterwards. Customers should not be allowed to merely deduct alleged shortages or damage from the shipper's invoices without an adequate explanation.

Shippers should also review (and enforce) their own "loss prevention" policies and procedures. The list should include proper packaging, blocking and bracing to minimize damage, good records and photos of the loading, use of tamper proof seals (with seal number on the bill of lading), premises and personnel security, recording and GPS tracking devices, etc.