Transportation & Logistics

Q&A in Plain English

Books 1, 2 & 3

A Compilation

By
George Carl Pezold

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INTRODUCTION

"Transportation & Logistics - Q&A in Plain English - Books 1, 2 & 3" is a compilation of the first three of the Council's popular texts that were originally published in 1999, 2001 and 2003.

Based on hundreds of actual questions submitted to the Council's "Q&A" forum on the Internet, to the T&LC HotLine and to the *TransDigest* by shippers, carriers and logistics professionals, this compilation is loaded with valuable and informative information and answers by George Carl Pezold and Raymond A. Selvaggio, two leading transportation attorneys.

These are **real** questions, from business people with a wide range of day-to-day transportation and logistics problems, and the answers are clear, concise and to the point.

Q&A in Plain English is a useful deskbook, and a refresher and handy reference for experienced transportation and logistics professionals. It also serves as an indispensable teaching aid for students and newcomers to the transportation and logistics field.

For those wishing to explore subjects in greater depth, there are numerous references to T&LC's texts and educational materials, such as *Freight Claims in Plain English* (3rd Ed. 1995), as well as to relevant statutes, regulations and court decisions.

In addition, readers may continue to view timely Q&A's as they are published in *TransDigest*, either by joining the Council or by subscribing. Information on membership and publications may be found by visiting the Council's web site at www.tlcouncil.org.

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1) 3PL's - Broker or Freight Forwarder?

Question: We are primarily a warehousing company, however, we have a transportation program where we act, we believe, as a broker, in arranging the consolidation of LTL orders from various shippers into TL routes via contract and commercial carriers, on a published "sailing" schedule, in order to reduce the cost of transportation for our customers. We want to be in the business of transportation, so we are looking toward providing more complete services.

First, I need your confirmation that in the performance of the services described above, we are legally acting as a freight broker. We do have a brokerage license.

Second, if we are paying the carriers and billing our customers (the shippers) for freight (at guaranteed, all-inclusive rates), can our customer withhold payment or deduct from future freight bills for a loss or damage shipment? Can we do the same to the carrier? I do not believe either practice is legal, but I cannot find the code.

Assuming this is not legal, is it therefore our responsibility to file the claim with the carrier since we arranged the transportation? If we do not have to file the claim, but if we do want to offer the service of handling the claims for our customers, what is the "right and professional" way to handle the customer's credit for loss or damage received?

Answer: Is sounds as though you are providing services that fall into the category of a "freight forwarder". The fact that you are consolidating shipments for one or more shippers, and using the services of a motor carrier, fits more within the definition of a freight forwarder, see Section 13.0, Liability of Freight Forwarders and Intermediaries in *Freight Claims in Plain English* (3rd Ed. 1995).

As a forwarder, you would be assuming liability for loss or damage in the same way as if you were a carrier. In the freight forwarder relationship there are really two contracts of carriage: between the shipper and the forwarder, and between the forwarder and the carrier. Thus, you would be liable to the shipper for the loss or damage, and would have to file your own claim against the motor carrier.

As far as setting off freight charges against loss and damage claims, this is a common practice and is not "illegal". If you want to avoid this problem, the best way is to cover it in a written transportation agreement with your customers.

2) 3PL's - Broker's Licenses

Question: I'm a 3PL who is using common carriers and household goods carriers to deliver large items to residences. Do I need a broker's license? If I do, where can I get one?

Answer: The definition of a "broker" is found in the FMCSA (formerly ICC or FHWA) regulations at 49 CFR Part 371, and provides:

> (a) "Broker" means a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport.

* * *

(c) "Brokerage" or "brokerage service" is the arranging of transportation or the physical movement of a motor vehicle or of property. It can be performed on behalf of a motor carrier, consignor or consignee.

If your activities fall within the definition of a "broker", the Interstate Commerce Act requires that you must "register" with the Department of Transportation (FMCSA), 49 U.S.C. Sections 13901 and 13904. This registration requirement replaces the former statutory requirement to obtain a "license" from the ICC. Brokers holding licenses from the ICC as of December 31, 1995 were "grandfathered" and deemed to be registered under the new law, 49 U.S.C. 13905.

The FMCSA has established regulations governing applications for broker registration that are published at 49 CFR Part 365. Application forms (Form OP-1) are available from the FMCSA, 400 Virginia Ave. SW, Washington, DC, 20590, phone (202) 358-7000, and are now available through the FMCSA web site at www.fmcsa.dot.gov (select “Licensing Forms”). I would suggest, though, that you consult an experienced transportation attorney.

3) 3PL's - Carrier or Broker?

Question: We utilize a 3PL to manage the process of getting our merchandise from our vendors into our DC's. From what I understand the 3PL is merely acting as broker on these loads and typically is not liable for loss and damage outside of their negligence or contractually assumed liability. My question is, what if, on the Bill of Lading, the shipper shows the 3PL as the carrier, when in reality the load is actually brokered to another carrier, who signs the BOL with aforementioned noted. By allowing the carriers to do this, has the 3PL held itself out as a motor carrier, and thus liable as a motor carrier under the Carmack Amendment?

Answer: There is no black and white rule for determining whether an intermediary is acting as a broker or a carrier. Each case turns on the individual facts: the representations, which were made, the relationship of the parties, the course of dealing, etc. - as well as the documents. I am not aware of any case that says that a broker becomes liable as a carrier merely because it was shown in the "carrier" space on a bill of lading.

Your question once again points out the importance of having carefully drawn, written agreements between shippers, intermediaries and carriers.

4) 3PL's - Motor Carrier, Broker or Freight Forwarder?

Question: We are in the process of revisiting our agreement with our 3rd party logistics provider. In referencing one of your manuals, *Protecting Shippers Interests*, am I to assume that the legal status of an asset based 3PL, could actually be any of the following depending on the transportation arrangement:

1. Motor carrier- when they arrange for their affiliated motor carrier to pickup a shipment
2. Broker- when they arrange for a carrier not affiliated with them to pickup a full truckload
3. Freight Forwarder- when they arrange for a LTL carrier, such as CF, to pickup and deliver a shipment

Answer: You are correct. Third party logistics providers may wear a number of different "hats" and often do. That is why it is so critical to make sure that you have well-drafted contractual

agreements with 3PL's and also that you check them out to make sure they are properly licensed and registered as required by applicable laws and regulations.

5) Accessorial Charges

Question: We are a manufacturer of disposable medical devices and ship all orders from one Midwestern facility. Roughly 80% of customer orders ship LTL, about 8% parcel and the remaining orders are FTL. We do not have any long-term FTL contracts; we use a few different carriers and current lane quotations from each to determine who will get the load.

Early last year, we made an agreement with one such carrier to include in their quoted price the added unload/driver assist charges we were regularly getting on our West Coast intermodal moves. From that point on, those accessorial charges were rolled into the base rate and no longer listed separately on their invoices. Recently, the carrier rep indicated that they had a negative balance in their accrual account and that we owed them nearly $10,000 as the result of their underestimating the amount of accessorial charges for over 100 loads dating from January of last year through May of this year. We have updated quotations for these lanes throughout that time period and have paid each invoice on time without dispute. Is there any possibility that we could be liable for these back charges? Any insight you can provide would help.

Answer: Do you have any documentation of your agreement regarding theses charges? You indicate that you do not have any formal transportation contracts, but have "quotations" from various carriers. The question is whether it can be determined from the "quotation" whether the accessorial charges are included in the rate; if so, then the "quotation" would be evidence of the contractual agreement between the parties. On the other hand, if the "quotation" is silent - or worse, if it incorporates the carrier's rules tariff by reference - you may be liable for the accessorial charges.

I should note that some of the claims you refer to are time-barred under the "180 day rule" in 49 U.S.C. § 13710(3)(A) which provides: "A carrier must issue any bill for charges in addition to those originally billed within 180 days of the receipt of the original bill in order to have the right to collect such charges."

My best advice to avoid this type of problem in the future is to enter into a properly drafted transportation agreement with each of your carriers.

6) Act of God - Tornado

Question: One of our plants shipped a switch gear via a carrier which interlined with another carrier. Before it was out for delivery, it became damaged and was refused by the consignee on that basis. The unit was returned to the Oklahoma City. It was there several days before a tornado struck, so we assume the carrier performed an inspection and sent it off to their claims. Later, the piece was completely destroyed by the tornado.

While we understand that the Act of God defense would be appropriate for the value of the entire switch gear, would the carrier be considered legally liable for a reasonable repair cost based on the damage noted at delivery and the inspection report, which occurred before the tornado hit and further destroyed the partially damaged device?

Answer: An interesting question... I don't think that the fact the damages (amount) may have been ascertainable before the tornado struck has any legal significance.

I would think that if the goods were actually lost in one of the recent Oklahoma tornados the carrier would have a valid "act of God" defense. Note also that, since the transportation had stopped, and the goods were apparently "on hand" in the warehouse, the carrier's liability would have changed to that of a warehouseman, with a lesser standard of liability.

There are some cases in which delay, either before or after an "Act of God" event, caused or contributed to the loss. You might be able to argue one of these special exceptions. I would suggest

that you read Section 6.3 of *Freight Claims in Plain English* (3rd Ed. 1995), which has a thorough discussion of the "Act of God" defense.

7) Air Freight - Declared Value and Insurance

Question: We send shipments out by air freight and will declare a value of $1,000.00 per shipment, which is the amount of our insurance deductible, even though the value may be much greater. The question is, have we prejudiced our ability to collect the invoice value from the insurance company by only declaring a $1,000.00 value on the air way bill?

Answer: By declaring a lesser value on the air waybill, you have prejudiced your insurer's ability to recover the full invoice value from the carrier through subrogation. You would have to review the particular insurance policy as some policies allow the shipper to ship under a bill of lading with a released rate or limitation of liability, and some do not.

Is the shipment domestic or international? The liability differs. Domestic could be 50 cents per lb., 50 cents per lb. per piece, or $9.07 per lb. per piece. International is now 17 SDR's per kilo, or about $10.41 per lb. per piece.

As to the declaration on the air waybill, if you declare the value at $1,000, the carrier will assess an excess value charge for the amount of value that exceeds its tariff limit, whatever that may be. For example, if a shipment weighs 500 lbs. and has an invoice value of $5,000, that's $10 per lb. But if the airline's liability is only 50 cents per lb., or $250, it will charge its excess value charge for $750.00. That could be 35 cents to $1.00 per $100 of excess value, depending on the carrier's tariff. ($26.25 to $75.00)

It may be cheaper to have the insurance deductible set at the carrier's liability limit. The shipper would file claims against the carrier for its tariff limit, and the insurer will pick up the losses over that limit. Insurers' premiums are usually much cheaper than carriers' excess value charges.

As to your question about the insurer's subrogation claim against the airlines, the insurer must claim the actual invoice value of the loss. However, the airline will only pay up to the limit of its liability unless a higher value has been declared. If you are successful in changing your insurance policy as suggested above, there will be no need to file claims against the airline, as you will recover up to the limit of the airline's liability.

8) Air Freight Forwarder - Liability for Theft

Question: An airfreight forwarder has declined our claim on the ground that it has no liability for thefts! Is this correct?

Answer: Definitely not. Air freight forwarders that issue their own house air waybill are liable as common carriers. Even if there were some exculpatory clause in the forwarder's unfiled tariffs, it would be unenforceable.

9) Air Freight Forwarders - Licensing Requirements

Question: I am checking credit on a potential customer. This customer is an airfreight forwarder. My question is, are air freight forwarders required to have surety bonds?

Answer: Airfreight forwarders, unfortunately, are unregulated by the U.S Department of Transportation or any other federal agency, so there is no requirement for registration, insurance, surety bonds, etc.

I would note that many so-called “air freight forwarders” actually engage in surface transportation by truck, where no portion of the movement is by air. In such circumstances they would be required to register as a freight forwarder with the Federal Motor Carrier Safety Administration.

10) Air Freight Forwarding - Legal Requirements

Question: We are trying to build an airfreight company in Greece and we are looking for International Law about establishing that company. We would like to be informed about all the regulations are needed.

Answer: The basic requirements for doing business will be governed by the local laws of the country where your principal office is located.

As for international laws, transportation of passengers, baggage and air freight is governed by international treaties, namely the Warsaw Convention and the Montreal Protocol No. 4 (which amends the Warsaw Convention, and has been ratified by most major trading nations).

Most air carriers participate in the International Air Transport Association (IATA), which establishes various rules and regulations governing transportation of air cargo.

11) Air Waybills - Declared Value

Question: I have a question about the air waybill. On the international air waybill and international house air waybill, there is a space called "Declared Value for Customs". Is this a mandatory field that one must fill in with the value? Which FAA or IATA rules and/or regulations refer to this subject?

Answer: The International Air Transport Association (IATA) air waybill used in international air freight contains two boxes for entering a value.

The "Declared Value of Carriage" is used when the shipper wishes to declare a value of the goods which is in excess of the carrier's limitation of liability ($9.07 per lb. under the Warsaw Convention, and slightly higher under Montreal Protocol #4) and to obtain additional liability coverage.

The "Declared Value for Customs" is used if the goods are subject to duty (import taxes) by the destination country. The requirements for entering a value in the "customs" box vary depending on the destination country.

IATA publishes the "Cargo Services Conference Resolutions Manual" which contains the air waybill forms, explanations, rules, etc. It is available from IATA, 800 Place Victoria, P.O. Box 119, Montreal, Quebec, Canada H4Z 1M1.

12) Arbitration of Freight Claims

Question: We have two old loss and damage freight claims (each claim is about $1500) that we have been trying to collect from a carrier for over 18 months. The carrier demanded that the claims go to arbitration. We are not familiar with arbitration and would like to know what steps we should follow.

Answer: If you agree to arbitrate these loss & damage claims, I would recommend using TAB (the Transportation Arbitration Board). You can get information on the Council's website: www.tlcouncil.org.

One note of caution: The statute of limitations is 2 years from the date of declination of the claim. The statute of limitations is not extended by arbitration, unless the parties expressly agree to waive it. If you haven't resolved these claims within that time period, they will be time-barred, and the carrier will have no further obligation to pay.

13) Bankrupt Broker - Payment to Carriers

Question: We have a situation where a truck broker that we use has gone out of business. I understand from the previous Q&A's that you have published that the credit for these services was extended by the trucker to the broker. As a result, we are not obligated to pay twice for the same shipment. On shipments where we have not paid as yet, the question has come up if it would be permissible to pay the trucker what he negotiated with the broker. Then also pay the broker for the difference between what we were originally charged to cover his commission.

I'm worried that if we did that, the broker or their bank could still come after us for the full price because the original contract (Bill of Lading) was with them. Would there be an appropriate document that could be created to relieve us from that risk?

Answer: In the situations where you have not yet paid the defunct broker, you may pay the carrier directly, but you must be extremely careful to avoid having the broker (or its assignee or trustee, etc.) come after you for the freight charges. I would not recommend that you pay the carrier unless you get a written authorization from the broker to pay the carrier directly or a "hold harmless" and indemnity agreement from the carrier. It would also be advisable to get a signed release from both parties.

14) Bankrupt Carrier - Missing Freight

Question: A furniture company gave a carrier a sofa which was to be shipped to a receiving warehouse in my town for me. I requested that they use this carrier on my purchase order to the furniture company. The carrier filed bankruptcy and it is unknown where my sofa is. If this sofa is lost who is responsible for it?

Answer: I have the following suggestions:

1. Try to contact the attorney for the bankrupt carrier (either the debtor in possession or for the trustee) and explain the problem to them. See if they can direct you to someone who can help trace your shipment.

2. File a claim with the bankruptcy court as soon as possible (you can usually get forms from either the attorney or from the court clerk).

3. If you can't find your shipment, and your claim is not paid within some reasonable time, you may be able to collect from the carrier's "BMC 32" cargo insurance, which covers shipments up to $5,000. This is a federal cargo insurance coverage requirement for motor common carriers, and you can get information from the Federal Motor Carrier Safety Administration (formerly the Federal Highway Administration) in Washington, D.C. [See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 12.1.]

15) Bar Code Errors

Question: When a shrink-wrapped pallet does not clear a bar code scanner, should it be noted as an exception on the delivery receipt?

Answer: Yes, as a precautionary measure. It would not be proper to report that pallet as a non-delivery - merely report the fact that it would not scan properly. If there is evidence of damage, shortage or breaking of the packages or shrink wrap, it should be surveyed and noted.

16) Bills of Lading - "Straight" vs. "Order"

Question: What is the difference between a "straight" bill of lading and an "order" bill of lading?

Answer: A straight bill of lading requires the carrier to deliver the freight to the named consignee. It is a "non-negotiable" bill of lading.

An order bill of lading is a negotiable document which represents title to the goods. It can be endorsed by the "order" party to transfer title to the goods to a third party. It must be physically surrendered to the carrier before delivery.

17) Bills of Lading - Alternate Forms

Question 1: Would current law support a different bill of lading form layout than described in the National Motor Freight Classification? This BOL will have the same information with an area for Bar Coding and a supplemental page or continuation page.

Question 2: Could someone describe the Voluntary Interindustry Commerce Standards (VICS) bill of lading?

Answer: At one time, most motor carriers were participants in the National Motor Freight Classification and thus were required to use the Uniform Straight Bill of Lading published in the NMFC. With deregulation, the abolition of the "filed rate doctrine", and the elimination of the ICC, there really is no law or regulation that mandates any particular form of the bill of lading. Today, many shippers have adopted their own forms, and there are many different versions of the "bill of lading" in current use. Carriers generally favor use of the Uniform Straight Bill of Lading as set forth in the NMFC. However, the NMFC bill of lading contains "incorporation by reference" language that makes the Classification and the carrier's (unfiled) tariffs part of the contract of carriage. These tariffs usually contain liability limitations, accessorial charges, late payment penalties and other rules that are unfavorable to the shipper.

One shipper-friendly bill of lading is the "Shipper's Domestic Truck Bill of Lading" which was developed by the Council. This is available in a "kit" from the Council, which includes an explanatory booklet, and a form that can be modified or tailored to the needs of the shipper. For further information, contact the Transportation & Logistics Council at (631) 549-8984.

The VICS bill of lading has been adopted by some of the large retailers and is principally intended to establish a uniform format and to facilitate EDI transmittal of the BOL data. However, the authors of this BOL adopted what they call the "legal statements" from the Uniform Straight Bill of Lading in the National Motor Freight Classification. Thus the VICS BOL incorporates the NMFC and the carrier's (unfiled) tariffs - an unfavorable result from the shipper's standpoint. Obviously, if all of your shipments move under a properly drafted transportation contract, the form and language of the bill of lading is not critical, because the contract provisions will prevail. On the other hand, there may be situations where

some shipments are not covered by your contract, so the VICS BOL language would govern. Also, use of the VICS form could create ambiguity and/or disputes, which you don't need.

If your customers should require you to use the VICS format, my suggestion is to delete the "legal statements" on the face of the BOL. You may also want to replace the language with your own text such as: "RECEIVED, SUBJECT TO THE TERMS AND CONDITIONS OF THE SHIPPER'S TRANSPORTATION CONTRACT IN EFFECT ON THE DATE OF SHIPMENT, WHICH IS AVAILABLE TO THE CARRIER ON REQUEST. THIS SHIPMENT IS NOT SUBJECT TO ANY CLASSIFICATIONS OR TARIFFS WHICH MAY BE ESTABLISHED BY THE CARRIER."

18) Bills of Lading - Carrier PRO Stickers

Question: I have noticed that certain carriers, such as Conway Central, Conway Southern, Land Air Express, American Freightways, and Roadway are placing Pro stickers on my Shipper's Bill of Lading (BoL) that indicate that the driver's signature only acknowledges receipt of freight, that the carrier's liability may be limited, and that the terms and conditions of their tariffs may apply.

After questioning this with their local reps, the answer I received was that this has become standard practice for carriers if they are moving freight under a Shipper's BoL and not the carrier's BoL. One of the carrier's had faxed to me an article which states that because of the decision made by the U.S. District Court in Massachusetts, carriers are now being advised to add this language to their Pro stickers. The case cited is "*Norpin Manufacturing Co. Inv. v. Con-Way Transportation Services, Inc*."

If the carriers are now placing these stickers on a Shipper's BoL, what effect is this going to have on the terms the shipper has, and has agreed to with the carrier? One of these carriers has told me that this does not apply to my shipments, however, they are still placing the labels on my BoLs. Have you heard of any similar situations from other shippers?

Answer: We have been giving some thought to the questions you have raised. The only statutory provision that even comes close to addressing the issue is 49 U.S.C. § 80108 (part of the Bills of Lading Act):

> Section 80108 Alterations and additions
>
> An alteration or addition to a bill of lading after its issuance by a common carrier, without authorization from the carrier in writing or noted on the bill, is void. However, the original terms of the bill are enforceable.

This presumes that the carrier "issues" the bill of lading, and not that it is a shipper-prepared bill of lading that is given to the carrier by the shipper and altered by the carrier. It does not address the problem you have described.

The question would appear to be determined by basic principles of contract law - offer and acceptance, counter-offer, performance, etc. There are no court decisions that we have found that are directly on point, and we are doing further research and analysis. It is not clear how a court would decide if there were a conflict between the bill of lading as prepared by the shipper and the carrier's unilateral attachment of a "Pro Sticker".

As you have previously observed, the best solution to the problem is to enter into a well-drafted written transportation contract with your carriers. Then, the form of the bill of lading will be irrelevant and the addition of the carrier's PRO sticker would not alter the terms of the underlying agreement.

19) Bills of Lading - Carrier v. Shipper

Question: When our drivers pick up back-hauls, we have them put a sticker on the shippers paperwork (BOL). Sticker: "Receipt subject to inspection, correction, and tariffs or note agreements. Driver is not authorized to waive rules or adjust charges"

We are additionally sending a quote to the broker/shipper that states $2.50 / lb. limit of liability, dentention information, shipper, consignor, consignee, rate information and wording "subject to terms and condition of the Uniform Straight Bill of Lading on file in carriers office".

If the shippers BOL has terms that we do not agree with are we bound by any of these rules?

Since we formally did not issue a BOL can we enforce the $2.50 / lb. limit of liability?

If we do issue a BOL and the shipper will not sign it or accept it, what is the governing contract or document?

Answer: Before I can properly answer your questions, please give me some more information:

1. Are you an authorized common or contract carrier (with ICC/FMCSA operating authority), or a private carrier, or what?
2. Are you a participating carrier in the National Motor Freight Classification?
3. Do you have published tariffs?
4. Are you dealing with shippers or with brokers?
5. Are these LTL or truckload shipments?

Response:

1. We are a common and contract carrier.
2. We do not participate in the NMFC
3. We have published tariffs. Most of the shipments we are talking about are loads received via brokers. The tariffs we have published are not sent to the brokers or shippers. We use the quotes to settle on a price.
4. We deal with both shippers and brokers. Majority are loads from brokers.
5. Most of the shipments are LTL.

My boss is saying that even if you have a signed contract with a shipper the judge will not look at the contract if you did not issue a BOL. In my mind, the contracts or quotes as we call them, have most of the same information as the BOL. The shipper or broker by signing this quote is creating a contract for transportation. When we apply the sticker to the shippers BOL we are alerting them to our contract and to apply the standard terms and conditions of the Uniform straight bill of lading. We are only using their paperwork as a pickup receipt. I see no problems.

Hopefully this will fill in the missing pieces.

Answer: The question of "which bill of lading governs" is a controversial subject. Shippers generally don't want to use a carrier bill of lading or the Uniform Straight Bill of Lading from the National Motor Freight Classification because it incorporates provisions of carrier's unfiled tariffs which usually contain liability limitations, accessorial charges, late payment penalties, etc. Unless the shipper demands (and the carrier provides) a complete copy of its tariffs, the shipper has no way to determine what is in the tariffs and the carrier can unilaterally modify its tariffs without any obligation to notify the shipper. Conversely, most carriers want to use a bill of lading that incorporates their tariff rates, rules, terms and conditions, etc. and don't want their drivers to accept shipper versions.

A bill of lading can be merely a receipt for the goods, or it can be a contract - IF it contains contractual language governing the obligations of the parties. Regardless of who prepares the bill of lading, if it has the typical language from the Uniform Straight Bill of Lading, the carrier's tariffs are usually "incorporated by reference" and would be binding on the parties.

If the shipper prepares a bill of lading and it does not incorporate any tariffs, and the carrier accepts the shipment, I would say that the carrier cannot rely on its tariff provisions. And, I don't think that any stickers or subsequent notations placed on the bill of lading "after the fact" would be enforceable.

If the carrier gives a written rate quotation which contains all of the important terms and conditions, and the shipper accepts and signs the quotation, it should be an enforceable contract (regardless of what bill of lading form is used). Note that the provisions of the Interstate Commerce Act, such as the "Carmack Amendment", time limits and statutes of limitation would still govern the transportation unless the contract contains an express waiver.

My suggestion would be to use a formal written transportation contract whenever possible. You may want to have different contracts when dealing with a shipper vs. a broker. A properly drafted contract is the best way to avoid problems and disputes. I suggest that you consult with a qualified transportation attorney.

20) Bills of Lading - Case or Piece Count

Question: If a driver signs the bill of lading with his carrier name, date of pick-up, and trailer #, but omits the case or piece count, is the carrier liable for the entire quantity indicated on the bill of lading if a shortage occurs?

Answer: Based on the limited information you have provided, let me try to answer.

If you have used a typical bill of lading, it would show the number of packages, a description of the goods, the weight, etc. on the face of the bill of lading. Assuming that your shipment is an "LTL" shipment, and not a full truckload that is loaded and counted by the shipper without the driver present or having an opportunity to count ("shippers load & count"), the general rule is that the bill of lading is "prima facie evidence" of what was shipped. In other words, unless the driver makes some other notation at the time of pickup, it would be presumed that the quantity shown on the face of the bill of lading was actually received by the carrier.

I would recommend reading Section 5.0 (particularly 5.2.1 and 5.2.2) of *Freight Claims in Plain English* (3rd Ed. 1995) for a thorough discussion of these principles.

21) Bills of Lading - Description of Freight

Question: I know there is a requirement, in writing somewhere, that states that a shipper is required to write a proper and accurate description of the freight being tendered for shipment. Is it codified in U.S. law? Is it in the National Motor Freight Classification (NMFC)? Is it on the back of the bill of lading (BOL)?

Answer: There is no law or regulation that is binding on a shipper.

49 C.F.R. § 373.101 requires a motor carrier to issue a "receipt or bill of lading" and sets forth the minimum information required. This includes:

- names of consignor and consignee
- origin and destination points
- number of packages
- description of freight
- weight, volume, or measurement of freight (if applicable to the rating of the freight).

The Uniform Straight Bill of Lading, of course, has a place on the face of the BOL to enter a description of the articles, weight, etc., but there is nothing in the terms and conditions other than the statement in Section 7, relating to liability for freight charges when there is "incomplete or incorrect information provided by the consignor".

22) Bills of Lading - False Information

Question: Is it illegal for a shipper to falsify the weight on a bill of lading?

Answer: Yes, if it is done "knowingly or with intent to defraud". The statutory provision is found in the Bills of Lading Act, 49 U.S.C. Section 80116, which applies to bills of lading in interstate commerce and provides:

§ 80116. Criminal penalty

A person shall be fined under title 18, imprisoned for not more than 5 years, or both, if the person...

(2) knowingly or with intent to defraud

(A) falsely makes, alters, or copies a bill of lading subject to this chapter;

(B) utters, publishes, or issues a falsely made, altered, or copied bill subject to this chapter; or

(C) negotiates or transfers for value a bill containing a false statement.

23) Bills of Lading - Forms

Question: As a shipper, we have historically provided a Bill of Lading/Packing List Form that is based on 49 C.F.R. § 1035. We are implementing a new form and would like to streamline it as much as possible. What is required by law on our new form?

Answer: First of all, the bill of lading prescribed in 49 C.F.R. (Code of Federal Regulations) 1035 is a RAIL bill of lading, not a motor carrier bill of lading. Although the ICC did prescribe the form of the rail bill of lading many years ago, it never did so for motor carriers.

At one time, most motor carriers were participants in the National Motor Freight Classification and thus were required to use the Uniform Straight Bill of Lading published in the NMFC. With deregulation, the abolition of the "filed rate doctrine", and the elimination of the ICC, there really is no law or regulation that mandates any particular form of the bill of lading.

Today, many shippers have adopted their own forms, and there are many different versions of the "bill of lading" in current use. Carriers generally favor use of the Uniform Straight Bill of Lading as set forth in the NMFC. However, the NMFC bill of lading contains "incorporation by reference" language that makes the Classification and the carrier's (unfiled) tariffs part of the contract of carriage. These tariffs usually contain liability limitations, accessorial charges, late payment penalties and other rules that are unfavorable to the shipper.

One shipper-friendly bill of lading is the "Shipper's Domestic Truck Bill of Lading" which was developed by the Council. This is available in a "kit" from the Council, which includes an explanatory booklet, and a form that can be modified or tailored to the needs of the shipper. For further information, contact the Council at (631) 549-8984.

24) Bills of Lading - Forms

Question: I am updating a BOL form (printed by the shipper) that currently uses the Uniform Straight Bill of Lading-Short Form, which references both the uniform freight classifications if it's a rail or rail-water shipment and the applicable motor carrier classification if it's a motor carrier shipment.

I understand that with deregulation, tariffs are no longer filed and motor carriers (for domestic shipments of commercial goods) are no longer regulated, at least with respect to BOLs and rates. I also understand that if a carrier uses the NMFC, the uniform BOL published by the American Trucking Association governs, absent a written contract.

My questions:

1. Can a short form uniform bill of lading that references both rail and motor carrier still be used?

2. With all of the changes to the motor carrier uniform bill of lading, would one form for both rail and motor carrier be problematic? (Tariffs no longer filed, changes in prepaid/collect, etc.?)

3. Is there any reason to use the Uniform Bill of Lading for motor carriers as opposed to having a shipper-friendly BOL?

4. There is a Uniform BOL for rail and water shipments, at 49 C.F.R. § 1035, that apparently must be used for shipments subject to the Interstate Commerce Act. Only a long form is referenced. Could a short-form be used? Also, when would an interstate rail shipment not be subject to the Interstate Commerce Act and thus not require this BOL?

5. The C.F.R. for the Uniform BOL referenced in number 4 above also indicates that modifications to the front of the form are permitted so long as they conform to "national standards for the electronic data interchange or other commercial requirements for bill of lading information." How does one know if changes made to the front of the Uniform BOL conform to these national standards?

Answer:

1. Motor carriers: The use of the Uniform Straight Bill of Lading (either the "short" or "long" forms) in the NMFC is becoming a controversial subject. Clearly, it is not in the best interests of the shipper to use the NMFC bill of lading. However, many carriers are very tenacious about requiring the NMFC form and incorporating the provisions of the Classification and their unfiled tariffs, and resist the use of other bills of lading.

The best advice to a shipper is to enter into a well-drafted formal transportation contract with each of its carriers. Rates, terms and conditions are all covered by the contract, so you don't have to be concerned about the form of the bill of lading or incorporation of the carrier's unfiled tariffs.

If you must ship via common carrier and use bills of lading, we recommend the Shipper's Domestic Truck Bill of Lading form that is available in "kit" form (explanatory booklet plus floppy disk) from the Transportation & Logistics Council. This is a "shipper friendly" bill of lading and the form can be easily tailored for the shipper's requirements.

2. Rail carriers: You are correct in noting that 49 C.F.R. § 1035 does prescribe the terms and conditions for the RAIL version of the uniform straight bill of lading. However, the great majority of rail movements today are "exempt", either because of the commodity, the equipment (boxcars, etc.) or the type of service (TOFC, COFC, etc.).

"Exempt" rail traffic generally moves under rail contracts or under rate quotations that refer to or incorporate by reference the railroad's exempt rail "circulars" (which are similar to tariffs). Thus, the form of the bill of lading is usually unimportant, and any form that serves to transmit the shipping information can be used.

3. EDI standards: Most major motor carriers and railroads now have the facility to transmit bill of lading and waybill information via EDI, and many of the large retailers are now adopting the VICS bill of lading. My suggestion would be to contact the carrier information systems group if you plan to transmit data via EDI.

25) Bills of Lading - Hazardous Materials

Question: 49 C.F.R. Part 373 requires the carrier to prepare the Bill of Lading ("B/L") (not withstanding the fact that shippers commonly perform this task). How does this law apply to shipments containing hazardous materials? There are specific requirements pertaining to the description of hazardous materials on "Shipping Papers". 49 C.F.R. § 172.200 (a), and § 173.22 (a)(1) indicate that a shipper is responsible. It appears to me that these laws conflict. Am I wrong? Who is responsible for preparing a Bill of Lading for a shipment containing a hazardous material?

Answer: It is true that both 49 U.S.C. § 14706 and 49 C.F.R. Part 373 require a motor carrier to "issue" a bill of lading or receipt.

There is a distinction between “issuing” and “preparing” a bill of lading. As you are aware, many shippers actually prepare bills of lading and the carrier's driver merely signs the bill of lading at the time he picks up the goods.

As I read it, the HazMat regulations place certain obligations on shippers of dangerous goods to ensure that the bills of lading and shipping documents contain specified information.

I really don't think this is a problem.

26) Bills of Lading - Import Shipments

Question: We are consolidating products from Singapore to US port-of-entry via a single flight. Once the goods have reached the port, the forwarder will break bulk and truck to various parts of the States. Some of the trucking destinations will be shipped in truckload quantities. Is there legislation in the US that states a requirement to have individual bill of lading for EACH truckload? Can we use 1 BOL for multiple truckloads?

Answer: If the goods are moving from origin (Singapore) to their ultimate destination(s) in the U.S. under a through air waybill issued by a foreign air freight forwarder, they would be covered by the forwarder's air waybill for the entire movement. If the forwarder contracts with one or more motor carriers for completion of the delivery, the motor carriers would normally issue bills of lading to the forwarder. However, this is not the shipper's concern, since it contracts only with the forwarder for the entire door-to-door movement.

27) Bills of Lading - Inter-Company Transfers

Question: We have two locations in the same town in Massachusetts, located about 3 miles apart. Is it necessary to produce a Bill of Lading when transferring materials between these two locations or could we just issue a shipping manifest? The carrier that transports our materials is under contract and we lease the equipment from them.

Answer: IF you have a properly drafted transportation contract (which I have not seen) that fully covers the situation you have described, you do not need a "bill of lading".

HOWEVER, there is no question that there must be some kind of appropriate receipt that adequately describes the shipment, signed and dated by the carrier's driver, whenever goods are tendered for transportation. This could be a shipping manifest or similar document, provided that it has a provision for the driver to acknowledge receipt, date and sign the document.

Likewise, the shipping document should provide for an acknowledgement of delivery by the receiver of the goods, and any notations of shortage or damage that may be observed at the time of delivery.

I would note that for inter-plant movements there may be a question as to the measure of damages (manufactured cost, inventory value, wholesale price, etc.) in the event of loss or damage in transit. This should be specifically addressed in your contract.

28) Bills of Lading - Pallets vs. Cartons

Question: Are carriers responsible for counting individual cartons if the bill of lading lists the shipment as 3 skids under number of pieces and 100 “STC” (said to contain) in the body of the bill of lading? If a bill of lading lists a shipment as 100 cartons under piece count and on 3 skids in body are carriers responsible for counting individual pieces? If a shipment is only listed as a piece count by shipper, and a driver is given an opportunity to count the shipment, but does not do so and adds

a notation under his signature stating the shipment was on a certain number of pallets and STC a certain number of pieces are the carriers liable for shortages?

Answer: If a driver is present at the time of loading and has an opportunity to count the freight as it is being loaded, or if he is able to count the number of packages that are being put on a skid or pallet, he should sign for the actual carton count.

In many cases though, the freight has already been palletized and stretch-wrapped when the driver arrives, and it is not possible to visually determine the number of packages or cartons. Many carriers instruct their drivers to sign only for the number of pallets and not the number of cartons in such situations, or to indicate "STC" (said to contain) on the bill of lading.

If this is true, you have the additional burden of proving what was actually loaded on the pallet and you will probably need a written statement or affidavit of the shipping person or supervisor who had actual knowledge of what was shipped. See Section 5.0 of *Freight Claims in Plain English* (3rd Ed. 1995) for a discussion of "Burdens of Proof".

If you have shortage from a palletized, stretch-wrapped pallet, you should investigate whether there was any sign of tampering with the stretch wrap (cuts, tape, etc.) or if it had been removed and replaced during transit.

29) Bills of Lading - Piece Count

Question: What is the proper procedure regarding putting the piece count on Bills Of Lading? Many of our locations feel that there is no need to do this but I disagree. I think that it is important so that our carriers are on notice in case there is a question regarding the shipment. For our customer, it enables them to know at time of delivery how many pieces they are signing for without of having to find the packing slip. One of my concerns is if there is no piece count on the Bill of Lading, then the carrier has reason to deny a claim based on a shortage. Please advise.

Answer; You are absolutely correct. It is always a good practice to show the number of packages or cartons on the bill of lading, and to have the driver acknowledge receipt by signing for the actual count.

The bill of lading (together with any classifications or tariffs of the carrier which may be validly incorporated by reference therein) is a legal document. Unless you have some other formal transportation agreement, the bill of lading will be considered the "contract of carriage" and will determine the rights and liabilities of the parties in the event of loss, damage or delay to shipments.

I suppose you could ship on a document such as a "packing slip", but you would still want some language indicating that the goods were received in good order and condition by the carrier, and a signature of the driver.

30) Bills of Lading - Private or Contract Carriage

Question: 49 C.F.R. § 373.101 states that the bill of lading is to contain the “weight, volume, or measurement of freight (if applicable to the rating of that freight)” – what does the ‘if applicable’ part mean? We run a closed distribution system, from our warehouses, where we deliver products on our own equipment or equipment exclusively contracted to our company. Our payment to these contract carriers is not dependent on a weight or volume measurement – so does the shipment weight need to be on our invoices or bills?

Answer: The C.F.R. provision that you refer to sets forth minimum requirements for a bill of lading or receipt issued by a motor carrier subject to the jurisdiction of the D.O.T. The reference to measurement of freight usually refers to weight, because most LTL carriers have established rates based on weight (cents per hundredweight). It could also refer to volume or some other measure, if that is how the freight charge is determined.

In your case, it sounds as though you are shipping on your own trucks (private carriage) or are using a for-hire motor carrier under a transportation contract or agreement. For private carriage movements, the regulations don't apply and there is no requirement to have any particular form of bill of lading or receipt. For your contract carriage movements, I don't know what your contract says or how you compensate the carriers. But, in any event, your contract governs and you can specify in your contract as to what kind of shipping document is used. In other words, I don't think you have a problem.

31) Bills of Lading - Proper Shipper's Name

Question: Company A has a tolling arrangement with Company B. Once the product is made and drummed. Company A sells the made product to a customer. The product will be shipped from Company B's warehouse to a customer using Company A's bill of lading.

My question is: What company needs to show on the Bill of Lading as the shipper? (My belief is that Company A is the shipper.)

Answer: I would assume from the arrangement you describe that "Company A" is the actual owner of the goods which are being shipped, and that "Company B" is essentially acting as its agent as far as shipping to the customer. Under such circumstances, I think it would be proper to show "Company A" as the shipper on the bill of lading. Thus, "Company A" would be responsible for payment of the freight charges, and would be the proper party to file a claim in the event of loss or damage to the goods, etc.

32) Bills of Lading - Required Content

Question: On the Bill of Lading, is it legally essential to disclose the NMFC classification based on 1) number of containers, 2) part numbers that apply, 3) weight, 4) all three, or 5) some combination?

We are trying to streamline our Bills of Lading for a new system we are implementing and any advice (short summary) that you might pass along on the current legal requirements of the Bill of Lading would be a big help. I have not had a chance to keep up on the latest requirements, so your advice would be appreciated.

Answer: If you are shipping with a motor carrier that is a participant in the National Motor Freight Classification, and you do not have a transportation contract, it would be the usual practice to use the Uniform Straight Bill of Lading. The Uniform Straight Bill of Lading has spaces for setting forth the number of packages, the description of the goods, the weight and the NMFC class. Freight charges are usually determined by the rate base (a function of the distance between origin and destination), the weight and the class.

Part numbers, purchase order numbers, etc. are often included in the description column on the bill of lading if useful to the shipper or the consignee, but they don't affect the freight charges.

The NMFC class is determined by reference to the Articles in the Classification, and determining what is the Article which most closely describes the commodity being shipped.

33) Bills of Lading - Required Information

Question: Historically, the carrier was legally obligated to "issue" the bill of lading even though many shippers do so for their own convenience. Is this legal obligation still in force? What information is legally necessary to be listed on a bill of lading? We would like to generate a simple bill of lading in spreadsheet form for our off-site warehouse, but are curious if all the typical “fine print mumbo jumbo” is really necessary.

Answer: The Interstate Commerce Act (ICA) requires motor carriers to "issue a receipt or bill of lading" for property received for transportation, 49 U.S.C. § 14706. (In practice, the shipper usually prepares a bill of lading on its own form and presents it to the driver for signature.) Theoretically, this requirement can be waived, if the parties expressly agree in writing, 49 U.S.C. § 14101, but it is always a good practice to have a written receipt for shipments.

The ICA does not specify any particular form of the receipt or bill of lading, but the Federal Motor Carrier Safety Admininstration (formerly ICC) regulations prescribe the minimum requirements, 49 C.F.R. Part 373.

> 373.101 Motor Carrier bills of lading.
>
> Every motor common carrier shall issue a receipt or bill of lading for property tendered for transportation in interstate or foreign commerce containing the following information:
>
> (a) Names of consignor and consignee.
> (b) Origin and destination points.
> (c) Number of packages.
> (d) Description of freight.
> (e) Weight, volume, or measurement of freight (if applicable to the rating of the freight).

I would not recommend that you use an “off the shelf” bill of lading or try to copy the contractual language from the motor carrier's Uniform Straight Bill of Lading.

I recommend that shippers enter into written transportation agreements with their motor carriers that clearly spell out the duties and obligations of the parties, and the terms and conditions of carriage. A properly drafted transportation agreement avoids problems inherent with using the Uniform Straight Bill of Lading (and many variations thereof) that incorporate by reference the Classification and the carrier's rates and rules tariffs. If you use a bill of lading that incorporates other terms by reference, unless you review all the incorporated terms, you may be unpleasantly surprised when you discover what you have agreed to.

You should contact a knowledgeable transportation attorney if you need assistance in developing an appropriate transportation agreement or other shipping documents.

34) Bills of Lading - Requirements

Question: 49 C.F.R. § 373.101, Motor Carrier Bills of Lading, states that “Every motor common carrier shall issue a receipt or bill of lading for property tendered for transportation in interstate or foreign commerce…"

1. When doing business with carriers that you do NOT have a transportation agreement or contract with, are you breaking the law if you do not follow the above regulation, i.e. a receipt or bill of lading is not issued, or the number of cartons is not shown on the receipt or bill of lading? If it is unlawful, is there a penalty? What about other information such as the seal number(s)? Is there any regulation stating that the seal number(s) must be shown on the receipt or bill of lading, or some other document?

2. When doing business with carriers that you DO have a transportation agreement or contract with, is it correct that you can legally dictate whether or not a receipt or bill of lading will be used,

and if so, what form to use; and also what the freight details are to be shown on the bill of lading and/or other documents, as long as all of this is clearly defined in the transportation agreement?

Answer: The requirement for a motor carrier to issue a bill or lading or receipt is found both in 49 U.S.C. § 14706 (the "Carmack Amendment" language) and in the FMCSA (formerly ICC) regulations at 49 C.F.R. Part 373. The regulations apply only to the motor carrier; they do not apply to a shipper.

There is no "penalty" if the carrier fails to issue a bill of lading or receipt. However, the carrier may be precluded from asserting bill of lading or tariff defenses such as time limits for filing claims or bringing suits, or limitations of liability that would otherwise be incorporated by reference in the bill of lading.

Many shippers prepare shipping orders or bills of lading and provide them to the carrier's driver for signature. There is no statute or regulation that governs the form or content of such shipping documents. Obviously, the basic information referred to in 49 C.F.R. § 373.101 should be included. Other information such as seal numbers, purchase order numbers, etc. can be included at the option of the parties.

If you have a written transportation contract with a carrier, it is important to make sure that your contract - and not the particular form of the bill of lading - covers and includes all relevant provisions, terms and conditions.

35) Bills of Lading - Retention

Question:

Does an image of an original Bill of Lading serve as a legal document for the purposes of any claims, lawsuits, etc. ? If so then do you see any issue with original Bills of Lading being shredded 30 days after shipment and after they have been scanned for imaging.

Answer:

I have not seen any court decisions dealing with electronic "images" of documents, but I would assume that the rules would be the same as microfilm copies, Xerox copies, etc. The admissibility of copies (in lieu of originals) has become much more accepted during recent years, but it may be necessary to establish, through witnesses having actual knowledge, that the copy represents a record kept in the ordinary course of business, and that the procedures for making the copy or image were routinely and properly observed.

I have two additional observations:

1. Are you going to take an image of just the face of the bill of lading, or both sides? Due to the variety of bill of lading formats presently being used, and the different contract terms and conditions which may be printed on the reverse side, this could become relevant in the event of a dispute or litigation.

2. Do you have written transportation contracts with the motor carriers your company uses? With a properly drawn agreement, the contract provisions govern and the bill of lading essentially serves only as a receipt.

36) Bills of Lading - Retention by Shipper

Question: Is there a legal time frame that a shipper must keep copies of bills of lading?

Answer: There is no legal time frame for a shipper to retain bills of lading.

There is, however, a legal time frame for carriers to retain bills of lading. This can be found in the federal regulations at 49 C.F.R. Part 379. Generally, a carrier is required to retain bills of lading for 1 year. However, if the bill of lading (or freight bill) relates to a shipment involving a claim (i.e.,

cargo claim, freight charge dispute), the carrier is required to retain the bill of lading, as well as other shipping documents, for 1 year after the claim is settled or otherwise resolved.

Although there is no legal requirement for a shipper to retain bills of lading, if the bill of lading (or other documents) relate to a dispute, we recommend that such documents be retained until the dispute is resolved.

Also, for shipments where there is no known dispute, we recommend that shippers retain bills of lading (and other shipping documents) for 3 1/2 years at a minimum. This is because a carrier has 18 months to file suit to recover freight charges, 49 U.S.C. § 14705(a). However, if the carrier files for bankruptcy, the bankruptcy trustee has two years from the date the carrier files for bankruptcy to determine if the carrier had any causes of action that it was entitled to pursue as of the date it filed bankruptcy. In other words, if the carrier had any causes of action during the 18 month period prior to filing bankruptcy, the trustee has 2 years from the date of bankruptcy to pursue such causes of action. Thus, if you add the 18 months to the 2 years, you get 3 1/2 years.

Please note that if the shipper and carrier agree to a statute of limitations period in a contract that is different than 18 months, then the recommended retention period would change accordingly.

37) Bills of Lading - Retention Period

Question: When using an electronic bill of lading of warehouse receipt is there a legal requirement (under the UCC or any other statute) to retain the original hard copy. If so, can you point me in the correct direction to research this issue.

Answer: There are federal record retention regulations that apply to motor carriers, but I am not aware of any "law" (or regulation) that requires a shipper to retain a bill of lading or a warehouse receipt.

The real question is whether an electronic record will be adequate in the event of a later dispute between the parties, or whether it will be admissible in a court proceeding if there is litigation. Obviously, the safest course of action is to create a hard copy and retain it for a reasonable time. We usually recommend 3 1/2 years for retention of shipping documents because the statute of limitations on suits for freight charges is 18 months, but it can be extended if the carrier files for bankruptcy by an additional 2 years.

38) Bills of Lading - Rules Regarding Forms

Question:

I would like to find out if is it possible for a forwarding company to freely print their own Bill of Lading?

Answer: A domestic surface freight forwarder (like a motor carrier) is required to issue a "receipt or bill of lading" for all shipments which it receives. This requirement is in the "Carmack Amendment" section of the Interstate Commerce Act, 49 USC Section 14706. The statute does not specify what a bill of lading must look like or contain, but the FHWA (formerly ICC) regulations specify the minimum requirements for a bill of lading, 49 C.F.R. Part 373.

Many motor carriers, and some freight forwarders, use the Uniform Straight Bill of Lading which is set out in the National Motor Freight Classification. Some carriers and forwarders design and use their own proprietary versions of the bill of lading.

For a thorough discussion of bills of lading, I would suggest *Freight Claims in Plain English* (3rd Ed. 1995) , at Section 4.0.

39) Bills of Lading - Seal Numbers

Question: I have a question regarding your "Explanation of Face of Bill of Lading" that we received with your Shippers Domestic Truck Bill of Lading package. My question has to do with your comments regarding the sealing of a trailer. You state "Seal numbers should not be recorded on the bill of lading as it facilitates a consignee's copying those numbers on delivery records instead of personally inspecting the condition of the seals on delivery to determine whether or not they are intact or have been tampered with."

My response to this is: If you do not note the seal number on the bill of lading or somehow communicate this information to the consignee, how is the consignee to know whether the seal he receives under is the seal that was placed on the truck at the time of shipment? Someone with a little smarts could break the original seal, help himself to whatever he desired, then put a new seal on the trailer. It seems to me that if you were going to seal a trailer and not note the number on the bill of lading, that there would need to be some clear communication between shipper and consignee, especially if the shipment came up short.

Maybe I'm thinking like the thief, but the trust I used to place in my fellow man is eroding. I would like to hear from you on this if you have the time.

Answer: I suppose that there are two schools of thought on this subject, but I agree with you.

It does seem logical to put the shipper's seal number on the bill of lading. This notifies the consignee that the trailer or container was sealed at origin, and implies that the seal should be inspected and the number checked upon delivery.

40) Bills of Lading - Section 7 - "Non-recourse" Provision

Question:I have two questions: 1. If Section 7 is signed, but bill of lading is marked "prepaid", who owes the freight? 2. If Section 7 is signed, but bill of lading is not marked "prepaid" OR "collect", who owes the freight? Can you share a legal authority for these responses?

Answer: In order to answer your questions, we should first get all the facts straightened out. Let's start by looking at the current version of the Uniform Straight Bill of Lading.

Section 7 - "Non-Recourse" Provision The face of the current Uniform Straight Bill of Lading as set forth in the National Motor Freight Classification, and which became effective December 27, 1997, contains a box that states:

> **FOR FREIGHT COLLECT SHIPMENTS:**
>
> **If this shipment is to be delivered to the consignee, without recourse on the consignor, the consignor shall sign the following statement:**
>
> **The carrier may decline to make delivery of this shipment without payment of freight and all other lawful charges.**
>
> _____
>
> **(Signature of Consignor)**

The reverse side (Terms and Conditions) contains the following language:

> **Sec. 7. (a) The consignor or consignee shall be liable for the freight and other lawful charges accruing on the shipment, as billed or corrected, except that collect shipments may move without recourse to the consignor when the consignor so stipulates by signature or endorsement in the space provided on the face of the bill of lading. Nevertheless, the consignor shall remain liable for transportation charges where there has been an erroneous determination of the freight charges assessed, based upon incomplete or incorrect information provided by the consignor.**
>
> **(b) Notwithstanding the provisions of subsection (a) above, the consignee's liability for payment of additional charges that may be found to be due after delivery shall be as**

specified by 49 U.S.C. § 13706, except that the consignee need not provide the specified written notice to the delivering carrier if the consignee is a for-hire carrier.

(c) Nothing in this bill of lading shall limit the right of the carrier to require the prepayment or guarantee of the charges at the time of shipment or prior to delivery. If the description of articles or other information on this bill of lading is found to be incorrect or incomplete, the freight charges must be paid based upon the articles actually shipped.

It should be noted that the word "Freight Collect" in the box on the face of the bill of lading, and the limitation to "collect shipments" in the Terms and Conditions on the reverse side, were not present in earlier versions of the Uniform Straight Bill of Lading and were added in the version which became effective December 27, 1997.

Prepaid vs. Collect It should also be observed that the face of the current version of the Uniform Straight Bill of Lading, effective December 27, 1997, contains another box that states:

Freight Charges are PREPAID
unless marked collect.
CHECK BOX IF COLLECT |__|

This was also changed when the NMFC bill of lading was revised in 1997. The previous language stated: "If charges are to be prepaid, write or stamp here 'To Be Prepaid'". Thus, in the new bill of lading, if nothing is done, the presumption is that the charges are "prepaid", instead of "collect".

Question 1 - Section 7 Signed, Bill of Lading Marked "Prepaid" If Section 7 is signed, but bill of lading is marked "prepaid", who owes the freight?

Answer to Question 1 Bills of lading are not marked "prepaid"; they are prepaid unless marked "collect". The current NMFC bill of lading does not permit the use of Section 7 for a prepaid shipment.

Under the court decisions interpreting the old (pre 1997) bill of lading, a shipper could sign Section 7 on a prepaid bill of lading. Usually this meant that the shipper would pay the freight charges agreed at the time of shipment, but would not be liable for charges accruing afterwards, such as detention or redelivery charges. There was some authority that the shipper could avoid all liability, even for the agreed prepaid charges. In other words, if the shipper did not pay the agreed prepaid charges, the carrier could collect only from the consignee.

Note: As of publication date there appear to be no reported federal or state court decisions construing the subject language in the current NMFC bill of lading.

Question 2 - Section 7 Signed, Bill of Lading Not Marked Either "Prepaid" or "Collect" If Section 7 is signed, but bill of lading is not marked "prepaid" or "collect", who owes the freight?

Answer to Question 2 As noted above, if the bill of lading is not marked at all, the shipment will automatically be considered prepaid, and the answer to Question 1 will apply.

41) Bills of Lading - Shipper Load & Count

Question: Can a shipment still be considered a true "shipper load, & count" if the carrier has broken the shipper's seal to verify carton count? Does a "shipper load & count" shipment lose its integrity if a shipment is processed through a consolidation hub where it is removed from the original trailer and reloaded before delivery? Can the carrier be held liable for a shortage if one occurs? Where can we find more information on "shipper, load & count" regulations?

Answer: A "Shipper Load & Count" notation of a bill of lading means exactly that: the shipper loads and counts (usually a full trailer load, and sealed upon completion of loading). So long as the trailer remains closed and the seal intact, there is a presumption that any shortage found upon delivery did not occur in transit.

If the carrier opens the trailer at an intermediate point for consolidation or transfer to another truck, it should count the contents and report any discrepancy. Unless a shortage is noted at this point, the carrier is no longer entitled to any presumption arising out of the original "Shipper Load & Count" notation on the bill of lading.

The subject of "Shipper Load & Count" is covered in greater detail in *Freight Claims in Plain English* (3rd Ed. 1995) at Sections 4.8.3 and 5.2.2.

42) Bills of Lading - Shipper's Signature

Question: I've been asked if our plants need to have their shipping clerk's(or anyone representing the consignor) signature on the BOL. They would like to have it replaced with a system generated printed name. Does the lack of a signature limit our legal recourse if we were to end up in some sort of transportation related litigation.

Answer: There is no legal requirement for a shipper to sign the bill of lading, and I generally recommend that shippers do NOT sign bills of lading, especially if they are provided by the carrier.

On the other hand, it is imperative that the carrier's driver sign the bill of lading to confirm that the carrier has received the goods, and that they were in good order and condition when received by the carrier.

43) Bills of Lading - Shipper's Signature

Question: Does a shipper or consignor need to sign the bill of lading? We would like to use a system that generates the BOLs with our name printed on it. Does the lack of a signature limit our legal recourse if we were to end up in some sort of transportation related litigation.

Answer: There is no legal requirement for a shipper to sign the bill of lading, and I generally recommend that shippers do NOT sign bills of lading, especially if they are provided by the carrier.

On the other hand, it is imperative that the carrier's driver sign the bill of lading to confirm that the carrier has received the goods, and that they were in good order and condition when received by the carrier.

44) Bills of Lading - Showing Number of Packages

Question: My questions are in regard to putting the piece count on bills of lading. Many of our locations feel that there is no need to do this. I disagree. I think that it is important so that our carriers are aware in case there is a question regarding the shipment. For our customer, it enables them to know at time of delivery how many pieces they are signing for short of having to find the packing slip. One of my concerns is if there is no piece count on the Bill of Lading then the carrier has reason to deny a claim based on a shortage. Please give me your views. Thanks!

Answer: You are absolutely correct. It is always a good practice to show the number of packages or cartons on the bill of lading, and to have the driver acknowledge receipt by signing for the actual count.

The bill of lading (together with any classifications or tariffs of the carrier that may be validly incorporated by reference therein) is a legal document. Unless you have some other formal transportation agreement, the bill of lading will be considered the "contract of carriage" and will determine the rights and liabilities of the parties in the event of loss, damage or delay to shipments.

I suppose you could ship on a document such as a "packing slip", but you would still want some language indicating that the goods were received in good order and condition by the carrier, and a signature of the driver.

45) Bills of Lading - SL&C Notations

Question: 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 "SLSC 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 discprepancies.

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.

I'm rather new at this and thought the "Customer/Carrier Loading Requirements" would help resolve claims for shortages, but it's almost like some carriers act like they don't know what we're talking about. Any help you could give me in this area would be greatly appreciated.

Answer: Whether a shipment is actually "SL&C" (shipper load and count) is basically a simple factual question. If the driver is present at the time of loading and has an opportunity to count the cartons at that time, a "SL&C" notation has no legal effect. This subject is discussed in *Freight Claims in Plain English* (3rd Ed. 1995) at Sections 4.8.3 and 5.2.2.

It is quite understandable that carriers would not want to accept responsibility for a particular count if their driver does not have reasonable access and an opportunity to verify the count during the actual loading by the shipper. Likewise, if the goods are palletized or shrink-wrapped before the driver arrives, so that the individual cartons are not visible or cannot be counted, the carrier cannot be expected to sign for a carton count.

Preprinting your bills of lading "SLDC" (shipper's load, driver's count) is probably a good procedure and should help to minimise problems. However, the most important thing is to request the driver to actually count the cartons as they are being loaded, and have your shipping supervisor make a notation or record of that fact so there can be no question later.

I would also note that we always recommend that our clients enter into written transportation agreements with their carriers. Liability provisions covering this kind of problem can be included in a properly-drafted contract so they become binding and enforceable.

46) Bills of Lading - Special Instructions

Question: What is the carrier's liability under the following circumstances:

Shipper issues a bill of lading to Carrier for orders going to various customer stores. On the bill of lading is the following instruction: "SPECIAL INSTRUCTION TO CARRIER: Ensure that [Customer] Receiving places Store Stamp on your delivery receipt. DO NOT DELIVER WITHOUT STORE STAMP."

Carrier picks up shipment and puts the following notation on their Freight Bill. "[CUSTOMER] STORE STAMP MUST BE ON DR" The customer now claims they never received the order and are requesting a POD with store stamp. Carrier cannot provide.

We file a claim with the carrier and they decline, stating: Our investigation of the above referenced claim has revealed that this shipment was delivered without exception. We are enclosing a copy of our Clear Delivery Receipt. Carrier provides a DR with a signature (but with no Store Stamp).

We have 27 shipments for over $46,000 worth of invoices that fall into this category. Let me know your thoughts.

Answer: I am not sure whether your real problem is with the carrier or with your customer.

The first and most obvious question is: were the goods delivered or not? Have you checked with your customer to see if the signatures on the delivery receipts are genuine? The lack of a store stamp on the delivery receipt is not conclusive one way or another. In other words, do some sleuthing and see if you can find out what really happened.

Your observation about notations on the bill of lading is substantially correct. Notations are not generally binding unless there is some tariff provision allowing or requiring a specific notation, such as "protective service required", etc. On the other hand, notations do give the carrier information, and the carrier was obviously aware of the requirement to obtain a store stamp because it carried the notation forward on its freight bills. It seems that, under these circumstances, you could argue that the carrier accepted this requirement as a part of the contract of carriage.

The best way to avoid this type of problem is to enter into a written transportation agreement with your carriers, and include specific provisions in the contract as to your special requirements. Then there can be no dispute.

47) Bills of Lading - Stickers on Shipper's Forms

Question: We are a common and contract carrier and do not participate in the NMFC. Most of our shipments are LTL loads we receive from brokers and we use rate quotes to settle on a price. While we have published tariffs, they are generally not sent to the brokers or shippers. When our drivers pickup back-hauls, we have them put a sticker on the shipper's paperwork (BOL) that reads: "Receipt subject to inspection, correction, and tariffs or note agreements. Driver is not authorized to waive rules or adjust charges"

We are additionally sending a quote to the broker/shipper that states $2.50/lbs limit of liability, detention information, shipper, consignor, consignee, rate information and wording "subject to terms and condition of the Uniform straight bill of lading on file in carrier's office".

The contracts or quotes as we call them, have most of the same information as the BOL. The shipper or broker by signing this quote is creating a contract for transportation. When we apply the sticker to the shippers BOL we are alerting them to our contract and to apply the standard terms and conditions of the Uniform straight bill of lading. We are only using their paperwork as a pickup receipt. My questions are: If the shippers BOL has terms that we do not agree with are we bound by any of these rules? Since we formally did not issue a BOL can we enforce the $2.50/lbs limit of liability? If we do issue a BOL and the shipper will not sign it or accept it, what is the governing contract or document?

Answer: The question of "which bill of lading governs" is a controversial subject. Shippers generally don't want to use a carrier bill of lading or the Uniform Straight Bill of Lading from the National Motor Freight Classification because it incorporates provisions of carrier's unfiled tariffs that usually contain liability limitations, accessorial charges, late payment penalties, etc. Unless the shipper demands (and the carrier provides) a complete copy of its tariffs, the shipper has no way to determine what is in the tariffs and the carrier can unilaterally modify its tariffs without any obligation to notify the shipper. Conversely, most carriers want to use a bill of lading that incorporates their tariff rates, rules, terms and conditions, etc. and don't want their drivers to accept shipper versions.

A bill of lading can be merely a receipt for the goods, or it can be a contract - IF it contains contractual language governing the obligations of the parties. Regardless of who prepares the bill of lading, if it has the typical language from the Uniform Straight Bill of Lading, the carrier's tariffs are usually "incorporated by reference" and would be binding on the parties.

If the shipper prepares a bill of lading and it does not incorporate any tariffs, and the carrier accepts the shipment, I would say that the carrier cannot rely on its tariff provisions. And, I don't think that any stickers or subsequent notations placed on the bill of lading "after the fact" would be enforceable.

If the carrier gives a written rate quotation that contains all of the important terms and conditions, and the shipper accepts and signs the quotation, it should be an enforceable contract (regardless of what bill of lading form is used). Note that the provisions of the Interstate Commerce Act, such as the "Carmack Amendment", time limits and statutes of limitation would still govern the transportation unless the contract contains an express waiver.

My suggestion would be to use a formal written transportation contract whenever possible. You may want to have different contracts when dealing with a shipper vs. a broker. A properly drafted contract by an experienced transportation attorney is the best way to avoid problems and disputes.

48) Bills of Lading - Straight v. Order

Question: I just read Section 4.1 "Bills of Lading " in your publication *Freight Claims in Plain English*. Since an "order" bill of lading is negotiable does this mean that the "title" to the goods passes to the consignee when the bill is signed and freight is picked up at the shippers warehouse? Does this type of bill legally have anything to do with title to the goods and if so at what point is it passed to the consignee? Therefore, since the straight bill is not negotiable I would suspect this kind of bill has nothing to do with title to the goods. When shipping on FCA or FOB origin terms it is not the "straight" bill that passes title or the actual Incoterm but rather title is passed thru some other document such as a Purchase Order clause or contract between buyer and seller. Is this correct?

Answer: "Title" to goods and risk of loss in transit are generally determined by the "terms of sale", e.g., FOB Origin, FOB Destination, FCA, etc. Usually the terms of sale are set forth in the purchase order or contract of sale. For domestic shipments, terms of sale are defined in the Uniform Commercial Code, and for most international shipments, the Incoterms are used. The use of these terms in a purchase order results in a legal presumption as to where "title" (the right to possession) passes from the seller to the buyer. This is a presumption which the parties may change by contract, i.e., agree to a different place or event for the passing of title.

When an order bill of lading is used, the original document itself is evidence of title or the right to possession. Order bills can be transferred (indorsed) from one party to another, similar to a check.

Order bills of lading are frequently used in international commerce as security for payment for the goods. The reason is that, with an order bill of lading, the carrier may not lawfully deliver the goods unless the original order bill of lading is presented. See 49 U.S.C. Section 80101, et. seq. (the Bills of Lading Act).

In a typical international transaction, the original order bill of lading is sent to an agent or a bank at destination and is released to the consignee only upon payment for the goods. The consignee then takes the original bill of lading, indorses and presents it to the carrier, and receives the goods.

49) Bills of Lading - Terms & Conditions

Question: In reference to a Straight Bill of Lading, is it a good practice to have the contract terms and conditions printed on the back of our bills of lading?

Answer: If you are using a short-form version of the Uniform Straight Bill of Lading, it will probably already have language incorporating the National Motor Freight Classification (NMFC) and the long-form version of the Uniform Straight Bill of Lading (which contains the terms and conditions on the reverse side). It may also incorporate by reference the carrier's unfiled rate and rules tariffs.

Note however, that only carriers that are participants in the NMFC can incorporate provisions from the Classification, including the bill of lading terms and conditions set forth therein.

The best practice is to have a written transportation contract with each of your carriers.

50) Bills Of Lading - The VICS BOL

Question: We are a shipper of consumer electronics. Many of our customers are requesting/requiring that we use a new standardized VICS Bill of Lading ("B/L"). What is this and what are the advantages or disadvantages of its use?

Answer: The VICS bill of lading has been adopted by some of the large retailers and is principally intended to establish a uniform format and to facilitate EDI transmittal of the B/L data.

However, the authors of this B/L adopted what they call the "legal statements" from the Uniform Straight Bill of Lading in the National Motor Freight Classification. Thus the VICS B/L incorporates the NMFC and the carrier's (unfiled) tariffs - an unfavorable result from the shipper's standpoint. Obviously, if all of your shipments move under a properly drafted transportation contract, the form and language of the bill of lading is not critical, because the contract provisions will prevail. On the other hand, there may be situations where some shipments are not covered by your contract, so the VICS B/L language would govern. Also, use of the VICS form could create ambiguity and/or disputes, which you don't need.

If your customers should require you to use the VICS format, my suggestion is to delete the "legal statements" on the face of the B/L. You may also want to replace the language with your own text such as: "RECEIVED, SUBJECT TO THE TERMS AND CONDITIONS OF THE SHIPPER'S TRANSPORTATION CONTRACT IN EFFECT ON THE DATE OF SHIPMENT, WHICH IS AVAILABLE TO THE CARRIER ON REQUEST. THIS SHIPMENT IS NOT SUBJECT TO ANY CLASSIFICATIONS OR TARIFFS WHICH MAY BE ESTABLISHED BY THE CARRIER."

51) Bills of Lading:Rail v. Motor Carrier

Question: I am updating a BOL form (printed by the shipper) that currently uses the Uniform Straight Bill of Lading - Short Form, which references both the uniform freight classifications if it is a rail or rail-water shipment and the applicable motor carrier classification if it is a motor carrier shipment.

I understand that with deregulation, tariffs are no longer filed and motor carriers (for domestic shipments of commercial goods) are no longer regulated, at least with respect to BOLs and rates. I also understand that if a carrier uses the NMFC, the uniform BOL published by the American Trucking Association governs, absent a written contract.

My questions:

1. Can a short form uniform bill of lading that references both rail and motor carrier still be used?

2. With all of the changes to the motor carrier uniform bill of lading, would one form for both rail and motor carrier be problematic? (no longer file tariffs, changes in prepaid/collect, etc.?)

3. Is there any reason to use the Uniform Bill of Lading for motor carriers as opposed to having a shipper-friendly BOL?

4. There is a Uniform BOL for rail and water shipments, at 49 CFR § 1035, that apparently must be used for shipments subject to the Interstate Commerce Act. Only a long form is referenced. Could a short-form be used? Also, when would an interstate rail shipment not be subject to the Interstate Commerce Act and thus not require this BOL?

5. The CFR for the Uniform BOL referenced in number 4 above also indicates that modifications to the front of the form are permitted so long as they conform to "national standards for the electronic data interchange or other commercial requirements for bill of lading information." How does one know if changes made to the front of the Uniform BOL conform to these national standards?

Answer: 1. Motor carriers

The use of the Uniform Straight Bill of Lading (either the "short" or "long" forms) in the NMFC is becoming a controversial subject. Clearly, it is not in the best interests of the shipper to use the NMFC bill of lading. However, many carriers are very tenacious about requiring the NMFC form and incorporating the provisions of the Classification and their unfiled tariffs, and resist the use of other bills of lading.

The best advice to a shipper is to enter into a well-drafted formal transportation contract with each of its carriers. Rates, terms and conditions are all covered by the contract, so you don't have to be concerned about the form of the bill of lading or incorporation of the carrier's unfiled tariffs.

If you must ship via common-carrier and use bills of lading, we recommend the Shipper's Domestic Truck Bill of Lading form which is available in "kit" form (explanatory booklet plus floppy disk) from the Transportation & Logistics Council. This is a "shipper friendly" bill of lading and the form can be easily tailored for the shipper's requirements.

2. Rail carriers:

You are correct in noting that 49 CFR § 1035 does prescribe the terms and conditions for the RAIL version of the uniform straight bill of lading. However, the great majority of rail movements today are "exempt", either because of the commodity, the equipment (boxcars, etc.) or the type of service (TOFC, COFC, etc.).

"Exempt" rail traffic generally moves under rail contracts or under rate quotations which refer to or incorporate by reference the railroad's exempt rail "circulars" (which are similar to tariffs). Thus, the form of the bill of lading is usually unimportant, and any form which serves to transmit the shipping information can be used.

3. EDI standards:

Most major motor carriers and railroads now have the facility to transmit bill of lading and waybill information via EDI, and many of the large retailers are now adopting the VICS bill of lading. My suggestion would be to contact the carrier information systems group if you plan to transmit data via EDI.

52) Broker - Caught in the Middle

Question:

We are an exempt freight broker and have been getting stuck in the middle between our customers demanding that we pay freight claims and the carriers demanding that we pay the freight charges, even though there are damage claims on the shipment. What should we do?

Answer:

As a freight broker, you are legally considered an "independent contractor". You are not a shipper and you are not a carrier. You should always make this clear to the people you deal with.

In order to avoid these problems you should enter into written agreements with both your shipper customers and the motor carriers that you use. Such a contract would make it clear that you are not liable for loss or damage, and that the shipper has primary liability for the freight charges (as well as other relevant provisions, which are agreed to in the contract).

For more information on the subject, refer to *Freight Claims in Plain English* (3rd Ed. 1995) which has a good section on broker liability. This can be ordered from T&LC through the web page or by calling (631) 549-8984.

53) Broker - Liability for Loss or Damage

Question:

It is my understanding that in some instances the courts have held that motor carrier brokers had to indemnify shippers or consignees for cargo loss or damage. What was the rationale for such decision when there is no requirement in Title 49 for brokers to have cargo coverage?

Answer:

Brokers, as such, generally are not liable for loss or damage to shipments because they do not actually handle or transport the goods. However, a broker could be liable if it were negligent. For example, suppose the shipper gave instructions to the broker that a load required refrigeration at 34 degrees and the broker failed to arrange for a reefer truck or did not tell the carrier that the load required protective service. Then the broker might be liable.

This subject is covered in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 13.2.

54) Broker - Liability for Non-Delivery

Question: I brokered freight from Los Angeles to Pennsylvania. Prior to giving the load to the carrier we obtained their authority and insurance, and then sent them a confirmation for pick up and delivery which they signed and faxed back. After missing their 3rd scheduled appointment for delivery, they informed us by letter that the freight rate had increased and that they must have payment prior to delivery. We offered to have a cashiers check at the consignee's dock when they delivered, which they refused and subsequently their phone has been disconnected and they have disappeared with the freight. We have contacted authorities for help without success. The carrier's insurer is denying the claim on the basis that their client will not respond, and I'm not sure my contingent cargo insurance will cover us. What can we do?

Answer: Initially, as a broker, you should not be in the middle. The shipper or owner of the goods is the proper one to bring a claim against the carrier. As a broker, you have no property interest in the goods and are not a party to the contract of carriage (bill of lading). This does not, of course, prevent you from assisting your customer with the claim.

Second, from the facts as stated, the shipper has a legal action against the carrier for the non-delivery of the shipment, and also probably for "conversion", but it would be necessary to get a lawyer, and commence a lawsuit. Even though the carrier appears to have disappeared, the carrier's insurer would probably step in to defend and/or pay the claim.

Third, depending on the value of the shipment, it might be worth filing a claim against the carrier's BMC-32 cargo endorsement, which would provide coverage up to $5,000.

Finally, with regard to your broker's contingent cargo policy, it is our experience that many of these policies have so many exclusions and conditions so as to be almost worthless. However, you

should never take "No" for an answer; if necessary, you can also sue your insurer to enforce the policy provisions.

55) Broker - Licenses

Question: We are considering getting a brokerage authority. Where do we get the form and what else do we need? We are a grain elevator using mostly hopper trailers. We would appreciate any help you could give us.

Answer: The Interstate Commerce Act requires that brokers for the transportation of property must "register" with the Department of Transportation (FMCSA), 49 U.S.C. §§ 13901 and 13904. This registration requirement replaces the former statutory requirement to obtain a "license" from the ICC. Brokers holding licenses from the ICC as of December 31, 1995 were "grandfathered" and deemed to be registered under the new law, 49 U.S.C. § 13905.

The FMCSA has established regulations governing applications for broker registration, which are published at 49 C.F.R. Part 365. Application forms (Form OP-1) are available from the FMCSA at www.fmcsa.dot.gov. If you need further assistance, T&LC Headquarters can refer you to experienced professionals.

56) Broker - Name on Bills of Lading

Question: When we ship with a broker, should their name be on the bill of lading or the carrier's? Also, if we put the language from the T&LC's Shipper's Domestic Truck Bill of Lading, "Carrier designates broker"... on our bill of lading, is this a legal agreement between the shipper and the carrier if both the shipper and the carrier (driver) sign the bill of lading?

Answer:

1. There is no problem with putting the broker's name on the bill of lading; so long as you don't show it as the CARRIER. If you do put the broker's name on the bill of lading, qualify it with the word "broker" to indicate the proper capacity.

2. While there are many variations of the bill of lading today, technically only carriers that are "participants" in the NMFC are required (or permitted) to use the Uniform Straight Bill of Lading in the Classification. Even if the carrier is a participant in the NMFC, Item 362 permits the parties to use alternative forms such as T&LC's Shipper's Domestic Truck Bill of Lading. Utilizing the language "Carrier designates broker..." can help avoid problems, but absent a prior agreement with the carrier, there is no guarantee that the carrier will honor such language based upon the signature of a driver. T&LC's "Shipper's Domestic Truck Bill of Lading" comes in a kit which explains the use of the bill of lading and recommends that the shipper get the carrier's prior agreement to use that form of the bill of lading.

57) Broker - Protecting Shippers' Interests

Question: We occasionally have the need to utilize the services of a transportation broker to secure flatbed trucks. I would like to know the proper way to utilize the transportation broker and to make sure that our company is protected against false claims. In the past, we have received a

quotation, given the final destination to the broker, requested and have received certificate of operating authority, and copy of the carrier's insurance. We also put the name of the broker on the bill of lading as the transportation company and we pay the bill timely. We had a problem recently when we received a telephone call from the carrier requesting payment, as they claim they had not received payment from the broker. We told them to call the broker as we paid our bill. How we can protect ourselves?

Answer: This is a problem that continues to arise and first, you should always know the party with whom you are dealing. Always get a copy of the broker's license and if there is any doubt, check with the FMCSA to make sure that the information is current and the broker has a surety bond on file. You can call (202) 358-7000 for registration and insurance information. You may also check with the Transportation Intermediaries Association to see if the broker is a member and is in good standing; telephone (703) 329-1894.

Second, we recommend that shippers who use brokers insist on a written shipper-broker contract, and that the brokers have written contracts with their carriers. This is the best protection.

An alternative is to use T&LC's "Shipper's Domestic Truck Bill of Lading" which contains the following language in the terms and conditions: "If transportation is arranged through a broker, Carrier designates broker as its agent for the collection of freight charges. When charges are paid to broker, Carrier agrees not to hold shipper or consignee liable for said charges."

Third, I would not recommend that you show the broker's name as the carrier on the bill of lading. If you show the broker's name, indicate "broker" to show the correct legal capacity.

Fourth, unfortunately, the "double payment" problem is very common when brokers go out of business or abscond with funds. This is a "gray area", but the general rule is that if the shipper has dealt only with the broker, and has paid the broker, the carrier cannot come back to the shipper to collect its freight charges.

58) Broker - Sale of Insurance

Question: We are a third party/brokerage firm that offers several different transportation options for moving our customers' products. Since many of our customers request insurance for their cargo, we are able to provide it through another company. The insurance company also informed us that we can mark up the cost of insurance for cargo in interstate transit as it is allowed by federal regulation, without the requirement of being licensed for the sale of insurance by the states. Is this true? Where would one look for this information?

Answer: As a broker, you are not generally liable for loss or damage to shipments while in the possession of a motor carrier.

Many brokers obtain insurance to cover their own operations and any potential liability they may have for cargo loss or damage; these are usually referred to as "contingent liability insurance". A number of companies offer this type of coverage, including the EFIL Group, 960 Rand Road, Suite 101, Des Plains, IL 60016.

I would be extremely cautious however in "selling" insurance coverage to your shipper customers. It is my understanding that you would have to be licensed to do this by the state in which you are operating.

Note that carriers often have "released rates" or limitations of liability which are dependent on the rate charged. A "valuation charge" (additional charge for additional liability coverage) is NOT the same as an insurance premium.

59) Broker Surety Bonds

Question: How does one access a brokerage bond's history and how does one file a claim against it. Is there a required form that we need to get.

Answer: FMCSA regulations provide that brokers must file a surety bond in the amount of $10,000, 49 C.F.R. 387.307.

To obtain surety bond information, you can access the FMCSA's "Licensing & Insurance System" on its website at www.fmcsa.dot.gov. You can also call the FMCSA at (202) 358-7000 and request the name, address and surety bond number of the broker's surety or insurance company. Then write to that insurer and submit your claim with proper documentation.

You should note that the bond is only $10,000, so that if there are other claims the insurer will probably pay each claimant only a pro-rata share of the bond amount.

60) Broker: Agents and Third Party Logistic Providers

Question: What are the differences between intermediaries such as Brokers, Agents and Third Party Logistic Providers. Also, how can we protect from liability, claims and billing chargebacks (when an intermediary does not pay and the carrier comes after you).

Answer: Your question cannot be easily answered in a brief message.

I would start by recommending that you look at Chapter 13 of *Freight Claims in Plain English* (3rd Ed. 1995) which covers the liability of freight forwarders and intermediaries for loss, damage & delay to goods. There are sections describing the differences between freight forwarders, brokers, shippers' agents and shipper associations.

With regard to liability for freight charges, the law is quite different depending on whether you are dealing with a freight forwarder, broker, etc. As a general rule, if you are dealing with a freight forwarder and you pay the forwarder, you should have no liability to the underlying carrier(s) for freight charges. If you are dealing with a broker, and you pay the broker, but the broker doesn't pay the carrier, you could possibly be liable to the carrier depending on the factual issues. In the case of a shipper's agent or a shipper association, the shipper generally will remain liable to the carrier if the agent or association does not pay the carrier.

61) Brokers - Assumption of Liability for Loss & Damage

Question: 1. Is it OK if our broker says it will pay all claims (rather than the carrier) and is willing to sign an agreement to that effect? Can a broker assume liability for claims under a contract and what if the broker's insurance company refuses to pay?

2. Our agreement states that the broker is compensated by the carrier on freight bills paid by shipper to broker. The broker dislikes this language, but this was written to reduce the exposure resulting from having the broker act as an agent for the shipper. Can we do this?

3. Where are the claims procedures that used to be at 49 C.F.R. §1005 now located?

Answer:

1. a. I see no reason why a broker cannot assume liability for loss & damage claims as part of its contract with the shipper.

b. Contractually assumed liability would probably not be covered by most "contingent cargo liability" policies. It would be necessary to review the broker's insurance policy to be able to give a definitive opinion.

2. It is common for the shipper to pay the broker, and the broker to pay the carrier, retaining its "commission" (profit) out of the spread. When carriers are not paid by the broker, they often try to collect from the shipper, arguing that the broker acted as the agent of the shipper. Thus, shipper-broker contracts and broker-carrier contracts sometimes include language to the effect that the broker acts as the agent of the carrier for purposes of collecting freight charges.

3. The former ICC claim regulations are now found at 49 C.F.R. Part 370 (under the FMCSA Motor Carrier regulations). 49 CFR Part 1005 applies to rail transportation.

62) Brokers - Definition & Registration Requirements

Question: What is the definition of a licensed property broker, and how does one become licensed?

Answer: The definition of a "broker" is found in the FMCSA regulations at 49 CFR § 371, and provides:

> (a) "Broker" means a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport.
>
> ***
>
> (c) "Brokerage" or "brokerage service" is the arranging of transportation or the physical movement of a motor vehicle or of property. It can be performed on behalf of a motor carrier, consignor or consignee.

Registration: The Interstate Commerce Act requires that brokers for the transportation of property must "register" with the Department of Transportation (FMCSA), 49 U.S.C. §§ 13901 and 13904. This registration requirement replaces the former statutory requirement to obtain a "license" from the ICC. Brokers holding licenses from the ICC as of December 31, 1995 were "grandfathered" and deemed to be registered under the new law, 49 U.S.C. 13905.

The FMCSA has established regulations governing applications for broker registration which are published at 49 CFR Part 365. Application forms (Form OP-1) are available from the FMCSA, 400 Virginia Ave SW, Washington, DC, 20590, phone (202) 358 7000 or through the FMCSA web site at www.fmcsa.dot.gov (Select “Licensing Forms”.

63) Brokers - Errors & Omissions Insurance

Question: You recently advised us that we should include a provision in our “Shipper-Broker” contract that requires the broker to acquire and maintain Errors and Omissions Liability Insurance.

We have not required this of our brokers in the past and I'm wondering if this point may be a show-stopper to them signing a contract. Do you feel this is a definite requirement for the broker and something we shouldn’t compromise or can we possibly delete this point from the contract without too much concern?

Answer: As a general rule, brokers are not liable for loss, damage or delay to goods in transit. However, a number of recent court decisions reinforce the principle that brokers can be liable if they are negligent, and their negligence causes or contributes to the loss, see e.g., *Professional Communications, Inc. v. Contract Freighters, Inc*., 171 F.Supp.2d 546 (D.Md., Oct 17, 2001) (NO. CIV. CCB-00-CV1309); *Custom Cartage, Inc. v. Motorola, Inc.*, 1999 WL 965686 (N.D.Ill., Oct 15,

1999) (NO. 98 C 5182); *Commercial Union Ins. Co. v. Forward Air, Inc.*, 50 F.Supp.2d 255, Fed. Carr. Cas. P 84,107 (S.D.N.Y., Jun 14, 1999) (NO. 98 CIV. 6814 (AGS)).

It has become common for brokers to be involved in loss & damage claims and lawsuits under various theories: negligent carrier selection (unlicensed or uninsured carriers, failure to verify a carrier's insurance, selection of a carrier with an "Unsatisfactory" safety rating, use of drivers in violation of safety regulations, etc.); failure to transmit critical information to the carrier (special equipment or protective services needs, etc.).

Because of this, we recommend that brokers should have appropriate insurance coverage for their "errors and omissions" - in other words, their negligence. Whether this coverage is part of a general business liability policy or a separate "E&O" policy is not critical, but I do think it is a reasonable requirement.

64) Brokers - Insurance Coverage

Question: Some brokers that we deal with have been submitting cargo insurance certificates that are notated "contingent cargo". I am aware that generally brokers are not liable for loss or damage, yet we require they use motor carriers with specific limits of liability. If in fact, the broker used a carrier with low or no cargo insurance, how would contingent cargo insurance affect potential claims?

Should we ever accept contingent cargo insurance regardless of whether it's a broker or carrier?

Answer: Broker's "contingent cargo insurance" policies come in different flavors from different insurers. They are supposed to cover loss or damage to the goods if the actual carrier or its insurer fails to pay the shipper's claim.

Usually there are quite a few conditions that must be complied with before the policy becomes applicable: the broker must obtain a certificate of insurance from the carrier with a limit sufficient to cover the value of the goods that are shipped, must file and pursue a timely claim that is not paid, etc. Also, the typical policies that we have seen contain many exclusions from coverage.

The broker is not a carrier, and he is not the shipper, consignee or owner of goods - so he really has neither common carrier liability nor an insurable interest in the goods.

As you have noted, a broker would not usually have liability for loss or damage in transit - unless he was negligent and his negligence caused or contributed to the loss, or he has contractually assumed such liability.

My opinion is that most of these policies miss the boat, and that brokers really should have two kinds of coverage: "errors & omissions" insurance in case they are negligent, and insurance that covers contractually assumed liability if they have held themselves out to the shipper to be responsible for transit loss and damage.

65) Brokers - Liability for Failure to Pick Up Shipment

Question: Our company is a licensed transportation broker. We were arranging transportation for a shipper to ship a perishable product from NC to NJ. The original truck we had schedule for the load was put out of service by the DOT, at that time we immediately notified the shipper that we would miss the pick up and would continue to look for a truck, but he should look as well. Through the next day and half we searched for a truck, still in communication with the shipper, and finally found one. During that day and half period we spoke with the shipper several times, so he was well aware of the problem. When the shipment got to NJ the next day it had spoiled, as a result of sitting in the shipper's

cooler. The shipper is filing claim with us because we did not pick it up on time. What is our liability? The shipper was well aware of the problem and had plenty of time to arrange other transportation.

Answer: As a general rule, a broker is not liable for loss or damage to shipments, since it does not physically handle or transport the goods and merely makes arrangements for the transportation. (This subject is covered in detail in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 13.2.) However, a broker may have liability if it is negligent in some way, for example, if the broker selects a "fly by night" carrier that has no operating authority or insurance, or an unsatisfactory safety rating from the Federal Motor Carrier Safety Administration.

Unless you had given the shipper some affirmative representation or guarantee that the shipment would be picked up and delivered according to a particular schedule, and from the facts you have described, I don't see how the shipper could establish that your company was liable for its loss.

66) Brokers - Liability for Loss or Damage

Question: We are a transportation broker in Phoenix. Recently we arranged for the shipment of a chair for a client. The client claimed a value of $1,200 for the retail value of the item. We utilized a company called Intercargo Insurance to insure the chair. The carrier we selected for this move damaged the chair and the receiver refused the shipment resulting in the loss of a sale for our client.

Intercargo Insurance claims that: A) the chair is only worth what it cost to make it-not what it would have sold for, and B) or if it can be repaired, the cost of the repairs. Our Client feels they should be reimbursed for the full amount of the item at retail value or the full $1,200.00. My questions are:

1. Who is right, our client, or the insurance company?
2. As a broker of transportation services, what is our liablility? If our client is not reimubursed for the full amount of their claim, are WE obligated to honor their claim?

Answer: I am assuming that your client is a distributor or retail store that sold the chair to a customer, and if the chair had been delivered to the customer the seller would have been paid $1200. Under those circumstances, the shipper-seller is entitled to his invoice price for the goods.

As a broker you do not ordinarily have liability for loss or damage since you are not a "carrier" and do not ever have physical possession of the goods. You could become liable if you assumed liability (represented to your shippers that you are responsible or will pay claims), or if you were negligent in some way which caused or contributed to the loss or damage.

Note: The subject of damages is extensively covered in Section 7.0, and liability of freight forwarders and intermediaries is covered in Section 13.0 of *Freight Claims in Plain English* (3rd Ed. 1995). You might wish to purchase a copy from T&LC.

67) Brokers - Liability for Loss or Damage

Question: The company I work for is a transportation broker. A customer of mine had some damage on a load that we handled for them. The customer did not file a claim, but instead deducted the amount of the claim from our invoice on the load. What are the laws regarding this issue? Can the customer legally do this w/o a claim being filed?

Answer: First of all, as a broker you should not get yourself caught in the middle on claims. Brokers are not generally liable for loss or damage (unless it is caused by their own negligence). You should make it clear to your shipper customers that you are a broker and that you are NOT a

motor carrier. If you want to assist your shippers in filing or processing their claims against the carriers, that is o.k., but you should not hold yourself out to be responsible for the payment of claims. We recommend to our broker clients that they enter into written agreements with their shippers so that this kind of problem is minimized.

Second, there is no law or regulation which would prevent a shipper from offsetting claims against freight charges, and it is done frequently.

I would note there are some risks to the shipper. If the shipper fails to file a written loss or damage claim within the 9-month time limit provided in the uniform bill of lading, it could end up having to pay the freight charges and not be able to collect its loss or damage claim because it is time-barred. In addition, the carrier might have a loss of discount or late payment penalty which would be added on top of the freight charges due.

68) Brokers - Liability for Negligence

Question: I am an agent for Landstar Logistics, a transportation broker. As an agent I am required to have all potential carriers insurance and safety approved through the Landstar staff located in Florida prior to allowing them to move any of my customers cargo. I used an approved carrier to move a in-bond load of wine from WA to CA. The trailer and cargo were stolen in CA. It turned out that the approved carrier had an exclusion on his insurance to transport wine and other goods. The claim was denied by the carriers insurance. It also turns out that Landstar's insurance approval process does not include making sure that insurance policies contain exclusions. Landstar does not want to honor the claim on the basis that they are a broker only. I feel there is negligence on Landstar's behalf and that they need to honor the claim with contingent cargo liability insurance. If Landstar does not honor claim, I will probably lose customer & business and am willing to go to court over this. Is there negligence and what legal recourse do I have?

Answer: As a general rule the court decisions hold that a transportation broker is not liable for loss, damage or delay to goods in transit. A broker can be liable if it is negligent, and its negligence causes or contributes to the loss.

The question is: (1) was the broker negligent in failing to inquire whether the carrier's insurance policy covered or excluded the commodities that were being transported; and (2) if so, whether its negligence caused damage to the shipper. The answer depends on the specific facts and circumstances, and the standards to be applied to a reasonably prudent broker.

In my opinion, from the facts you have described, there would be a cause of action for negligence against the broker.

I would, however, observe that you described your position as an agent of the broker. This raises the question as to whether you would have any standing to bring a legal action, since you have no ownership interest in the shipment.

69) Brokers - Liability Under Carmack Amendment

Question: What is the "Carmack Amendment" and where can I find the exact ruling online? Does this protect brokers from liability of loss/damage claims? If not, where can I find a ruling that does protect brokers in this situation?

Answer: The "Carmack Amendment" was an amendment in 1906 to the Interstate Commerce Act. Over the years the original language was changed a number of times and now appears at 49 U.S.C. Section 14706 (for motor carriers).

The Carmack Amendment governs the liability of motor carriers and freight forwarders for loss, damage or delay to shipments in interstate and foreign commerce. It has no application to brokers, see Custom Cartage, Inc. v. Motorola, Inc., No. 98 C 5182, 1999 WL 965686 (N.D. Ill. 1999).

As a general rule, brokers do not have liability for loss, damage or delay to shipments. This subject is discussed in detail in Chapter 13.0 of *Freight Claims in Plain English* (3rd Ed. 1995), which is available from T&LC.

70) Brokers - Licensing Requirements

Question: I own two shipping stores and am interested in freight brokering. I am aware that in many instances that I will be required to have a freight brokers license in order to resell certain services. What are the requirements and where can I get more information?

Answer: The Interstate Commerce Act requires that brokers for the transportation of property must "register" with the Department of Transportation (FMCSA), 49 U.S.C. §§ 13901 and 13904. This registration requirement replaces the former statutory requirement to obtain a "license" from the ICC. Brokers holding licenses from the ICC as of December 31, 1995 were "grandfathered" and deemed to be registered under the new law, 49 U.S.C. § 13905.

The FMCSA has established regulations governing applications for broker registration which are published at 49 C.F.R. Part 365. Application forms (Form OP-1) are available from the FMCSA, 400 Virginia Ave SW, Washington, DC, 20590, phone (202) 358 7000.

You can now get application forms and instructions through the Internet via the FMCSA web site:

Go first to http://www.fmcsa.dot.gov ; then go to the Motor Carrier Licensing Forms section at: http://www.fmcsa.dot.gov/factsfigs/licensing/licensing.htm

Select the form "Op-1" and you will be given the instructions and you can actually print out the forms.

71) Brokers - Record Keeping Requirements - Confidentiality

Question: Title 49, chapter III, Sec. 371.3 indicates a broker's requirement to maintain records of each transaction and that "Each party to a brokered transaction has the right review the record". I am considering a start-up "broker" service. My intentions are to be completely honest with my clients on all subjects, including this requirement. My question is in regard to service providers I choose, and their potential to use this information to my company's detriment. Do I have any protections, or legal recourse in this event?

I don't think many shippers are aware of this right, and have never heard of carriers taking advantage of it either. Have you

Answer: You are correct in observing that there are FMCSA (formerly ICC) regulations governing the requirements for property brokers, which include record-keeping requirements.

If one of your concerns is "back solicitation" by your carriers, the best way to deal with this is to include proper restrictions in a written broker-carrier agreement.

We generally recommend to broker clients that they have written agreements with all of their shippers and carriers. You should consult an experienced transportation attorney If you need assistance in this regard.

72) Brokers - Record Retention Requirements

Question: Can you please send us the pertinent information regarding how long we have to store freight bills? We are a broker/logistics services provider and need to know the law requiring retention and storage of freight bills.

Answer: Record keeping requirements for brokers are set forth in 49 C.F.R. Part 371 as follows:

371.3 Records to be kept by brokers.

(a) A broker shall keep a record of each transaction. For purposes of this section, brokers may keep master lists of consignors and the address and registration number of the carrier, rather than repeating this information for each transaction. The record shall show:

(1) The name and address of the consignor;

(2) The name, address, and registration number of the originating motor carrier;

(3) The bill of lading or freight bill number;

(4) The amount of compensation received by the broker for the brokerage service performed and the name of the payer;

(5) A description of any non-brokerage service performed in connection with each shipment or other activity, the amount of compensation received for the service, and the name of the payer; and

(6) The amount of any freight charges collected by the broker and the date of payment to the carrier.

(b) Brokers shall keep the records required by this section for a period of three years.

(c) Each party to a brokered transaction has the right to review the record of the transaction required to be kept by these rules.

73) Brokers - Registration Requirements

Question: We have recently obtained our common carrier authority and are hauling for a man who says he is a broker. When I went into the FMCSA data bank I found that he has his Common authority and Contract authority, but no broker authority. He pays with a check but there is no statement or anything that goes with it. We have not signed any lease with this man of any kind. Is he, as a carrier, authorized to broker freight to other trucks. And if he isn't what are the legal aspects that we need to be aware of? Any information you can provide would be greatly appreciated.

Answer: There are a lot of companies today that are wearing multiple "hats", and offering services as a common carrier, a contract carrier, a freight forwarder, a broker, etc. and many of them ignore the legal requirements.

The Interstate Commerce Act defines carriers and brokers differently (49 U.S.C. Section 13102) and imposes separate requirements for registration (Sections 13902 and 13904). The regulations of the Federal Motor Carrier Safety Administration (formerly the FHWA and the ICC) establish different requirements for carriers and brokers (see, e.g., 49 CFR Parts 365, 366, 371, 387).

The bottom line is, if a carrier also wants to act as a broker, it needs to register as a broker, file a surety bond, and comply with the regulations governing brokers.

One obvious problem, aside from operating illegally, is that it may be difficult to tell who is the carrier and which party is liable to the shipper in the event of loss or damage to the shipment. Other potential problems might involve disputes over the collection or payment of freight charges.

It is important to know who you are dealing with, and in what capacity. I would advise against doing business with someone who is operating illegally or without the required operating authority.

74) Brokers - Registration Requirements

Question: In general, would a person who provided leads or contracts to freight forwarders or moving companies be considered a broker? Would there be any federal/ state regulation regarding such activity?

Answer: The term "broker" is defined in the Interstate Commerce Act as "a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement or otherwise as selling, providing or arranging for, transportation by motor carrier for compensation." 49 U.S.C. Section 13102(2).

If you are acting as an agent of a carrier or forwarder and are paid a fee or commission by the carrier or forwarder, you would not be considered a broker. If you arrange for transportation as a middleman, and are compensated by the difference paid by the shipper and the amount paid to the carrier or forwarder, you would be considered a broker. Brokers are required to be registered with the FMCSA (formerly the ICC and/or FHWA).

75) Brokers - Withholding Payment for Claim on Prior Load

Question: We are a motor carrier and carried a load a couple of months ago contracted through a broker.

After delivery, I billed the broker for the amount agreed upon in the rate confirmation and submitted a signed, clear BOL. They, in turn, sent me payment for the load.

I was informed a week ago, there was a claim on the load for damages. Now, they are withholding payment on another load. My questions are: Can the broker withhold payment on the other load? Can the shipper file a claim for damages when there is a clear BOL?

Answer: As to your first question, the broker cannot withhold payment of freight charges which are due. The broker has no ownership interest in the shipment, and is merely a middleman who arranges for transportation.

Regarding the claim for loss or damage, the fact that there was a clear delivery receipt does not preclude the shipper or consignee from filing a claim. It could be "concealed damage" which was discovered after delivery. The clear delivery receipt does place a greater burden on the claimant, to prove that the loss or damage could not have occurred after delivery. Note also that the bill of lading requires that the claimant file a claim in writing with the carrier, with appropriate supporting documentation.

76) Bumping Privilege - Limited to Shippers

Question: Can a consignee take advantage of the "bumping privilege" in NMFC Item 171 upon delivery?

Answer: No. The language of item 171 is quite specific and is limited to action taken by the shipper at the time of shipment. The obvious answer for consignees on collect shipments is to notify their shippers to be aware of the rule and take advantage of the bumping provision at the time of shipment.

77) Bumping Privilege - NMFC Item 171

Question: What is a "bumping privilege" under the NMFC's rules, and what does it mean?

Answer: Item 171 of NMFC 100-Y, the latest issue effective Oct. 17, 1998, allows a shipper to increase the weight of its shipments to artificially increase package density so that it may apply the next lower class in a density scale and thus obtain a lower rate. The applicable tariff must make reference to this Item, and this may be done only at the time of shipment.

78) Cargo Insurance - BMC 32

Question: We've been requesting BMC 32 Endorsements from our carriers this year. So far, we've had some interesting responses. Some have no idea what we are requesting, some send the wrong form, etc. CWX has sent a copy of their BMC 83, which looks like it is something similar to the BMC 32. Is this sufficient information and why would a carrier not have a BMC 32? Also, the BMC 32's that we have received have expiration dates. Would it be wise to follow up for updated forms as we do with Certificates of Insurance?

Answer: The BMC-32 is a cargo insurance endorsement; the BMC-83 is a cargo surety bond. They essentially serve the same purpose, see 49 C.F.R. Part 387.313.

You can check with the Federal Motor Carrier Safety Administration to find out if the carrier has current public liability and cargo coverage by accessing their web site at www.fmcsa.dot.gov and selecting the licensing and insurance database. We recommend this as the best way of verifying carrier status and compliance.

79) Carmack Amendment - Applicability

Question: Assuming the subject is either not addressed in and/or there is no contract of carriage (only the carrier's rules and/or tariff) when would or would not Carmack apply with regard to claims? Stated another way, would you briefly clarify, list, identify when Carmack applies and when it doesn't.

Answer: The "Carmack Amendment" applies to interstate transportation or service provided by rail carriers (49 U.S.C. 11706, formerly 11707) and by motor carriers and freight forwarders (49 U.S.C. 14706, formerly 11707). A thorough discussion of the Carmack Amendment may be found in Section 1.1.1 of *Freight Claims in Plain English* (3rd Ed. 1995).

Basically, Carmack applies to all interstate U.S. surface transportation, and to transportation from the U.S. to contiguous foreign countries (Canada and Mexico). There are a number of statutory and administrative exemptions, the most significant of which are: private carriage (Section 13505); transportation of agricultural commodities, transportation incidental to an air movement, and transportation within a commercial zone (Section 13506)

80) Carmack Amendment - Who is Covered?

Question: Which carriers are currently subject to the Carmack Amendment? Are UPS and Federal Express subject to it?

Answer: Yes, all carriers subject to the DOT's regulation are subject to Carmack, including the surface operations of UPS and Federal Express. Some of their claim policies are in violation of government regulations, and could be changed if enough support were generated among shipper groups.

81) Carrier Defenses - Act of God

Question: What is the responsibility of the carrier in the event of freight damage from a tornado or sudden violent weather conditions?

Answer: Both under the common law and under the Uniform Straight Bill of Lading, which is in common use, a carrier has a defense against liability if it can establish that the cause of the loss or damage was an "Act of God", and that it was free of any negligence.

The case law defines an "Act of God" as "an occurrence without intervention of man or which could not have been prevented by human prudence. It must be such that reasonable skill or watchfulness could not have prevented the loss..." Generally, only extraordinary events such as tornadoes or hurricanes would qualify, and ordinary bad weather, rain, snow, etc. would not be considered an "Act of God".

This subject is discussed in detail in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 6.3, Act of God.

82) Carrier Holding Freight "Hostage"

Question: I made three shipments via a broker, who, in turn, gave the shipments to a motor carrier for delivery. After two weeks, the freight had still not been delivered. When the freight finally did arrive at the intended location, the pallets were triple stacked, and had fallen over. There were parts scattered all over.

The carrier told me they would restack the load and redeliver, but they never did. I called the broker and told them to get my freight back. The carrier told the broker that they would do it . . . FOR $7,800.00.

I have a big problem. None of my shipments were delivered and I am being blackmailed for their return.

Is it the responsibility of the broker to get my freight back or am I screwed?

Any help would be most appreciated as this has been going on for a number of weeks and now the carrier has faxed me a letter saying It was going to cost me $100.00/day for storage until I pay for the freight.

Answer: Unfortunately, your story is not unusual.

First, you have to recognize that a motor carrier has a "lien" for freight charges on any shipments it transports and does not have to release the shipment until its charges are paid. In your case, the carrier can probably hold your cargo hostage until the charges are paid. You probably have to tender payment of their charges before they release the shipment. Then, your recourse for the loss or damage to your freight is to file a written freight claim with them and, if necessary, bring a lawsuit to collect your damages. You may also want to question the amount of the freight and/or

storage charges and see if they are charging you based on their correct tariff rates; it is quite possible you may have been overcharged.

As to the broker, your recourse is limited. A broker is not a carrier; it is only an intermediary and, as such, is not generally liable for loss or damage to your cargo. The only exception is when the broker is clearly negligent - such as selecting an unsuitable carrier with a bad safety rating or no insurance. I am surprised, however, that your broker did not try to intercede for you and try to work something out with the carrier. My guess is that the broker and carrier are not on good terms.

83) Carrier Liability - Damage Caused by Double Stacking

Question: We received a denial letter where a carrier has denied the claim because they allege "the material was not properly packaged to withstand the normal rigors of transportation." They go on to state, "please keep in mind that double stacking freight unless specified per the shipping instructions is a common procedure in the industry."

We are in possession of pictures of the double-stacking that caused the damage. Apparently after picking up our material the carrier picked-up, and placed on our goods, large pallets weighing approximately 950-1100 lbs. each.

My question is this: Does the requirement for OUR packaging to withstand the normal rigors of transportation also include the requirement to withstand the weight of a 1000 lbs. pallet that is placed on top of it? Note: Our packages don't have symbols which prohibit double-stacking.

Answer: As a general rule, yes, the shipper is supposed to package goods in a manner "to withstand the normal rigors of transportation..."

However, getting back to basics, a carrier can only escape liability if he can prove two things: (1) that the "act or default of the shipper" (improper packaging) caused the damage, AND (2) that the carrier itself was free from negligence.

These principles are discussed in detail in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 5.0, Burdens of Proof.

I don't see how a carrier can refuse to pay a claim if they placed some other heavy freight on top of your shipment, which caused the damage.

84) Carrier Liability - Damage to SL&C Shipment

Question: On a full truckload shipment from our DC, the truck was sealed and the driver did not have the opportunity to inspect the load. When the truck arrives at our store for delivery, the driver breaks the seal and opens the trailer door, and the load appears to be properly secured. The driver then begins to back into the dock, and the load then shifts and packages fall out of the back of the trailer and are damaged. Would the carrier at this point be liable for the damage?

Answer: This appears to be a Shippers Load & Count ("SL&C") situation, where the trailer was loaded and sealed by the shipper, and the driver had no opportunity to observe or participated in the loading. Under these circumstances, the shipper assumes a greater responsibility than if the driver is present and can supervise the loading.

The question is whether the carrier/driver was negligent in any way. You say that the driver broke the seal, opened the door, and then started to back up the trailer. If the driver could not see any obvious problem with the loading, and was careful in operating the truck while backing up, I think it would be difficult to hold the carrier liable for the damage. On the other hand, if he backed

up very rapidly, bumped the loading dock, etc., you could argue that the driver's negligence was a contributing cause of the damage, in which case, the carrier would be liable.

I would refer you to *Freight Claims in Plain English* (3rd Ed. 1995), Section 5.0 Burdens of Proof, for a discussion of carrier liability.

85) Carrier Liability - Defenses - Improper Packaging

Question: We had a shipment that was damaged in transit. The freight company is refusing to pay the claim, quoting N.M.F.C. classification 100 series and referencing item 23320 – "such articles will be accepted for transportation in any container or in any other form tendered to carrier which will permit handling into or out of vehicles as units, providing such containers or tendered forms will render the transportation of freight reasonably safe and practicable." If they accepted the freight for shipment are they responsible for any damages which occur?

Answer: Common carriers are liable for loss or damage unless they can prove that the loss was due to one of the basic defenses such as act of God, act or default of the shipper, etc. AND that they were free from negligence. See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 5.0 for a detailed discussion of carrier liability.

Item 23320 of the Classification refers to "belts or belting, elevator, conveyor or transmission, etc...", but there is no reference to "containers". I don't see how it could affect your shipment.

I am assuming that this carrier is saying that you did not properly prepare or package your goods for transportation ("act or default of shipper"). If so, the carrier still has to prove that the improper packaging is the sole and proximate cause of the damage and that it was not negligent in handling your goods. In other words, the answer to your question is "Yes".

86) Carrier Liability - Dropped Trailers

Question: I have an issue I would like you to review and give me your opinion. We currently employ the use of drop trailers for our short haul dedicated fleet used to deliver from our Distribution Centers to our stores. Most stores within a 125 mile radius of a DC are delivered by the dedicated fleet. The driver drops the loaded and sealed trailer at the store dock and takes yesterday's empty trailer back to the DC.

Each store has a storage box on the rear wall near the dock containing three trailer kingpin locks. Once the driver unhooks from the loaded trailer he is required to install a kingpin lock prior to departing the store. The store takes the kingpin lock off the trailer once the trailer is unloaded so the next day's driver can pick up the empty trailer.

This has worked well for us in recent years. We have experienced zero theft of trailers from our locations. In the past many of our stores have been in semi-rural markets or are in markets with populations of from 50k to 200k people with generally less organized theft than is seen in major population centers.

I am concerned with trailer/product theft as we move into major metro markets such as New York City, Los Angeles, Chicago and the like. I need your opinion regarding trailer theft from our site. If a dropped trailer with a kingpin lock installed is stolen from our dock who has liability for the loss? Does the liability for the loss change if the carrier does not install the pin lock as our policy dictates? How clear is the legal precedent on this topic? Do you have any recommendations either within the language of our contract or regarding the physical trailer that may help us?

Answer: As a general rule, the carrier's liability ends upon "delivery", and delivery has been defined by the courts to mean physical delivery in a manner that nothing further needs to be done by the carrier. (I can give you case citations if needed, and you may wish to read Section 3.0 in *Freight Claims in Plain English*.)

I am not aware of any cases dealing with the specific situation where the consignee provides and/or requires the driver to install a pin lock on the trailer. I suppose we could write some specific language into your transportation contract with this requirement, and stating that the carrier would remain liable for loss or theft if the pin lock is not installed.

I would note that I am aware of some trailer thefts even when there were pin locks installed, so it is not 100% protection. Perhaps you should look at your overall facility security measures: fences, lighting, guards, etc. if you think this may be a serious potential problem.

87) Carrier Liability - Goods Refused by Customer

Question: I recently shipped goods to my customer, and they have chosen to refuse part of the shipment based upon our noncompliance with the their packaging standards. Incidentally the issue at hand is loose on skids vs. shipped in cartons, which their packaging standards do not stipulate either way.

1. Is the carrier liable for damages/shortages incurred as a result of breaking apart the shipment integrity?
2. Is the consignee liable for shortages or storage charges incurred by the carrier resulting from this action (refusal of goods)?
3. Is there a governing NMFC rule stipulating that the carrier cannot deliver partials regardless of consignees concerns, meaning take all of the cargo or none of it?

Answer: I'm not sure whether your problems are with your customer or with your carrier.

Obviously, carriers are responsible if they damage your freight, regardless of how it is packaged, unless they can establish that the damage results solely from your improper packaging without any negligence on their part.

However, the consignee should not refuse shipments to the carrier because of some disagreement with the shipper as to packaging, but only if the carrier has damaged the shipment so badly that it is "practically worthless", see Section 10.9 of *Freight Claims in Plain English* (3rd Ed. 1995). If they abandon the freight to the carrier, the carrier becomes a "warehouseman" and, although it does have a duty to protect the freight, it has a lesser standard of care.

I am not aware of any provision of the NMFC that prevents a carrier from delivering a partial shipment.

88) Carrier Liability - Misdelivery

Question: Would a common carrier have any liability under the following circumstances?

Carrier picks up 1 pallet of calendars going to a bookstore in a shopping mall. Carrier makes the delivery the next day. Unknown to the shipper, the consignee moved three months earlier. A different company, which is also a bookstore had moved into the location. This new store accepted the order from the trucking company. The error was not discovered until 4 months after the delivery was made. The new store has since moved and no one can locate the merchandise. Sign on the delivery door at the mall still reads the original consignee's name.

Carrier did the following: Delivered the goods to the address on the B/L. Had delivered to this location in the past. The delivery door was marked with the name that was on the B/L. The company that accepted the freight was also a bookstore.

Original consignee claims that they notified shipper of the fact they were moving, although shipper has no record of it. Company that accepted the merchandise has also not been cooperative.

Is the carrier liable for the merchandise?

Answer: The general rule is that the carrier has a duty to ascertain the proper party named as consignee in the bill of lading and to deliver only to that party. Failure to do so is a "misdelivery" for which the carrier is liable. See Section 11.3.3 in *Freight Claims in Plain English* (3rd Ed. 1995) for a discussion of the court decisions.

The company that wrongfully accepted the merchandise is, of course, also liable and should not have accepted goods that were the property of someone else.

My recommendation would be to pursue your claim against the carrier, and let them try to collect from the company that accepted the merchandise.

89) Carrier Liability - Misdelivery

Question: Our terms of sale are F. O. B. Shipping Point, but we regularly file claim for loss and damage as a courtesy to our customers. We made a shipment of two skids of 303 wrapped boxes on November 10th with a certain regional carrier. 1 of the 2 skids delivered on November 16th on a clearance bill, but the remaining skid was missing in action. Our customer (Customer A) notified us of the shortage on December 2nd and we filed claim with the carrier on December 6th for $6683.59. The carrier notified us on January 5th that they misdelivered the skid to another one of our customers (Customer B), who had taken it into their warehouse and put in stock. Customer B confirms that he was in possession of the merchandise and would pull the items from stock and return them to us. However, this has never happened. Now Customer B says he has sold most of the merchandise and wants us to invoice him for the items he regularly stocks. This would be difficult due to the length of time that has elapsed. Carrier would also like for us to handle in this manner, but we feel that Customer B and the carrier should settle between themselves. To add another little twist, we no longer do business with the carrier. Should we stick to our guns and insist that the carrier pay the claim in full?

Answer: Clearly, the carrier failed to deliver the goods in accordance with the contract of carriage (bill of lading), and is liable to you for the misdelivery. The carrier has a claim (possibly legal action for conversion) against "Customer B", who wrongfully kept the goods that it should have known belonged to someone else. You have no legal obligation to get involved as between the carrier and "Customer B".

90) Carrier Liability - Misdelivery - Impostor Theft

Question: I work for a carrier that recently delivered a shipment for which a signed delivery receipt was obtained. This is a repeating type move that has occurred almost daily, for almost two years. The consignee claims this particular shipment was never received. After furnishing them with a P.O.D., the consignee claims the signature is a forgery. All internal records indicate there was nothing unusual about it (it was checked by different employees at different cities along its route). The P.O.D. includes a time of delivery (12:15 p.m.). The merchandise is job specific; hence, no "street value". The

claim was denied, and the shipper accepted the declination without litigation. My employer is still handling this move almost daily.

I would like your opinion on the potential results of litigation had it been pursued. Everyday millions of shipments are delivered to unknown employees. Drivers simply find someone at the prescribed address willing to accept delivery. I have worked for trucking companies over twenty years, and am surprised I have not come across issue. Some shippers require drivers to offer identification when tendering a shipment. Should drivers require the same of consignees? I would appreciate your opinion on this subject.

PS. I suspect the time of delivery (lunch) may have something to do with the shipments mystery. Driver is a 22-year veteran with same employer and has a clean file.

Answer: As a general rule, the carrier has a duty to ascertain the identity of the consignee before giving up custody of the shipment. Failure to do so would expose the carrier to liability for misdelivery if the shipment should be stolen by an impostor.

In most situations it is pretty obvious that the person signing for the freight is an employee or person authorized to do so, but if there is any doubt, the driver should not release the freight until some appropriate proof is received.

I should point out that in the "impostor theft" cases there are often disputed questions of fact, and it may be necessary to have a court determine the credibility of the witnesses.

91) Carrier Liability - Multiple Carriers

Question: I have a question concerning a claim on a shipment with multiple carriers. We are a 3PL and contracted with a long haul contract carrier to move a consolidation shipment from California to several points in the southeast. The shipment was brought into Atlanta and received by a short haul carrier. We contracted with the local carrier to cross dock the pallets for each customer, then deliver them.

When the original carrier picked up in California it was the driver's responsibility to count the load on the pallets, and it was then shrink wrapped. The driver for this company signed that the correct number of pieces were loaded on his truck. When this carrier's driver delivered the load to our short haul carrier in Atlanta he allowed the short haul carrier to sign for the load so many pallets "said to contain" so many pieces. This carrier then delivered the pallets to our customers. The pallets were not reworked in Atlanta; they remained shrink wrapped. When the pallets were delivered they were broken down and the pieces were counted. At this time a shortage was discovered.

We take taken the position that the original carrier would have to assume the responsibility for the shortage due to the fact they signed for the load whole and did not require the short haul carrier to sign for the pieces on each pallet. They have denied our claim because they have a clear bill of lading and no shortage was noted. We feel by not getting the short haul carrier to sign for the correct piece count, this is not correct. Is this the correct assumption on our part? Do you feel with the facts I have given you our position would be defensible if we pursued legal proceedings against the original carrier.

Answer: Do these shipments move under a through bill of lading issued by the origin carrier, or did you enter into two separate arrangements?

It sounds to me as though there are two separate movements and two separate contracts of carriage. This is not a situation where the origin carrier has issued a through bill of lading and assumed liability for its connecting carriers (Carmack Amendment).

Regardless of how the second carrier signs the delivery receipt, you basically have a mystery on your hands - where did the loss occur: in the first movement or the second movement. Note

also the possibility that the shipment was short when tendered to the first carrier, or that the shortage occurred after delivery by the second carrier, ie., the shipper or consignee could be at fault.

If you decide to pursue legal proceedings, I would suggest bring suit against both carriers. If this is a recurring problem, you should change your receiving procedures at the Atlanta "cross dock" facility. Require them to break down and count the pallets at that point, so you can determine who is responsible. You may also consider recommending to the shipper that they use a distinctive shrink wrap or color coded tape to signal any tampering or pilferage from palletized shipments.

92) Carrier Liability – Parcel and Express Carriers

Question: How are carriers such as UPS,RPS, and Federal Express able to get away with liablity limitations of $100 per package, and have maximum liability limitations?

Answer: UPS, RPS and Federal Express are common carriers and generally subject to the same laws and regulations that govern all motor carriers. However, "express companies" and small package carriers have traditionally had a different liability regime.

For rail and motor carriers we start with the presumption that the carrier is liable for full actual loss unless there is an agreement to limit liability, in consideration for a lower rate. Freight rates are usually based on the classification which takes into account the nature of the commodity - its weight, density, value, susceptibility to damage, etc.

With express companies, the base rate is traditionally tied to a limited liability ($100 per package, etc.), unless the shipper declares a higher value and pays an additional charge. This difference goes back to the days of Pony Express, and is based on the fact that rates are not dependent on the commodity - you can ship a letter, a pair of gloves, a package of diamonds, or a lock of hair - and the carrier doesn't know or care what is in the package.

In theory, you can negotiate the any kind of contract with a package carrier that you would with an LTL or TL carrier. In practice, unless you have substantial bargaining power and are a large shipper, UPS and Federal Express will usually insist on their own contracts, or if they use your form contract, will require that the provisions of their Service Guide or tariff be incorporated into the contract. It essentially boils down to how much "clout" you have.

93) Carrier Liability - Protective Service - Ice Cream

Question: I have a problem with a claim of ice cream. We are a broker that hired an outside contract carrier to haul this load. This carrier was faxed a rate confirmation with shipper and consignee information and told what temperature to use (-20 degrees). The carrier picked up the load and at the consignee he found out the load of ice cream went soft in the middle. The middle of the trailer was pulped at +18 degrees; the product at the end of the trailer was pulped at -10 degrees and then shot by a freezer gun at -3 degrees. This caused the refusal of the whole load. None of it was salvageable.

The carrier said to me that they are denying the claim because it was the shipper's fault that the product wasn't frozen properly for shipment. They went and had the reefer refrigeration unit checked afterwards, and that was tested as fine.

I know that it is the carrier's responsibility to inspect the product when loaded and if they find any problems they should not accept the product until the problem has been corrected. The carrier said also that they were not told of what temperature to use, so it would not be there fault that it wasn't cold

enough when delivered. Wouldn't you think that if a carrier is accepting a load of ice cream they would make sure of the temperature before loading it? Regardless if they were told or not?

This carrier doesn't plan to let his insurance to investigate the claim. I did send the claim certified to the carrier and their insurance agency for review. By law aren't they required to do a reasonable inspection of the situation? This claim is $47K. Our customer wants to know when they will get paid for this large claim. I'm not sure what to tell them other than we have 120 days legally to accept or deny. Can you help me?

Answer: First of all, I would hope that you have a contract with your shipper that makes it clear that you are acting as a broker, not a carrier, and that you are not liable for loss, damage or delay to shipments. If all you are doing is attempting to assist your customer with the filing or processing of the claim, that is fine, but you should not be assuming responsibility for transit loss or damage.

As to the specific claim, there are some basic principles:

The shipper would be responsible for ensuring that the product was at the proper temperature when tendered to the carrier. A refrigerated truck is designed to maintain the temperature of the product, but may not be able to bring down the temperature if the product is warm.

Normally the shipper will note on the bill of lading or shipping document that protective service is required, and the proper temperature or temperature range that must be maintained during transit.

However, even if the carrier was not told what temperature to use, any carrier that operates reefer trucks should be experienced and familiar enough with refrigerated transportation to know the proper temperature for a product like ice cream.

Whether the carrier is able to determine that the product is at the correct temperature upon loading depends on the physical circumstances, e.g., whether the shipper loads the truck, whether the product is on pallets, etc. Most likely, the carrier would not check product temperature as it was being loaded.

There are obviously a number of factual issues and disputes, and it is likely that the claimant and the carrier may need to engage experts and/or attorneys if the claim cannot be resolved.

94) Carrier Liability - Successor Company

Question: We were using a carrier (Carrier 1) that was bought by another company (Carrier 2). We continue to use Carrier 2. From my past experiences with this situation, Carrier 2 would have also taken on the debt (claims) of Carrier 1. Not in this instance. The original owner is still responsible for the debt even though the new owners are researching the claims. Supposedly, once the old owner approves, we will get paid. I have my doubts, however, since these claims are nearing their first birthday.

My question is: Do we have any recourse against the new owners? My guess is "no", but I would prefer that the old and new owners of the company resolve this without us in the middle.

Answer: I really can't answer your question without more information. There are a number of ways one company can acquire another; for example, it can purchase only the assets, it can purchase assets and liabilities, it can acquire the stock of the other, etc. Usually, if only the assets are purchased, the buyer will insist that the seller remain responsible for outstanding debts and obligations.

The best recommendation is to act as quickly as possible to collect your claims. You may have legal remedies against the seller or against the buyer, but enforcement is usually costly.

One point to remember: if the seller is out of business and won't pay your claims, you may still have recourse under the BMC 32 mandatory cargo insurance endorsement. See Section 12.1.1.1 of *Freight Claims in Plain English* (3rd Ed. 1995).

95) Carrier Liability - Unreasonable Delay

Question: We are a freight broker. One of our customers tendered a shipment to a local carrier for a delivery that was approximately 50 miles distance. The carrier "lost" this shipment for 60 days. During this time a loss claim was filed. The shipper had to repurchase this special order (at an even higher cost due to expedited production costs) for a construction job. The original freight has very little value due to the customized nature of the product. The carrier refused the claim as they feel they have returned the freight in good order. Is there any recourse for our customer due to this unreasonable delay? The original purchase price is around $850.00, which is the amount of the claim.

Answer: A carrier has a duty to deliver with "reasonable dispatch". Clearly this shipment was not delivered within a reasonable period of time, and the consignee was entitled to consider that it had been lost, and to purchase a replacement.

The fact that the shipment was found 60 days later is not a defense to the claim. However, there is a duty to mitigate damages. Even if the "found" shipment cannot be used by the original consignee, it may still have some value - either to another purchaser or for salvage. Thus, the claimant should take reasonable measures to find another buyer or to salvage the shipment, and give an appropriate credit against the claim.

96) Carrier Use of Shipper's Forklift

Question:

What kind of liability is the shipper subject to when the carrier's driver uses the shipper's forklifts to load shipments into or onto the carrier's trailer? If there is an injury is it a workman's compensation issue or something else?

Answer:

This is not a "transportation law" question. This falls into the general area of liability for negligence to a business invitee, i.e., anyone on your premises for normal business purposes.

Most shippers don't allow anyone other than their own employees to operate their equipment.

In theory, the shipper could be liable in negligence to a truck driver if it provided an unsuitable or defective piece of equipment such as a fork lift for his use, resulting in injury to the driver. While the driver's claims against his employer (the trucking company) would be subject to Workmen's Compensation, the driver could have a cause of action for negligence against a third party, i.e., the shipper.

97) CDL Licensing

Question: I'm requesting information on CDL positions and requirements. Thank you for your assistance in this matter

Answer: CDL licensing procedures vary from state to state. I would suggest that you contact the local department of motor vehicles where you live and get the application forms and information from them.

98) Certified Claims Professional Accreditation Council (CCPAC)

Question: Is there a nationally recognized certification program for individuals who specialize in the administration and negotiation of freight claims?

How does one become certified?

Answer: Yes, there is! The Certified Claims Professional Accreditation Council, Inc. is a non-profit organization that is co-sponsored by the Transportation & Logistics Council, Inc. and the Transportation Loss Prevention and Security Association, Inc., and is recognized throughout the industry.

Information and requirements for accreditation as a Certified Claims Professional is available through the Council's website: www.tlcouncil.org.

99) Charge Backs for Late Deliveries

Question: Recently we have been inundated with customer deductions on back charges for late delivery, especially to job sites. From past experience I understand the carrier's liability is limited by reason of reasonable dispatch and carriers knowledge and acceptance of financial consequences of late delivery. Have there been any recent court cases upholding these principles? If not what references could I seek to reinforce my position that carrier is limited in his liability for late delivery?

Answer: Unfortunately, the practice of "back charging" for missed delivery appointments seems to be a prevalent practice.

There are two basic issues - and two different contractual relationships involved.

First, there is the contract of carriage - often a uniform bill of lading - with the motor carrier. Ordinarily, a motor carrier is only required to deliver with "reasonable dispatch", which means to transport the goods within the usual and customary time period, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 11.2, et seq.

Carriers can and do AGREE to deliver by appointment or at a particular "window" specified by the shipper or the consignee. However, unless such an agreement is in writing, it may be unenforceable. Most shippers that require delivery by appointment or at specific times include such provisions in their transportation contracts.

We always advise our clients to enter into formal transportation contracts with their carriers, and our contracts usually contain a provision that the carrier will be responsible for customer charge backs resulting from late deliveries or missed appointments.

The second part of the problem is your customer. I assume that there must be some provision in the purchase order or the contract of sale, which addresses delivery requirements and penalties for missing appointments or delivery windows. IF NOT, your customer probably has no legal right to assess charge backs, and you should refuse to pay them. On the other hand, if your sales or marketing people have accepted an order containing penalty provisions for late delivery or missed appointments, you would be bound by that agreement. I would suggest that your company legal department or a qualified transportation attorney should be consulted on your terms and conditions of sale.

100) Chargebacks - Late Delivery to Job Sites

Question: Recently we have been inundated with customer deductions on backcharges for late delivery, especially to job sites. From past experience I understand the carrier liability is limited by reason of reasonable dispatch and carriers knowledge and acceptance of financial consequences of late delivery. Have there been any recent court cases upholding these principles?

If not what references could I seek to reinforce my position that carrier is limited in his liability for late delivery?

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101) Claim Rules and Regulations - Concealed Damage

Question: Does NMFC's Item's 300125-300150 still apply when filing for concealed damage claims? I do not have a current copy of the NMFC and I did not know if the wording had changed since 1987. We do not have any signed contracts with any of the carriers. I had a shipment that delivered to my customer and the delivery receipt was signed for clear. To my knowledge, the carrier was not contacted, nor, did the carrier make an inspection of the product. The consignee filed a damage claim, not a concealed damage claim, with the carrier and the claim was denied because of clear delivery. I spoke with the claims representative and was informed that they would not pay the claim (even 1/3) because the burden of proof was to prove the carrier caused the damage. I do not know if the original packaging is available for inspection on this shipment. The claim was filed eight days after the shipment was delivered. Does the consignee have any recourse?

Answer: In 1972, following an extensive investigation in Ex Parte No. 263, Rules, Regulations, and Practices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims, the ICC issued a set of regulations which were served February 24, 1972. These regulations were originally published in 49 CFR Part 1005 and, after the demise of the ICC, were transferred first to the FHWA and then to the FMCSA. The regulations - virtually unchanged - are now found at 49 CFR Part 370.

The National Motor Freight Classification (NMFC) contains two sections pertaining to loss and damage claims: (1) Items 300100-300122, Principles and Practices for the Investigation and Disposition of Freight Claims, and (2) Items 300125-300155, Regulations Governing the Inspection of Freight Before or After Delivery to Consignee and Adjustment of Claims for Loss or Damage

The first of these two sections is essentially drawn from the FMCSA (formerly ICC/FHWA) regulations, 49 CFR Part 370, Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage. To the extent these provisions reflect the federal regulations, they are binding on all motor carriers and freight forwarders.

The second of these two sections is not found in the federal regulations. These rules would only be binding on motor carriers that are participants in the National Motor Freight Classification. Provisions of the NMFC become binding on a shipper if they are "incorporated by reference" into the contract of carriage - either through the use of a Uniform Straight Bill of Lading or by language in a transportation contract.

Now, with respect to concealed damage, the basic issue is always a question of fact. Did the loss occur while the goods were in the possession of the carrier, or after delivery to the consignee had been made? A clear delivery receipt is only presumptive evidence that the goods were delivered in good order and condition. The presumption can be rebutted by evidence that the damage could not have occurred subsequent to delivery. Usually this is in the form of testimony or affidavits from the receiving people who have actual knowledge of how the goods were handled after delivery.

Obviously it is good practice to notify the carrier promptly upon the discovery of concealed damage, to request an inspection, and to retain all packaging materials. The more time that passes between delivery and notification of damage, the more difficult it is to convince the carrier that the loss occurred in transit.

Regardless of the clear delivery receipt, or how many days have passed before notification of the damage, the carrier does have a duty to "promptly and thoroughly" investigate the claim. If the consignee can meet its burden of proving, with reasonable evidence, that the damage did not occur after delivery of the shipment, the carrier should pay the claim.

102) Claims - Federal Regulations

Question: We are a broker, and we broker loads to our contract carriers. We have a clause in the contract that we are to be held harmless of any claims that arise for any loads that were under the care of the carrier.

We submit claims to the carrier if we are unable to deduct it from any settlements, a good portion of the carriers don't care, ignore the claim filed. I try calling them and don't always get a response.

In your book, *Freight Claims in Plain English* under “claim processing rules”, section 12.1.3, it states that if a carrier fails to acknowledge claims that we can report them to the I.C.C. Is that correct? If so, what address is this and is there anything else we can do other than filing them with a collection agency for help? I would like to report all the carriers that I can that refuse to follow the rules for claims. Can I still report them if I have to turn them over to a collection agency, and they are able to discuss the situation with them?

Answer: Motor carriers are subject to the federal regulations governing the processing of claims at 49 CFR Part 370. These are the former ICC regulations which were in 49 CFR Part 1005, and are now under the jurisdiction of the Federal Motor Carrier Safety Administration. You might try writing to the General Counsel's office at the FMCSA in Washington, DC. Unfortunately, the FMCSA does not have the resources to do much in the way of enforcing these regulations.

Obviously, if you are not getting anywhere with the carriers you have the option of turning the claims over to a claims collection company or law firm.

103) Claims - Mitigation of Damages

Question: A door assembly for an off-road haul truck was damaged when we received it and it was noted on the freight bill. Because the customer could not wait for the claim to be resolved, we had to order another door for the customer. Now the freight carrier wants us to have the door repaired, which we don't want to do for several reasons: first, our customers would not want a repaired door; second, off-road haul trucks fall under rules and regulations regarding the modification of roll over structures, and this door is part of the roll over cab and should not be modified; finally, we only sell one of these doors maybe every ten years or so and have no outlet for it. The freight carrier has been inflexible in this matter. What can we do to get our $1600.00 dollars back?

Answer: This is a tough one. The problem is that a consignee receiving a damaged item usually has a duty to "mitigate the damage" if it can reasonably be done. Normally this would involve repairing or refurbishing a damaged item, or sorting and segregating damaged/undamaged items. This is explained in detail in *Freight Claims in Plain English* (3rd Ed. 1995) in Section 7.1.4, Duty to Mitigate Loss, and in Section 10.10, Salvage Procedures.

The legal test is whether your actions were "reasonable under the circumstances". I would say that you do have some good reasons for purchasing another door for your customer. The only thing that I might suggest is to contact the door manufacturer and see if they will take it back for some kind of salvage allowance. They would probably be in a better position to repair and resell the door.

As a last resort, of course, you may have to bring a lawsuit against the carrier. From the size of the claim, you may be able to do this in a local small claims court.

104) Claims - Outsourcing Claims

Question: My company is interested in finding out about 3rd party claims filing. Any suggestions

Answer: I assume you may be looking to "outsource" the filing and collection of your loss and damage claims. If so, there are a number of companies which provide this type of service. We usually recommend Champion Transportation Services (you can get information by calling (631) 368-7496.

105) Claims - Prepaid Freight Charges

Question: We include prepaid freight charges with our loss and damaged claims. We did not charge the customer for the freight. Two carriers have denied the freight portion of our claims on the premise that the merchandise value includes the cost of the freight. Our merchandise moved Prepaid-FOB nearest warehouse. The freight is paid by us and it is not in the price of the product. In light of this, is the carrier obligated to pay the prepaid freight charges?

Answer: I think the carriers may be correct on this one. You have apparently priced your product so that the selling price to the customer is sufficient to cover the anticipated cost of freight which you are separately paying to the carrier.

Look at it this way - if the customer had risk of loss in transit (FOB origin), and the goods were lost by the carrier, the customer would have to pay you the invoice price only, and would not also have to pay the freight charges. The customer's claim against the carrier would be for the invoice price. Why should the amount of damages be different depending who files the claim?

106) Claims - Recovering Freight Charges on Partial Deliveries

Question: On partial deliveries, can I recover the freight charges on the missing cartons as a part of my claim?

Answer: Yes. Claimants are to be made whole when shipments are delivered short or damaged. You are entitled to add a prorata share of the total freight charges based on the weight of the missing cartons. If the shortage is to be replaced with another shipment which costs more freight due to the smaller size shipment (LTL, for instance, rather than the original TL shipment), you are entitled to recover the extra freight cost from the carrier as your measure of damage. See *Freight Claims in Plain English* (3rd Ed. 1995), Section on Measure of Damages, for the authorities.

107) Claims - Regulations and Procedures

Question: We are not having much luck recovering loss and damage claims. It seems the carriers either decline the claims or simply fail to respond. What do you suggest?

Answer: Motor carriers are subject to federal regulations governing claims: "Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage", 49 C.F.R. Part 370. These regulations are also incorporated into item 300100 et seq. of the NMFC.

The regulations outline the procedures that are supposed to be followed and include specific time limits in which action is to be taken. Unfortunately, since the demise of the I.C.C., there is little effort to enforce these regulations and they are often ignored.

We suggest that you enter into properly drafted contracts with your carriers that include provisions for the handling of L&D claims. You should also avail yourself of the educational materials provided by T&LC. If you do not have the staff or expertise to process the claims, farm the work out to experienced professionals. Contact T&LC Headquarters for more information.

108) Claims - Repackaging Expenses

Question: A carrier delivered part of a shipment late. The consignee refused the freight because it was late. Since the cartons were labeled for that specific consignee the cartons required repackaging. The carrier refuses to pay for repackaging, but they would "consider a reasonable restocking fee." Since the freight was delivered late and refused shouldn't the carrier be liable for the repackaging expenses?

Answer: This claim falls into the category of a "delay claim", and the legal issue is whether the damages (your repackaging expenses) are "foreseeable" at the time of shipment. If they were, they are recoverable. For a thorough discussion of general vs. special damages, I would suggest that you read Chapter 7.0 of *Freight Claims in Plain English* (3rd Ed. 1995).

I would think that the need to repackage, relabel, etc. if shipments are rejected due to carrier delay would be a reasonably foreseeable consequence of the delay. Certainly, it can be argued that you have mitigated your damages by putting the goods in a condition that they can be resold to another customer.

The carrier should pay these repackaging expenses.

109) Claims - Standard Forms

Question: Is there any particular form that must be used to submit a claim to a carrier? Are there standard claim forms available? If so, where would I be able to find these?

Answer: There is no legal requirement for any specific form to be used in submitting a claim for loss, damage or delay. A letter or form which provides the essential information is sufficient to constitute a valid claim. See Section 10 of *Freight Claims in Plain English* (3rd Ed. 1995) for a thorough discussion of claim filing requirements.

Most shippers use the "Standard Form for Presentation of Loss and Damage Claim", a copy of which is reproduced at Appendix 129 of *Freight Claims in Plain English*. These forms may be obtained from many commercial stationers or from ATA (American Trucking Associations), 2200 Mill Road, Alexandria, VA 22314-4677, phone 1-800-225-8382. In addition, motor carriers often make the forms available to their customers on request.

110) Claims - Who May File

Question: 1.Is it legal for a shipper to file claims for shortages or damages if the terms are FOB Origin Freight Collect?

2. The claim is declined, 9 months have passed since the incident and the owner of the goods, the consignee, elects to open up new issues with the carrier. Is the new filing considered part of the 1st claim?

3. Is it a norm or an exception for the shipper to file short and damage claims for shipments that have terms FOB Origin Freight Collect?

4. What's the feeling of the carriers when a 2nd claim is filed for the same shipment?

5. We would be deducting the cost of the short or damage from the vendor's invoice as a matter of information.

Answer: Let me try to answer your questions.

1. Either the shipper or the consignee may file a claim (regardless of the terms of sale).

2. As a general rule, once a claim has been timely filed, it may be amended or supplemented. However a new claim may not be filed after the expiration of the 9-month time period in the Uniform Bill of Lading.

3. When the terms of sale are "FOB Origin" or equivalent, the presumption under the Uniform Commercial Code is that the risk of loss passes to the buyer at the time the goods are tendered to the carrier at the point of shipment. However, in many situations, the seller still files claims for loss or damage.

4. Carriers generally will reject a "second claim" on the same shipment. If this situation should arise, the carrier may require an indemnity agreement or a letter assigning the claim.

5. Since you are apparently the consignee on the subject shipments, if they are in fact sold "FOB Origin", you would have risk of loss in transit and should be the party to file the claims.

I would note that these subjects are covered in greater depth in *Freight Claims in Plain English* (3rd Ed. 1995), which is available from T&LC.

111) Classification - National Motor Freight Classification

Question: Where can I download or view NMFC Descriptions? Looking for area rugs, rolled and baled in plastic. I would like to see what my options are. 71000 or 70680 etc.

Answer: As you probably know, the NMFC (National Motor Freight Classification) is, ostensibly, a pricing tool that provides a comparison of commodities moving in interstate and intrastate transport. Based on an evaluation of density, stowability, ease of handling and liability, the commodities are grouped into one of 18 classes. The NMFC provides both carriers and shippers with a standard by which to begin pricing negotiations and greatly simplifies the comparative evaluation of the many thousands of products moving in today's marketplace.

It is, though, also a copyrighted publication, published by the National Motor Freight Traffic Association in Alexandria, Virginia (see the contact information below).

Short of subscribing to the publication, I know of no way to access the information online. For your convenience, I have attached a copy of the NMFC pages covering the pertinent items.

The contact information for the NMFTA follows:

National Motor Freight Traffic Association
2200 Mill Road
Alexandria VA, 22314
Phone: (703)838-1810
Fax: (703) 683-1094
www: http://users.erols.com/nmfta/

112) Classification - NCC Density & Value Guidelines

Question: We recently had one of our carriers request us to discontinue doing business with them. The reason for this request was due to the lack of revenue our product generated due to the average pound per cubic foot. The carrier cited that the PCF averages around 6.2 pcf. Our rates are based on a FAK 77.5. They also stated that the average pcf is 13.5 for 77.5 class per National Classification Committee which of course was developed by their members (carriers). (see www.erols.com/nmfta/)

Is there anyway to argue this point with our carrier? Are there any other industry standards in this area developed by the shipping public that we could use?

This carrier handles freight out of other locations, sister companies, however they only site our location and one other as being low revenue producing.

Answer: I assume that you now have a discount off the full tariff rates, and that your FAK rating of Class 77.5 is probably less than the actual weighted average of your shipments, so you are, in effect, getting a double discount.

I can't tell how this carrier determines what traffic is profitable. Density of freight is only one consideration in determining profitability. The volume and frequency of shipments, loading (shipper vs. driver), packaging (loose cartons vs. palletized loads), number going to a particular destination or area at one time, location of terminals, etc. all affect the carrier's efficiency in handling your shipments. Also, there are other traditional factors which are built into the classification system such as value, susceptibility to damage, etc.

My suggestion is to sit down with the carrier and analyze your volume, shipping patterns, claims history, etc. See if there is anything you can do to improve efficiency and make the traffic more profitable for the carrier. If this fails, put out a request for proposals to other competing carriers and go with the carrier that offers the best combination of good service and price.

113) Classification of Shipments

Question: How do we determine the correct "Tariff Code" when shipping plastics and rubber products to Canada and Mexico?

Answer: It is not clear what you mean by "tariff code".

If you are talking about the proper identification of an article on a motor carrier bill of lading, the usual way is to refer to the National Motor Freight Classification which lists thousands of "articles" and sets forth the "class" which is used for rating the shipment. If you do not have a copy of the Classification, or are unfamiliar with it, seek answers from a transportation consultant. See T&LC's Directory for a list of qualified consultants.

If you are talking about how to describe articles on an export document, contact a freight forwarder dealing in exports to Canada or Mexico.

114) COD Charges

Question: Recently our company moved a shipment of custom automotive accessories which were COD for $6600. Our driver failed to collect the COD monies from the consignee and did not obtain the consignee's signature for receipt of the shipment.

We have since attempted to collect the COD monies owing to the consignor, but the consignee is now stating that they never received the shipment.

What is our potential liability? The shipping document used was a uniform bill of lading showing a description of the shipment and its value and the COD amount.

Answer: Under the facts as described, your company could be liable under two theories: failure to deliver the goods, and failure to collect the COD charges. As to the non-delivery, this is obviously a question of fact and depends on the veracity of the witnesses - the driver vs. the consignee. The failure to collect the COD is considered a breach of contract, however, and the court decisions generally hold the carrier liable for the COD amount stated on the bill of lading if it fails to collect the funds upon delivery.

I would note that, if you have to pay the COD amount to the shipper, and it can be proven that the goods were actually delivered to the consignee, you should have a right of indemnity over against the consignee to collect the money.

115) College Programs in Transportation

Question: Can you provide information on college programs for a career in transportation?

Answer: I admire your interest in continuing your education in the field that you have selected. The various universities name their programs in a variety of ways: transportation, distribution, logistics and the latest is "Supply Chain Management". This e-mail is also directed to Dr. Zinszer at Syracuse University and I am asking him to get your mailing address to send you details of their program. Syracuse has an excellent program in Supply Chain Management and last year its graduating students received the highest starting salaries in their whole School of Management! I know of several other schools, such as the Universities of Tennessee, Ohio State and Michigan State (packaging school). This will give you a start in your search, but there are not many schools that have majors in traffic, transportation, distribution, logistics or supply chain management, etc. Please feel free to contact me for any information and support. My telephone number is (607) 562-3373. Thank you for your interest. I am the Director of Education for T&LC. John T. Harvey

116) Common Control - Shipper and Broker

Question: May a shipper own or have an interest in a broker?

Answer: No, the former ICC's regulations (now FMCSA) prohibit brokers from receiving compensation when they own a shipper, where the shipper owns the broker, or when there is a common ownership of the two. See 49 C.F.R. 371.9.

117) Concealed Damage - Canned Goods

Question: I have a question concerning concealed damage on canned goods.

We have a shipment that we consolidated with both refrigerated and dry product. We specified and paid extra for a bulkhead to protect the dry product from freezing. The shipment was delivered to our customer in south Florida (hot and humid). It was delivered with no exception on the bill of lading.

Several weeks later our customer informed us that the cans were rusting and seeks to file a claim against the carrier.

My question is this: Can we file a claim for concealed damage or would this be considered inherent vice of this product.

Answer: From your description of the facts there is no evidence that the cans got wet while in the truck, or that they were wet at the time of delivery. It would seem that, most probably, moisture condensed from the atmosphere onto the cold cans ***after*** they were delivered and that they remained wet for a long enough period to cause rust.

I don't see how the carrier is responsible for this. After all, it was the shipper who decided to ship both refrigerated and dry product in the same truck. Also, the consignee might have prevented the rusting by opening the cartons and drying off the cans, or by storing them in a dryer atmosphere.

118) Concealed Damage - Clear Delivery Receipt

Question: Can a carrier refuse to participate in concealed damage claims? I filed a concealed damage claim and the carrier was notified a few hours after delivery of the damaged goods. The carrier replied that they will not participate in any claim where they have a clear delivery receipt. Is this legal?

Answer: The fact that damage may be "concealed" does not relieve the carrier of its duty to conduct a proper investigation of the claim. See generally, *Freight Claims in Plain English* (3rd Ed. 1995) at Section 11.1, Concealed Damage. This requirement is set forth in federal regulations which are binding on all interstate motor carriers, see 49 C.F.R. Part 370.

119) Concealed Damage - Responsibility

Question: We were directed by our customer's P.O. to ship product to their contractor, to be installed in our customer's store. The contractor received the freight and signed the delivery receipt clean. Concealed damage was found a week later after the contractor brought it to the construction

site. Is it too late to file a claim against the carrier? We had a similar problem twice in one week with this contractor. My customer is in Georgia and the shipment was intrastate in California. My customer directed me to bill the contractor directly for the damaged unit, but the contractor refuses to respond. Is the contractor responsible and if so, what law allows me to pursue him for the damage?

Answer: "Concealed Damage" cases are always a problem because it is difficult to determine where and when the damage occurred, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 11.1 for a full discussion of this subject. Obviously, it is even more difficult when your consignee refuses to cooperate.

The first question is what were the terms of sale? If the terms of sale were "FOB origin" (point of shipment), the risk of loss falls on the consignee/purchaser. (See FCIPE at Section 10.5.1) If so, you should be able to collect the selling price from your customer, and the customer would have to seek indemnity from either the motor carrier or its contractor. I would start here and see if you can shift the problem to your customer.

Second, it is not too late to file a claim against the carrier. Even if the bill of lading or delivery receipt is signed without exception (a "clear receipt"), you can still claim against the carrier. The burden of proof is more difficult, because claimant must prove, by a preponderance of the evidence, that the damage could not have occurred after the goods were delivered.

Assuming that you (not the customer) have risk of loss in transit, if neither the carrier nor the consignee will accept liability for the damage, about the only thing that can be done is to file a suit against both of them and let the court sort out as to who was responsible.

120) Contamination - Salvage Allowance

Question: An agricultural product (weed killer) shipped via contract carrier was damaged and returned to shipper. To prevent contamination, the shipper disposed of the product. Full invoice value was claimed, but no charges were added for handling and disposal.

Do we have to give a salvage allowance to the carrier? The product is essentially worthless, but due to product liability and contamination issues, the shipper does not want the carrier to have the product.

Answer: Since this is a "contract carrier" movement, you first should look at the contract and see what it says about return of damaged goods to the shipper and salvage. Our "model shipper-carrier" contracts, for example, provide that the carrier must return damaged goods and that the shipper has sole discretion whether to salvage or not.

Now, if you don't have a contract, or it doesn't cover this kind of dispute, you may have a problem. The shipper has a duty to mitigate damages, and this means to attempt to salvage damaged goods if they can be salvaged (refurbished, repacked, etc.) at a reasonable cost. This is a factual question and you have not given me enough information to make a judgment...

121) Contamination - Warehouse or Carrier Liability?

Question: A carrier came into a contracted public warehouse, picked up food grade chemicals and transported them to the consignee. The consignee rejected the load due to intense odor of perfume on trailer, and that the product on trailer has a natural tendency to absorb odors. The driver admitted carrying a damaged shipment of perfume prior to this. The carrier then loaded the shipment on a different trailer and attempted redelivery the following day. When the doors were opened the odor was still extremely obvious, and the shipment was rejected again.

Both the carrier and the warehouse are denying any liability in the matter. Where does liability fall?

Answer: Under the Interstate Commerce Act (49 U.S.C. 14101) a carrier is required to provide "safe and adequate service, equipment, and facilities..." This requirement has been construed by the courts from time to time to mean that the carrier is responsible to ensure that its equipment is clean and free from noxious substances which would contaminate other cargo.

It is not clear from your description whether the goods were actually contaminated so as to make them unusable or unsuitable for their intended use. If so, the carrier would be liable.

On the other hand, if the goods were not actually damaged or could be salvaged in whole or in part, the consignee should not have rejected them, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.1.4, Duty to Mitigate Loss.

Regarding the warehouse, since they are acting as your (the shipper's) agent, there is a duty to exercise reasonable care in handling and shipping your products. If the odiferous condition of the trailer was clearly obvious ("patent") at the time of loading, the warehouse personnel should have refused to load the trailer. In other words, you may also have a claim against the warehouse, based on negligence.

122) Contract Carrier - Termination of Service

Question: I had provided a furniture company with a shuttle service between two of their stores. The services included two 45 foot trailers -- one at each location, to be switched four days a week. The trailers had to remain on their property backed against there loading docks 365 days a year. We have been doing this for three years, problem free, with never a complaint from the company. We received a letter one month ago stating that they were terminating our services. We were given no reason.

Three weeks before I received a call from an old “friend” of mine who knows the operations manager of the company. In a nut shell, he gave me an option to sell him my truck and trailers so he could do the contract or he was going to the operations manager and was going to get the contract out from under me. I did not take him seriously but, he did it.

The operations manager claimed to be very unhappy with our service. Of course, they had never before complained about any part of the services provided over the course of three years!!!

Do I have any legal recourse to save this contract??

Answer: I really can't give you an answer without reviewing your contract with the furniture company. I would have to look at the term of the agreement, whether there are guarantees or minimums, the termination provisions, etc.

There is a possibility, from what you say, that you might have a cause of action for interference with an advantageous business relationship, but, again, I would need more information.

123) Contracts - "Standard Contracts" for Brokers?

Question: I represent a transportation broker. My question is this: the broker(s) that I represent do not have a set of standard contracts or documents which they use to contract with (1) the shipper and (2) the carrier. I wanted to know whether any standard documents or forms exist.

Answer: There are no "standard" contracts for use by brokers in contracting with shippers and with carriers. Our law firm frequently prepares agreements for shippers, brokers, motor carriers and freight forwarders, but they usually must be tailored to fit the needs and requirements of the client.

You may want to obtain a copy of my new seminar manual "Contracting for Transportation and Logistics Services" which is published by the Council, and contains information on the legal and regulatory requirements, together with extensive discussion of contract provisions. If you are interested, please contact T&LC at (631) 549-8984.

124) Contracts - Broker Liability

Question: I am preparing a shipper-friendly broker agreement and have included a provision that the broker will be liable for all of shipper's claims for loss, damage or delay to shipments tendered to the broker. Is there any reason to obligate the parties to follow the procedures in 49 C.F.R. Part 370, particularly when the regulations do not apply to brokers? Those would seem to put unnecessary constraints on the shipper regarding time limits, etc. Would you recommend including procedural requirements between the shipper and the broker for such claims?

Second, it appears that the regulations (Part 378) regarding claims for overcharges and duplicate payments would not apply to a broker. If the shipper were to inadvertently pay to the broker an overcharge or duplicate payment passed on by the broker from the carrier, couldn't the shipper simply offset the overcharges or duplicate payments (or otherwise demand payment from broker) and leave it to the broker to submit the claim to the carrier as required by the regulations so that the broker can be reimbursed? Is there any need to refer to procedural requirements between the shipper and the broker for the shipper to be reimbursed by the broker for these charges?

Answer: In reply to your first question, you are correct in observing that the claim regulations in Part 370 do not apply to brokers. However, the claim regulations are generally considered to be for the benefit of the shipper, so there is no harm in including them by reference into your contract. On the other hand, you may wish to depart from the regulations and draft your own language as to claim filing and payment requirements.

Likewise, the same considerations would be applicable to the regulations governing overcharges and duplicate payments in Part 378. Again, if you choose not to incorporate the regulations, you should cover the subject adequately in the contract.

I would note that you might want to include an express provision for setting off loss & damage claims, overcharges, etc. against freight charges due to the broker.

125) Contracts - Confidentiality of Rate Information

Question: As the Corporate Transportation Manager, I was recently asked by my company to release some of our current freight rates to a customer so the customer could compare their rates with ours and see if "we were getting the best deal". I've resisted this mainly because the contracts we have with our carriers specifically mention that the rates given are confidential between us and will not be shared with anyone else. My question is, are there any other legal issues I should be aware of?

Answer: The confidentiality clause in your contract is critical, but not having a copy, I cannot advise you. I have seen some that contain liquidated damages in the event of a breach. Offhand, I am not aware of any other legal problems in sharing rate info with a customer. I suppose it may have an influence on the terms of sale, as to whether the buyer or seller will pay the freight charges, or prepay and add. For a more formal answer, we would need to be retained to review your dealings and terms of sale, etc.

126) Contracts - Consignee-filed Claims

Question: We have a contract provision that reads “Liability for loss and damage is the invoice value plus applicable paid freight.” Our problem is that when our customer files a claim, the carrier insists on applying its tariff limitation of liability rather than the agreed-to contract value because we did not file the claim. Can they do this and how should we protect our customers and ourselves in the future?

Answer: The legal issue is “what is the contract of carriage”. The shipment was tendered to the carrier under your contract with the carrier. Thus, the terms and conditions of the contract govern. Conversely, if there were no transportation agreement, the contract of carriage would be the bill of lading issued by the carrier to the shipper, and the tariffs, if any, incorporated therein by reference.

In the future, you could spell out in the contract what claims and liability provisions will apply to customer-filed claims.

Note that terms of sale (such as FOB origin, FOB destination), which govern risk of loss in transit are of no concern to the carrier and are not binding on the carrier. These terms are part of the contract of sale between seller and buyer and they are not part of the contract of carriage.

127) Contracts - CzarLite Rate Tariffs

Question: While working for a previous company, we had a LTL carrier contract which required the LTL carriers to maintain their rates for a specific length of time and provided a base tarriff (Roadway 507A) for them to quote rates against. In my current situation, I have many LTL carriers who change their rates all the time and we want to bring some order to the situation. Someone suggested that we draft a contract with the ususal "boiler plate" and reference the CZAR-Lite Nationwide Baseline Pricing System.

Answer: Many of our clients are now using proprietary tariffs such as Czar-Lite as their basis for LTL rates in their transportation contracts. Usually they specify Czar-Lite in their request for proposal to the carriers, and most major carriers are agreeable to using these as the base rates. The obvious advantage is that you can compare discounted rates "apples to apples"; it also simplifies your freight bill audit and payment procedures. You can specify a tariff in effect as of a particular issue date, such as January 1, 2001, and provide that the rates will not change for a specified period of time, such as a year. Our firm can prepare a tailor-made contract to fit your company's specific requirements.

128) Contracts - Fuel Surcharges

Question: If you have established rates on truck loads, with contract carriers, and with the fuel surcharges being added now, are we obligated to pay these surcharges?

Answer: Many carriers have instituted fuel surcharges as a result of the recent increase in diesel prices, and shippers are being billed for these surcharges.

If you have a properly drafted, written transportation contract, and it does not provide for escalation or fuel surcharges, you should be able to enforce the rates and charges specified in the contract. Of course, there may also be a cancellation provision in the contract that allows the carrier to cancel on specified notice, such as 30 or 60 days, so beware.

129) Contracts - ICC Termination Act - Waiver of Provisions

Question: Why would you want to have a "waiver" clause in a transportation contract? What is the statute or law where this is found?

Answer: The ICC Termination Act of 1995 was specific legislation (like the NRA or TIRRA) that amended the Interstate Commerce Act. Under the amended Act, 49 U.S.C. 14101 provides that if the parties waive the provisions of the Act, "the transportation provided under the contract shall not be subject to the waived rights and remedies and may not be subsequently challenged on the ground that it violates the waived rights and remedies..." If the parties intend to include any provisions that differ from the statutory requirements such as time limits for claims or suits, the "180 day rule", etc. this language should be included. Of course, the contract should then properly cover all of the subjects that are relevant to the transportation services.

130) Contracts - Incorporation of Rate Tariffs

Question: Some contract carriers are now stating that their discounts will be off the rates in effect on the date of shipment. Is this proper?

Answer: In theory, the parties to a transportation contract can include any condition they wish to have govern the agreement. Remember, however that all of the terms and conditions are negotiable.

A properly drawn contract should state that the applicable rates and rules shall be those stated in the contract rather than those in the carrier's tariffs. If it is necessary to incorporate any portion of a carrier's tariff by reference, it should be limited to those

provisions that are in effect on the date of the agreement. A copy of those tariff provisions should be attached to the contract. Anything less may subject the shipper to surprises.

131) Contracts - Incorporation of Uniform Straight Bill of Lading

Question: I am currently in negotiations with a motor carrier. I am making every effort to explicity exclude the Uniform Bill of Lading reference from the contract, however the carrier insists it must stay. He sites the following cases as examples of contracts that have been ignored by the courts and the uniform bill of lading became the controlling document. (I think I just answered my own question). Cases he refers to are: Jackson v. Brookledge, Hollingsworth v APA Transport and Toledo Ticket v Roadway Express.

Are you aware of any good reason why I should accept the Uniform Bill of Lading as a part of my contract with the carrier? My wording already states that the bill of lading is to be used for a receipt of goods only. It would appear to me to create a conflict between the documents.

Answer: The carrier is all wet. None of the cases you mentioned say that a written transportation contract will be ignored by a court.

Most properly drafted transportation agreements provide that the terms and conditions of the contract will govern all transportation. Some contracts say that the bill of lading will serve "only as a receipt"; others say that, in the event of any conflict, the contract provisions will prevail over the terms and conditions of the bill of lading.

132) Contracts - Legal Requirements

Question: In a situation where a shipper is dealing with carriers that are only licensed as contract carriers (and not as common carriers), is it legally necessary to have a written contract with those contract carriers?

Even if not legally required, what are the specific benefits of having a written contract, if any, other than being able to generally provide for the terms of shipment.

It seems that there is inconsistent case law in determining whether the Carmack Amendment applies to both common and contract carriers and whether there is even a distinction any longer between the two (even though it appears that they are licensed differently).

Answer: The ICC Termination Act of 1995 eliminated any statutory distinction between "common" and "contract" carriers and replaced it simply with the term "motor carrier".

Unfortunately, neither the FHWA nor the FMCSA (successors to the ICC following the sunsetting of the ICC) have yet gotten around to updating the regulations and procedures for motor carrier registration, so there are still carriers with "common carrier certificates" and "contract carrier permits" - some seven years after ICCTA.

The current statutory provision relating to contracts provides that:

"A carrier [i.e., motor carrier] may enter into a contract with a shipper..." 49 U.S.C. § 14101(b). Because the statute uses the word "may," it is permissive or optional as opposed to mandatory.

At one time the ICC required "contract" carriers to have written contracts, and there were regulations governing the content of such contracts. There is currently no requirement for "contract" carriers to have written contracts in place. Nor is there a requirement for "common" carriers (except household goods carriers and carriers engaged in noncontiguous domestic trade) to have tariffs.

Most of our shipper clients enter into written transportation agreements with their motor carriers that clearly spell out the duties and obligations of the parties, and the terms and conditions of carriage. A properly drafted transportation agreement avoids the inherent problems in using the Uniform Straight Bill of Lading or some variation thereof that incorporates by reference the classification and the carrier's rates and rules tariffs. The bill of lading essentially acts only as a receipt for the shipment because all material terms and conditions are set forth in the transportation contract.

133) Contracts - Liability Limitations

Question: We have contracted most of our carriers since 1996 using one of your transportation contracts. This year's bid has shown a new twist, in that several new carriers and two that we currently are doing business with now want to limit their liability to $25.00 per pound. Does this mean that any shortage/damage would be covered using the total weight of the shipment, or would the coverage be limited to the weight of the shorted/damaged item?

Also, after requesting a copy of their BMC 32 Endorsement, we received a form BOC-3 from one of our carriers. What is the difference between these two forms and should we continue to ask for the BMC 32?

Answer: Many motor carriers are now attempting to impose liability limitations in their transportation contracts. Typically, these limitations range from $2.50 per pound to $50 per pound. Obviously, you do not have to agree to any limitation of liability, but if you do, you should first carefully evaluate the value(s) of the goods that you ship or receive to make sure the limitation is reasonable.

I would note that they also have limitations in their rules tariffs, so be very careful not to allow the carrier to refer to or incorporate any tariffs into the contract.

As a general rule, if the language merely says "$25 per pound" it would be construed to apply to the total weight of the shipment. On the other hand, if it says "$25 per pound per article" (or words to the same effect), the limitation would be calculated on the weight of the article or package

that is lost or damaged. In order to avoid any ambiguity, it would be prudent to make sure that the language is clear. If you do agree to a limited liability, I would suggest that you state it as "$25 per pound based on the total weight of the shipment".

As to your second question, the BMC-32 is a mandatory cargo insurance endorsement that is required by federal regulations and is filed with the Federal Motor Carrier Safety Administration (formerly the ICC). The BOC-3 is a form that lists registered agents for service of process, and is also filed with the FMCSA. They are not the same, and you should insist on a copy of the BMC-32.

134) Contracts - Price Increases

Question: If I have a contract with a carrier with this clause, do I have to accept a price increase? My contract provides:

> 16. TERM OF AGREEMENT
>
> The term of this contract shall be for a period of one (1) year commencing the date first above written and shall automatically renew for additional one (1) year periods unless written notice of non-renewal is given by either party at least thirty (30) days prior to the end of any term.

Answer: Without reviewing the complete agreement, it is not possible to give you a definitive answer to your question.

However, it would appear from the language quoted, that the contract should be binding on both parties for the entire one-year period, or for any additional one-year renewal periods. So long as the contract is in effect, it would be my opinion that the rates agreed to in the contract would be enforceable.

I would point out that there may be some other provision in the contract that allows a party to terminate the contract on shorter notice, such as 30 or 60 days.

135) Contracts - Rate Increases and Fuel Surcharges

Question: A carrier did not deliver to the shipper true copies of the rates (Fuel Surcharge and Base Rate increase) prior to the commencement of transportation services. The Contract stipulates the following "Should any of the schedules attached as an appendix to this contract make reference to any printed rules, rates or discount tariffs of the Carrier, true copies of such tariffs shell be delivered to Shipper prior to the commencement of transportation services under this contract. Failure to furnish such true copies will be a material breach of this Contract".

The Appendix to the Contract has a “Waiver of Increase” signed by both carrier and shipper. Which takes precedence, the Contract or the Appendix? Also, can the shipper file overcharge claims against the carrier?

Answer: Without seeing and reading the entire contract, it does sound as though the carrier has failed to comply with a material condition, although the consequences are not clear. Breach of a material provision would usually give the other party the right to terminate the agreement.

As to the "waiver of increase", it sounds as though the carrier agreed that during the term of the agreement it would not increase its rates. Thus, if the carrier has unilaterally imposed a fuel surcharge or other rate increase, you may have a claim for overcharges.

Again, it would be necessary to review the entire agreement to give you a more definitive answer.

I would note that your questions illustrate the importance of having a properly drawn transportation contract. Incorporation of a carrier's tariffs by reference in a contract is usually not a good practice, and if you should do this, the reference should be to a specific tariff, item(s) and effective date.

136) Contracts - Released Rates on Computers

Question: What are computer companies generally agreeing to in their contracts with motor carriers, $5.00 per lb. or higher?

Answer: Sorry, we don't know what individual computer companies are doing in their contracts. Perhaps they will share that information with us, unless they have a confidentiality clause in their contracts.

137) Contracts - Termination of Oral Agreement

Question: A truckload carrier, who we did not have any type of transportation agreement with, was utilized by one of our DC's for over a year. We did about $200,000 with this carrier during that time. The facility manager terminated their services, without any warning, due to a lost trailer load, and now the carrier is going to sue us stating that there was an oral agreement with the manager to haul our freight, which the manager denies, and that the termination of our business caused the carrier financial hardships. Absent any written agreement to the contrary, what legal basis would a carrier have to sue a shipper for termination of services?

Answer: This not a simple question. Basically, you are asking about the enforceability of an oral agreement for trucking services. This would be governed by state law, and I cannot give you a definitive legal opinion without a full investigation of the facts and some research of the laws of the state in which the alleged contract was made.

I suggest that you engage the services of a qualified transportation attorney.

138) Contracts - Waiver of Carmack Amendment Provisions

Question: I understand that, since the ICC deregulation of 1996, the parties to a trucking contract can waive the provisions of the Carmack Amendment entirely. My question is: "what forms a valid waiver"? By this I mean - what terms in the waiver form are required, and what must it say (or how must it be executed . . .) for it to be valid. Have courts invalidated or upheld waivers for some reason since 1996? If so, what was right or wrong with the waiver? I'm nervous that the validity of waivers might be some type of legal issue to worry about. Am I right?

Answer: 49 U.S.C. 14101 provides as follows:

(b) CONTRACTS WITH SHIPPERS-

(1) IN GENERAL- A carrier providing transportation or service subject to jurisdiction under chapter 135 may enter into a contract with a shipper, other than for the movement of household goods described in section 13102(10)(A), to provide specified services under specified rates and conditions. If the shipper and carrier, in writing, expressly waive any or all rights and remedies under this part for the transportation covered by the contract, the transportation provided under the contract shall not be subject to the

waived rights and remedies and may not be subsequently challenged on the ground that it violates the waived rights and remedies. The parties may not waive the provisions governing registration, insurance, or safety fitness.

Waiver under this section is usually done by express language in a written transportation agreement between the shipper and the carrier. If the parties waive "rights and remedies", they are then free to insert provisions which would otherwise be limited or governed by the statute, such as minimum time limits for filing loss and damage claims or bringing suits (49 U.S.C. 14706). Note: I have not yet seen any court decisions which deal with the "waiver" issue.

139) Contracts - Waiver of IC Act and Regulations

Question: If in a motor carrier agreement, persuant to 49 U.S.C., we have the motor carrier waive all rights under the ICA. Does this automatically waive the regulations in 49 CFR, such as the rules and regulations for processing claims,etc?

Answer: If the parties expressly waive the "rights and remedies under this part" as is provided in 40 U.S.C. Section 14101(b)(1), I would say that they have also waived the corresponding federal regulations of the Federal Motor Carrier Safety Administration (formerly FHWA and ICC regulations). The reason is that the regulations were promulgated by the agency to carry out the requirements of the statute, ie., without the statute there can be no regulations.

I should note that, in the contracts which we prepare for clients, we specifically refer to and incorporate selected regulations which are beneficial to the client such as the claim regulations.

140) Contracts - Waiver of Interstate Commerce Act Provisions

Question: If we have a motor carrier agreement in which the parties waive all rights under the Interstate Commerce Act pursuant to 49 U.S.C. § 14101, does this automatically waive the regulations in 49 C.F.R., such as the rules and regulations for processing claims, etc?

Answer: If the parties expressly waive the "rights and remedies under this part" as is provided in 49 U.S.C. § 14101(b)(1), I would say that they have also waived the corresponding federal regulations of the Federal Motor Carrier Safety Administration (formerly FHWA and ICC regulations). The reason is that the regulations were promulgated by the agency to carry out the requirements of the statute, i.e., without the statute there can be no regulations. However, the statutory provisions governing registration, insurance and safety fitness cannot be waived. Therefore, any regulations corresponding to these items would not be waived.

I should note that, in the contracts which we prepare for clients, we specifically refer to and incorporate selected regulations which are beneficial to the client such as the claim regulations.

141) Contracts - Waiver of Interstate Commerce Act Provisons

Question: After reading several of your texts, one area I am still somewhat uncertain is when you have a written agreement with a motor carrier. If liability for loss and damage is not specifically addressed in the contract, do the terms of the Interstate Commerce Act and the Code of Federal Regulations (49 C.F.R.) govern, or would the carrier be held to a lesser standard of liability?

Answer: Normally, a well-drafted transportation agreement will cover liability for loss and damage, and the contract provisions will govern the transactions.

Under the Interstate Commerce Act, all motor carriers are able to enter into contracts. The statute also provides that the parties to a contract may "waive" provisions of the Act (except for registration, safety requirements, etc.). If you expressly "waive" provisions of the Act in your

contract, then you are free to include contract language which is different from the statutory requirements such as the "Carmack Amendment" (49 U.S.C. § 14706), the time limits for overcharges & undercharges, the statute of limitations for suits, etc.

However, if the parties do NOT expressly waive these provisions in their contract, then the terms of the Act (and the corresponding regulations) would continue to apply.

142) Contracts - Waiver of Statutory Provisions

Question: After reading several of your texts, one area I am still somewhat uncertain is when you have a written agreement with a motor carrier. If liability for loss and damage is not specifically addressed in the contract, do the terms of the ICA and 49 CFR govern, or would the carrier be held to a lessor standard of liability?

Answer: Normally, a well-drafted transportation agreement will cover liability for loss and damage, and the contract provisions will govern the transactions.

Under the Interstate Commerce Act, all motor carriers are able to enter into contracts. The statute also provides that the parties to a contract may "waive" provisions of the Act (except for registration, safety requirements, etc.). If you expressly "waive" provisions of the Act in your contract, then you are free to include contract language which is different from the statutory requirements such as the "Carmack Amendment" (49 U.S.C. § 14706), the time limits for overcharges & undercharges, the statute of limitations for suits, etc.

However, if the parties do NOT expressly waive these provisions in their contract, then the terms of the Act (and the corresponding regulations) would continue to apply.

143) Courier Service - Bonding

Question: Our company offers handcarry service. This is a 'courier for hire' service and is occasionally referred to as “On Board Courier Service”. A board member recently mentioned the issue of utilizing bonded couriers for this service. Are there any laws that govern the type of courier we use. I need to find out if it requires the use of bonded couriers and if so, what type of bonds should they possess. Any information on bonded carriers would be much appreciated.

Answer: I believe that you are referring to what is known as a "fidelity bond". This is a bond obtained from an insurance or surety company that is intended to provide security in the event of "employee infideity" - such as theft of valuable items being carried by the courier.

I am not aware of any law that requires the use of bonded couriers. However, many courier services do have bonds covering their employees, and many customers feel more secure in dealing with a courier service that has bonded couriers.

I would suggest talking to the person who handles your company's insurance (Risk Manager, etc.) and have them check with the insurance companies that handle your corporate insurance program.

144) Court Decisions on Carrier Liability

Question: Where can I find recent court decisions on carrier liability?

Answer: The Transportation & Logistics Council reports regularly on recent court decisions in its newsletter, TransDigest. This is the best place to stay abreast of the latest developments. T&LC also covers this type of information, in less extensive version, on its web page - www.tlcouncil.org, and specific questions can be answered through our Hotline via email, phone or fax. I would also recommend *Freight Claims in Plain English* (3rd Ed. 1995) as a valuable text on all aspects of carrier liability for loss or damage. The 2-volume text, often referred to as "the Bible of the industry", is also available from T&LC and is current through mid-1995. You can get information on joining the Council and on subscribing to the TransDigest on the web page or by calling T&LC at (631) 549-8984.

If you have access to a law library, you may be able to use online research databases such as Westlaw® or Lexis® (either of which can be exceedingly expensive). "Goods in Transit" by Saul Sorkin, is an excellent treatise, but it is expensive (initial cost of over $750 plus annual updates).

145) Cross-Docking for Lower Rates

Question: Can a shipper agree to cross-dock another shipper's freight to get a lower rate for the consolidated load, or would that require a broker's license?

Answer: I see no reason why two shippers cannot do that without obtaining a license as a broker. It would raise a question of how each shipper would be billed for 1/2 of the truckload rate, without subjecting one shipper to liability in the event one shipper failed to pay for its portion of the freight charges. Also consider liability exposure for personal injury and property damage during the cross-dock operation for the other shipper's freight.

146) Customer Chargebacks

Question: We are having a lot of problems with unreasonable "chargebacks" from our customers. One example is "no packing lists on cartons". Such chargebacks can only be negotiated in the hope that the customer will be reasonable enough to realize that packing lists are sometimes torn off in transit. Aside from this, there is no way, short of video taping each shipment as it leaves our dock, for a vendor to prove the packing lists were there. This is just one example. Do you have any suggestions?

Answer: I can certainly sympathize with you about your chargeback problems. Unfortunately, there is not much you can do when dealing with a large, important customer that is in a position to dictate the terms and conditions which it includes in its purchase orders. One thing that you should do is to carefully review customer purchase orders, and all of the terms and conditions which may be incorporated by reference, such as the customer's shipping instructions, routing guide, etc. If the chargebacks are not specifically set forth somewhere in your contractual agreement with the purchaser, you do not have to accept them. If you find unreasonable or offensive provisions, the time to correct them is during the negotiation phase, before you accept the purchase order and ship your goods. If the customer insists on including provisions which are unacceptable, you either have to live with them or refuse to sell your goods to that customer. I would suggest that you bring this to the attention of your top management and let them know what these practices are costing your company. Perhaps they would be in a better position to deal with their major customers' counterparts.

147) Damages - Cost of Shipping Replacement Shipment

Question: I have four claims on my desk now that follow a similar scenario. We ship something, the LTL delays the shipment and to satisfy our customer we must expedite, usually by air, a shipment at additional costs. The carriers refuse to reimburse for the additional costs incurred, i.e. the air/expedited charge. The common defense is they were not advised prior to receipt of the shipment. Are you aware of a way around this defense?

Answer: Air freight or other express charges to ship a replacement shipment, when the original shipment is delayed in trancit, usually fall into the category of "special damages". Special damages are generally not recoverable unless the carrier has actual or constructive notice as to the consequences of failing to deliver with reasonable dispatch.

Special damages are covered in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.3, and a number of cases involving substitute transportation are discussed in Sections 7.3.2 - 7.3.4, and 7.4.9. In most of the decisions, the claimant was not able to recover because the carrier had not been given adequate notice at the time of shipment, although there are cases going in favor of the shipper, see, e.g., Franklin Mfg. Co. v. Union Pacific R.R. Co., 311 Minn. 296, 248 N.W.2d 326 (1976).

148) Damages - Missed Delivery Appointment

Question: We use a common carrier to deliver our product. Recently, we had a job-site type delivery that the carrier had to perform. On the bill of lading was a phone number for the carrier to contact. The carrier contacted the customer and made an appointment, the details or time of which were not know to us (the shipper).

The customer supposedly hired equipment to unload the shipment. The carrier was some two hours late, causing the customer to incur extra charges for the rental of equipment. The shipment was delivered and signed for clear. . . without exception.

Now the customer is withholding payment for our product, is back-charging us for the equipment rental, and wants us to file a claim against the carrier.

Answer: You have two problems: one with your customer and one with the carrier.

The customer cannot withhold payment unless there is some contractual obligation which you have failed to perform. I would question whether there is anything in your purchase order, terms of sale, etc. which says anything about extra charges for late delivery, etc. Maybe that is where you should start.

In the absence of a special contract, the carrier is only required to deliver "with reasonable dispatch" and would not ordinarily be liable for a short delay of 2 hours. The carrier would undoubtedly deny your claim on the grounds that it is for "special damages" and they were not on notice that there would be extra charges for rental of equipment, etc. if they missed the appointment time. The subject of "special damages" is covered in detail in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.3.

149) Damages - Special Damages for Rail Service Failures

Question: It is my understanding that special damages claims could be filed against CSX and/or NS because of service failures due to the purchase of Conrail. Because of the poor service

we have had to use truck service at a cost penalty to keep plants running. In addition, we lease a lot of rail cars that have sat idle due to the inability of the railroad to move equipment.

What documentation would be necessary to supply the railroad to support a special damages claim or is that decided by the railroad?

Answer: Many shippers have experienced severe service problems since CSXT and Norfolk Southern took over operation of the former Conrail lines.

Although the Interstate Commerce Act requires rail carriers to provide "transportation or service on reasonable request" (49 USC Section 11101), the legal obligation of these carriers to honor "special damage" claims for shipper's expenses resulting from service problems and delays is largely a function of the contracts and/or "circulars" which govern the traffic. However, in view of the embarrassing "meltdown" of the Union Pacific last year, and the public commitments of CSXT and Norfolk Southern, it is likely that these carriers will acknowledge their responsibility and make some reasonable compensation to affected shippers without the necessity for litigation.

In terms of documentation for "special damage" (delay) claims, I would suggest the following:

1. Review and analyze your historical transit times for movements between the same origins and destinations in order to determine the usual and normal transit times ("reasonable dispatch").

2. Save all communications (letters, e-mail, faxes, memos of phone calls) to or from the carrier relating to problems in locating or tracing cars, misrouting, delays, delivery problems, etc. in order to show that the carrier had notice of the problems and the potential consequences of its service failures.

3. Document your damages with invoices, canceled checks, time sheets or other appropriate business records. Damages might include expenses of alternative transportation to meet delivery or production schedules, demurrage, detention, extra labor, overtime, higher prices for raw materials or parts purchased from other sources or vendors, administrative expenses, etc.

4. Be prepared to show how your damages were caused or necessitated by specific instances of delays or service failures.

150) Damages- Uncrated, Used Equipment

Question: We are a Canadian LTL truck carrier operating international. We recently had a load which consisted of an uncrated piece of used equipment. When the load was delivered it was noticed that it had tipped in the van and some parts had been damaged. I remember reading some place that carriers will only take responsibility for equipment that is properly crated and skidded, but I can not find where. Also, this happened in the USA, so I don't know if this would apply. Could you reply to our situation.

Answer: From the limited facts, I assume that this shipment originated in Canada and was delivered in the U.S., so the applicable law is most likely Canadian law. Thus, I can give you only an answer based on general principles. Improper packaging or protection of a shipment may constitute a defense to carrier liability. The "act of default of the shipper" is a common law defense and is usually part of the terms and conditions of the bill of lading. If the carrier can establish that the sole and proximate cause of the damage is the "act or default of the shipper", it may avoid liability. However, it must be remembered that the carrier must also prove freedom from negligence. It is generally the carrier's duty to ensure that shipments are properly loaded and secured in the truck. If the carrier's driver was present during the loading of the equipment and had opportunity to see that it was not properly crated or skidded, and accepted the shipment nevertheless, the carrier will not be able to prevail.

As an additional observation, I would note that most shipments moving under a Canadian bill of lading are subject to a $2 per pound limitation of liability. And most U.S. carriers publish a limitation

of liability for used machinery in their tariffs - often as low as 10 cents per pound. You may wish to check this out. Lastly, these subjects are discussed in detail in *Freight Claims in Plain English* (3rd Ed. 1995).

151) Declination from Insurer

Question: Is a declination from a carrier's insurer alone a valid carrier declination?

Answer: No. See 49 U.S.C. Sec. 14706(e)(2)(B), which states:

"(B) communications received from a carrier's insurer shall not constitute a disallowance of any part of the claim unless the insurer, in writing, informs the claimant that such part of the claim is disallowed, provides reason for such disallowance, and informs the claimant that the insurer is acting on behalf of the carrier."

In other words, an insurer's declination which does not comply with this section will not trigger the 2-year time limit for instituting a lawsuit.

152) Definitions - "Shippers Load and Count"

Question: I would like to see the definition and application of the term: "Shippers Load & Count" as it relates to loading trucks, and more specifically, ocean going containers.

Answer: The notation "shippers load and count" ("SL&C") on a bill of lading is generally used when, for the shipper's convenience, the carrier "drops" a trailer or container to be loaded and sealed by the shipper, and returns at a later time to pick up the trailer or container without inspecting or counting the contents. The Bills of Lading Act (49 U.S.C. §80113) addresses the effect of loading by the carrier or the shipper. The relevant language reads as follows:

> §80113 Liability for nonreceipt, misdescription, and improper loading
>
> (a) Liability for nonreceipt and misdescription. - Except as provided in this section, a common carrier issuing a bill of lading is liable for damages caused by nonreceipt by the carrier of any part of the goods by the date shown in the bill or by failure of the goods to correspond with the description contained in the bill. The carrier is liable to the owner of goods transported under a nonnegotiable bill (subject to the right of stoppage in transit) or to the holder of a negotiable bill if the owner or holder gave value in good faith relying on the description of the goods in the bill or on the shipment being made on the date shown in the bill.
>
> (b) Nonliability of carriers. - A common carrier issuing a bill of lading is not liable under subsection (a) of this section -
>
> (1) when the goods are loaded by the shipper;
>
> (2) when the bill -
>
> (A) describes the goods in terms of marks or labels, or in a statement about kind, quantity, or condition; or
>
> (B) is qualified by "contents or condition of contents of packages unknown", "said to contain", "shipper's weight, load, and count", or words of the same meaning; and
>
> (3) to the extent the carrier does not know whether any part of the goods were received or conform to the description.
>
> (c) Liability for improper loading. - A common carrier issuing a bill of lading is not liable for damages caused by improper loading if -
>
> (1) the shipper loads the goods; and

(2) the bill contains the words "shipper's weight, load, and count", or words of the same meaning indicating the shipper loaded the goods.

(d) Carrier's duty to determine kind, quantity, and number -

(1) When bulk freight is loaded by a shipper that makes available to the common carrier adequate facilities for weighing the freight, the carrier must determine the kind and quantity of the freight within a reasonable time after receiving the written request of the shipper to make the determination. In that situation, inserting the words "shipper's weight" or words of the same meaning in the bill of lading has no effect.

(2) When goods are loaded by a common carrier, the carrier must count the packages of goods, if package freight, and determine the kind and quantity, if bulk freight. In that situation, inserting in the bill of lading or in a notice, receipt, contract, rule, or tariff, the words "shipper's weight, load, and count" or words indicating that the shipper described and loaded the goods, has no effect except for freight concealed by packages.

When "SL&C" is inserted on a bill of lading, it is essentially creates a rebuttable presumption that the shipper has loaded and counted the shipment, and that the carrier has no knowledge of the condition of the goods or the number of packages or items in the shipment. It can have significant legal effect upon the carrier's liability, especially in the case of shortages, which may be discovered, at destination. For a discussion of the shipper's burden of proof in cases involving "SL&C" notations, see Section 5.2 in *Freight Claims in Plain English* (3rd Ed. 1995).

153) Definitions - Common v. Contract Carrier

Question: I would like a formal definition of the term "Common Carrier" and the difference between the terms "Common Carrier" and "Contract Carrier".

Answer: For the purposes of interstate transportation, these terms are defined in the Interstate Commerce Act at 49 U.S.C. Section 13102. The ICC Termination Act of 1995 eliminated the distinction between "common carriers" and "contract carriers" - all for-hire carriers are now considered "motor carriers", and motor carriers may enter into contracts for "specified services under specified rates and conditions". Relevant definitions from Section 13102 are as follows:

(3) CARRIER- The term ‘carrier’ means a motor carrier, a water carrier, and a freight forwarder.

(4) CONTRACT CARRIAGE- The term ‘contract carriage’ means--

(A) for transportation provided **before** the effective date of this section, service provided pursuant to a permit issued under section 10923, as in effect on the day before the effective date of this section; and

(B) for transportation provided **on or after** such date, service provided under an agreement entered into under section 14101(b).

***

(12) MOTOR CARRIER- The term ‘motor carrier’ means a person providing motor vehicle transportation for compensation.

I would also refer you to some of the recent publications of the Transportation & Logistics Council that discuss the changes resulting from the ICC Termination Act of 1995, and are available through the web site.

154) Definitions - Logistics Company

Question: What is a "Logistics Company"? Do they have to have any sort of broker license or authority?

Answer: Many companies call themselves "logistics companies" today. They can be anything from a warehouse/distribution facility, a motor carrier, a freight forwarder, a broker, a shipper's agent, a consultant, or some combination of these functions. There is, unfortunately, no legal or official definition of a "logistics company."

Motor carriers, freight forwarders and property brokers are required by law to "register" with the FMCSA and it is illegal to perform or provide these services without operating authority, insurance, surety bonds, etc. as provided in the Interstate Commerce Act and FMCSA regulation. Unfortunately, the FMCSA has limited resources to enforce the laws and many of them operate illegally.

You must be extremely careful when dealing with a "logistics company." Determine exactly what services are to be provided and demand copies of their operating authority, insurance, etc. before doing business. It is always advisable to enter into a written contract, which specifies the services, rates, rules, etc.

155) Definitions - Property Broker as Shipper

Question: I sometimes see references to a "Dixie Midwest" decision in contract carriage agreements involving property brokers. Could you give me the definition of a shipper as stated in that decision and where could I get a copy of the document.

Answer: The "Dixie Midwest" decision you refer to resulted from administrative appeals before the I.C.C. in which a number of motor carriers had applied for operating authority to provide service to brokers. The principal issues were whether a property broker can be considered a contract shipper, and, if so, the proper form of operating authority (common or contract).

The decision contains a lengthy discussion of the distinctions between "common" and "contract" carriage and the requirements for obtaining operating authority at that time (1982).

The I.C.C. essentially held that a property broker can be a contract shipper if he exercises sufficient control over the transportation, and meets certain criteria (payment of freight charges, regularity and continuity of traffic, specialized or particularized needs, etc.).

The decision may be found in 1982 Federal Carriers Cases Par. 36,982, and in the I.C.C.'s Motor Carrier series of reports, 132 MCC 794, which should be available in a good law library.

I would note that the ICC Termination Act of 1995 eliminated the statutory distinction between "common" and "contract" carriage. Thus, the issues which may have been relevant in 1982 are now essentially moot.

156) Definitions - Shipper's Load and Count

Question: Are there any laws or regulations which cover "SL&C" (shipper's load and count) shipments

Answer: The statutory provisions relating to "shipper's load and count" are found in the Bills of Lading Act, specifically 49 USC Section 80113. This subject is discussed in " *Freight Claims in Plain English* (3rd Ed. 1995), in Section 4.8.3.

157) Delay - Penalties for Late Delivery

Question: We have a customer that files delay claims, but refuses to supply supporting documentation. When a delay occurs, they send us an incident report and ask us to respond. If we affirm that we were late and at fault, although we may disagree with the length of time of the delay, then an invoice is sent to us and payment is expected. The invoice will state total charges due, but may show only that the truck was two hours late or a more 'detailed' invoice will show number of men, hourly wages and length of delay time. No other supporting documentation is provided. (time cards, etc) If we deny being late, but the consignee charges back our customer for a delay, we are invoiced anyway. Many times the B/L will not indicate a late delivery or show a specific delivery time. Our customer refuses to provide additional documentation and will offset our freight charges after 60 days. The contract allows this, but it also requires that they provide documentation. They are telling us to pay the claims, without negotiations or compromise or lose all their business. How can we resolve for a win-win?

Answer: You mention a "contract" with this customer, so my answer is qualified to the extent that the contract has not been furnished.

I am assuming that you have contractually agreed to deliver in accordance with specified delivery schedules or by appointment with the consignees, and that the contract provides for the late delivery penalties which are being assessed by your customer.

My first suggestion to instruct your dispatchers and drivers to be aware of the problem, and to keep accurate records of all appointments, due dates, actual pickup and delivery times, etc. That way, you will be in a better position to deal with any disputed claims. Secondly, you should discuss the problem with your customer to clarify the proper procedures, and improve communications.

158) Deregulation - Sources of Information

Question: I am trying to ascertain what exactly is regulated at the federal level and what is regulated at the state level in the trucking industry. Ever since the destruction of the ICC and the creation of the Surface Transportation Board, there does not seem to be much literature out there informing one on this issue. I am aware that this is a very broad question, but any help you can provide (including telling me where to look!) would be greatly appreciated.

Answer: I would suggest that you start with one of T&LC's seminar texts such as "A Guide to Transportation After the Sunsetting of the ICC" which explain the legislation starting with the Trucking Industry Regulatory Reform Act of 1994, the Federal Aviation Administration Authorization Act of 1994 and the ICC Termination Act of 1995. This can be ordered through the T&LC web page (www.tlcouncil.org) or by calling (631) 549 8984.

You may also find articles in some of the transportation journals:

The Transportation Lawyer (TLA)

Journal of Transportation Law, Logistics & Policy (ATLL&P)

159) Detention Charges

Question: What are the rules regarding a carrier billing for detention time? What paperwork is required for backup from the consignee and carrier? What is the time frame for figuring charge:

Appointment? Arrival? Start of unloading? Completion of unloading? Does the carrier have to provide written copies of rates with detention time listed to the consignee?

Answer: I assume that you do not have a written transportation contract with the carrier. If you did, the contract would usually specify the rates, charges and rules applicable to your shipments, including detention charges, if any.

If you used a bill of lading which provides that it is subject to the carrier's tariffs, those tariffs are said to be "incorporated by reference" and become part of your contract. Detention charges are usually set forth in the carrier's "Rules Tariff". The rules tariff specifies the free time, when detention charges start to accrue, and how detention charges are calculated.

I would suggest the following:

If you are being billed for detention charges, demand a copy of the carrier's rules tariff. Carriers are required by law to provide copies of their tariffs upon demand by the shipper, see 49 U.S.C. Section 13710. If the carrier does not provide the tariff (or does not have a tariff), you should not pay for detention.

In the future, you should enter into a properly drafted transportation contract with each of the carriers that you use.

If you are subject to detention charges, establish a company procedure for recording when equipment is placed or received, when notice is given to the carrier that the equipment is unloaded and available to be picked up, and when the equipment is actually picked up.

160) Detention Charges - Liability

Question: On our inbound loads, 50% of the volume is delivered to us on a collect basis. With the carriers I use, there are contracts in place concerning detention time charges, i.e., allotted free time, costs, etc. On the other 50% of the loads, the shipper prepays the freight, and obviously uses carriers of their own. On the loads that are prepaid by the shipper, what are the obligations on the consignee to pay extra charges such as detention? The carriers are billing the shipper for the prepaid freight charges, and billing us collect for detention charges.

Answer: The first question is whether the inbound "prepaid" shipment is moving under a transportation contract that governs the allocation of the charges, or whether it is a common carrier movement governed by the bill of lading and carrier's tariffs.

If it is a common carrier movement, and the bill of lading is marked "prepaid", the shipper would ordinarily be billed for the transportation charges AND any additional charges accruing on the shipment. If the shipper executes "Section 7" (the non-recourse provision) on the Uniform Straight Bill of Lading, any additional charges such as detention must be billed to the consignee.

161) Detention Charges - Who is Liable?

Question: We negotiate four hours of free time before detention begins to accrue with those core carriers who insist on unloading detention charges in our contract. Some of the carriers our vendors choose to ship to our company on a prepaid basis have in their tariff or contract detention beginning after only two hours free time. As a result we routinely get detention charges from carriers moving goods on a prepaid basis for labor intense loads that take over two hours to unload.

My desire is not to pay these charges but instead to refer the carrier back to the vendor to collect these charges. Since the vendor negotiates and ships prepaid are we legally bound to pay the charges or are we on firm ground to refer the carrier back to the vendor for payment of any detention that is incurred at our receiving docks?

Answer: First, you have to realize that there are three different contractual relationships: Vendor-Purchaser, Vendor-Carrier and Purchaser-Carrier.

Assuming that the shipment moves under the vendor's contract (or a common carrier bill of lading), the carrier will be entitled to charge whatever accessorial charges (such as detention charges) that are provided for in the contract (or tariff). Whether these should be charged to the shipper or the consignee depends on the contract (or tariff). For example, if there is a non-recourse ("Section 7") provision, the carrier would have to look to the consignee for payment of any detention charges at the point of delivery.

Your relationship with the vendor is governed by the terms and conditions of your contract or purchase order. Unless the contract specifically covers matters such as detention, you probably do not have the right to require the vendor to pay the detention charges. If you want to fix the problem, this is where you should start.

162) Detention Charges on Inbound Collect Shipments

Question: On our inbound loads, 50% of the volume is delivered to us on a collect basis. We have contracts in place with the carriers we use and detention time charges, i.e. allotted free time, costs, etc. are addressed. On the other 50% of the loads, the shipper prepays the freight and uses carriers of their own. On the loads that are prepaid by the shipper, what are the obligations on the consignee to pay extra charges such as detention?

The carriers are billing the shipper for the prepaid freight charges, and billing us collect for detention charges.

Answer: The first question is whether the inbound "prepaid" shipment is moving under a transportation contract which governs the allocation of the charges, or whether it is a common carrier movement governed by the bill of lading and carrier's tariffs.

If it is a common carrier movement, and the bill of lading is marked "prepaid", the shipper would ordinarily be billed for the transportation charges AND any additional charges accruing on the shipment. If the shipper executes "Section 7" (the non-recourse provision) on the Uniform Straight Bill of Lading, any additional charges such as detention must be billed to the consignee.

163) Discount Rates - Discounted from What?

Question: Some contract carriers are now stating that their discounts will be off the rates in effect on the date of shipment. Is this proper?

Answer: In theory, the parties to a transportation contract can include any condition they wish to have govern the agreement. Remember, however that all of the terms and conditions are negotiable.

A proper shipper-drawn contract should state that the rates and rules to apply shall be those stated in the contract, and not in the carrier's tariffs. If it is necessary to incorporate any portion of a carrier's tariff, it should only be those provisions that are in effect on the date of the agreement. A copy of those tariff provisions should be attached to the contract. Anything less may subject the shipper to surprises.

164) Dot.com Entities - Federal Regulatory Requirements

Question: Being a truckload carrier, we are constantly being approached by these new entities wanting do business under contract. We've also been approached by existing logistics providers (with whom we have contracts) who have now developed dot.com facilities, wanting to assign the provisions/terms of the existing contract to the name & address of the new dot.com (sometimes the new dot.com consists of more than one party doing business in the motor carrier industry.) Lots of confusion on application of transportation law. Would appreciate comments.

Answer: There are all too many "logistics providers" and intermediaries running around that are ignorant of the laws and regulations that may be applicable to their activities, and the Internet is making the situation worse.

We advise both our shipper and our carrier clients to carefully investigate the intermediaries they deal with and to make sure they are properly licensed, bonded, etc. For your information, the following is an excerpt from my seminar text "Contracting for Transportation and Logistics Services", available from the Transportation & Logistics Council, which summarizes the legal status and requirements for a broker.

> DEFINITION OF BROKER
>
> The definition of a "broker" is found in the FMCSA regulations at 49 CFR § 371, and provides:
>
> (a) "Broker" means a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport.
>
> * * *
>
> (c) "Brokerage" or "brokerage service" is the arranging of transportation or the physical movement of a motor vehicle or of property. It can be performed on behalf of a motor carrier, consignor or consignee.
>
> REGISTRATION
>
> The ICA requires that brokers for the transportation of property must "register" with the Department of Transportation (FMCSA), 49 U.S.C. § 13901 and 13904. This registration requirement replaces the former statutory requirement to obtain a "license" from the ICC. Brokers holding licenses from the ICC as of December 31, 1995 were "grandfathered" and deemed to be registered under the new law, 49 U.S.C. 13905.
>
> The FMCSA has established regulations governing applications for broker registration that are published at 49 CFR Part 365. Application forms (Form OP-1) are available from the FMCSA, 400 Virginia Ave. SW, Washington, DC, 20590, phone (202) 358-7000.
>
> SURETY BOND
>
> FMCSA regulations provide that brokers must file a surety bond in the amount of $10,000, 49 CFR 387.307.
>
> AGENTS FOR SERVICE OF PROCESS
>
> Brokers must also designate agents for service of process for each state in which offices are located or in which contracts are written, 49 CFR § 366.
>
> OTHER REQUIREMENTS
>
> 49 CFR Part 371 sets forth requirements for brokers such as record keeping, misrepresentation, rebating and compensation, accounting, etc.

If the "dot.com" companies you are dealing with fit within the above definition of a "broker", they must be registered with the FMCSA. I would strongly suggest that you do not do business with any company or "dot.com" that does not comply with the law.

165) Dropped Trailers - Liability

Question: We currently employ the use of drop trailers for our short haul dedicated fleet used to deliver from our Distribution Centers to our stores. Most stores within a 125 mile radius of a DC are delivered by the dedicated fleet. The driver drops the loaded and sealed trailer at the store dock and takes yesterday's empty trailer back to the DC.

Each store has a storage box on the rear wall near the dock containing three trailer kingpin locks. Once the driver unhooks from the loaded trailer he is required to install a kingpin lock prior to departing the store. The store takes the kingpin lock off the trailer once the trailer is unloaded so the next day's driver can pick up the empty trailer.

This has worked well for us in recent years. We have experienced zero theft of trailers from our locations. In the past many of our stores have been in semi-rural markets or are in markets with populations of from 50k to 200k people with generally less organized theft than is seen in major population centers.

I am concerned with trailer/product theft as we move into major metro markets such as New York City, Los Angeles, Chicago and the like. I need your opinion regarding trailer theft from our site. If a dropped trailer with a kingpin lock installed is stolen from our dock, who has liability for the loss? Does the liability for the loss change if the carrier does not install the pin lock as our policy dictates? How clear is the legal precedent on this topic? Do you have any recommendations either within the language of our contract or regarding the physical trailer that may help us?

Answer: As a general rule, the carrier's liability ends upon “delivery”, and delivery has been defined by the courts to mean physical delivery in a manner that nothing further needs to be done by the carrier. (See Section 3.0 in *Freight Claims in Plain English*, 3rd Ed. 1995).

I am not aware of any cases dealing with the specific situation where the consignee provides and/or requires the driver to install a pin lock on the trailer. I suppose we could write some specific language into your transportation contract with this requirement, and stating that the carrier would remain liable for loss or theft if the pin lock is not installed.

I would note that I am aware of some trailer thefts even when there were pin locks installed, so it is not 100% protection.

Perhaps you should look at your overall facility security measures: fences, lighting, guards, etc., if you think this may be a serious potential problem.

166) Duty to Accept Damaged Goods

Question: We have a situation where a shipper loaded baled waste paper into a trailer and the load shifted in transit, causing the bales to fall over. Now the consignee refuses to accept the shipment and says he can't unload the bales because they would break apart. Doesn't the consignee have to accept the shipment?

Answer: Normally, the consignee has a duty to accept a damaged shipment unless it is "substantially worthless", and also has a duty to take reasonable steps to mitigate damages. In this case, it appears that the consignee can't remove the bales with his forklift equipment and could incur significant expense or other problems in trying to unload the truck. Since the fault is either with the shipper (for improper loading) or with the carrier (for causing the load shift), it does not seem that the consignee would be unreasonable in rejecting the load.

167) Educational Programs and Materials

Question: I recently transitioned from the Marine Corp. I worked in supply and logistics for many years. I understand the logistical concepts. I have learned a lot in the few months working at Bakery Chef. Are there any publications or another means that gives a well-rounded understanding of basic procedures and terms dealing with transportation, shipping and receiving?

Answer: The best recommendation I can give you is to join the Transportation & Logistics Council. The Council publishes an excellent newsletter called the "TransDigest" which is full of current news, practical information and tips; it also holds an annual conference with round tables and seminar programs on a variety of transportation and logistics subjects There are seminars from time to time in various parts of the country on loss and damage claims, contracting for transportation and logistics services, etc. As a member, you also have access to the "hot line" for your questions and advice, and the "Q&A" column. For membership information visit the web page: www.tlcouncil.org or contact T&LC headquarters at (631) 549-8984.

168) Exempt Products

Question: Fresh Fruits and Vegetables have always been considered exempt products. With that in mind, what guidelines should we follow with regard to:

1. time limits to file claims?
2. normal transit times for perishables, such as strawberries?
3. responsibility of "brokers," are they an agent or the principal?

Answer: You are correct in observing that most fresh fruits and vegetables are "exempt" under 49 U.S.C. § 13506. This exemption has been construed to mean that the provisions of the "Carmack Amendment" (49 U.S.C. § 14706) are not applicable, such as the minimum time periods for filing claims and bringing suits for loss or damage.

Although such commodities are "exempt" from regulation, there are still laws which are applicable, such as the Uniform Commercial Code, which contains provisions about bills of lading, etc. and requirements that time limits and liability limitations must be commercially reasonable.

As a practical matter, many exempt shipments move under a Uniform Straight Bill of Lading, so the terms and conditions are the same as non-exempt shipments.

For loss or damage claims the time limits would be nine months to file a claim and two years and a day from declination to file a suit. With respect to delay, the basic criterion is still "reasonable dispatch", which is measured by the usual and customary transit time. I would refer you to *Freight Claims in Plain English* (3rd Ed. 1995) for a thorough discussion of these subjects.

In theory, "Brokers" in the produce business are not subject to the registration requirements for property (truck) brokers in 49 U.S.C. §§ 13901 & 13904. In addition to arranging for transportation (as an independent contractor), they may also perform other functions. For example, they often act as a commission agent for the grower, in which case they may be subject to the Perishable Agricultural Commodities Act ("PACA").

169) Exemptions - Fresh Fruits & Vegetables

Question: Fresh fruits and vegetables have always been considered exempt product. With their exempt status in mind.... What guidelines do you follow with regard to:

1. time frame to file a claim
2. normal transit time for perishables like strawberries
3. responsibility of "brokers"- agent or principal?

Answer: You are correct in observing that most fresh fruits and vegetables are "exempt" under 49 U.S.C. § 13506. This exemption has been construed to mean that the provisions of the "Carmack Amendment" (49 U.S.C. Section 14706) are not applicable, such as the minimum time periods for filing claims and bringing suits for loss or damage.

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170) Factoring Companies

Question: What can you tell me about "factoring companies" and how they fit in to the whole scheme of payment liabilities?

Answer: Trucking companies often assign their accounts receivable to factoring companies or financial institutions. If you are notified by a factor that freight bills are to be paid to the factor, and not to the trucker, BEWARE!

First, this may be an indication that the motor carrier is in financial difficulty.

Second, you should double-check with BOTH the carrier and the factor to make sure that the accounts have actually been assigned. If you pay the wrong company you could be exposed to double payment liability.

Make sure you get confirmation IN WRITING.

171) Factoring Company

Question: What is the best way to check a factoring company's credibility?

Answer: I would assume you represent a trucking company and wish to "factor" your accounts receivable or freight bills. I am not aware of any trade groups or industry listings for factors which might tell you if the factor is financially fit and reliable.

You could do the following: (1) ask for references - check with other trucking companies they are handling; (2) check with the local better business bureau for any complaints; (3) ask for their most recent financial statement; (4) get the names and addresses of the principals; (5) get a D&B report on the company and the principals; and, (6) last, but not least, make sure your lawyer reviews any agreements before you sign them.

172) Federal Regulations - Claims Processing Rules

Question: We are a broker company, and we broker loads to our contract carriers. We have a clause in the contract that we are to be held harmless of any claims that arise for any loads that were under the care of the carrier.

We submit claims to the carrier if we are unable to deduct it from any settlements, a good portion of the carriers don't care, ignore the claim filed. I try calling them and don't always get a response.

In your book, *Freight Claims in Plain English* under Claim processing rules 12.1.3, it states that if a carrier fails to acknowledge claims that we can report them to the ICC Is that correct? If so, what address is this and is there anything else we can do other than filing them with a collection agency for help? I would like to report all the carriers that I can that refuse to follow the rules for claims. Can I still report them if I have to turn them over to a collection agency, and they are able to discuss the situation with them?

How do we know if the carrier is a member of the National Freight Claim & Security Council?

Answer: Motor carriers are subject to the federal regulations governing the processing of claims at 49 C.F.R. Part 370. These are the former ICC regulations which were in 49 C.F.R. Part 1005, and are now under the jurisdiction of the Federal Motor Carrier Safety Administration. You might try writing to the General Counsel's office at the FMCSA in Washington, DC. Unfortunately, the FMCSA does not have the resources to do much in the way of enforcing these regulations.

Obviously, if you are not getting anywhere with the carriers you have the option of turning the claims over to a claims collection company or law firm. Contact Headquarters for information on firms that specialize in transportation law and handle loss and damage claims.

As to the Transportation Loss Prevention & Security Council (formerly known as the National Freight Claim & Security Council), this group was dissolved by its parent, the American Trucking Associations. A new group has been formed, the Transportation Loss Prevention & Security Association, which is independent of ATA.

173) FOB Terms vs. Payment Terms

Question: I have a customer who claims that FOB terms (ownership of goods) and freight terms (burden of freight cost) are separate and that they could order from my company :

Freight - Prepaid

FOB Factory

meaning that title would pass at my dock but the freight would be prepaid. Is this legal and/or correct?

Answer: "FOB terms" are terms of sale and are defined in the Uniform Commercial Code. They govern the risk of loss in transit, i.e. whether the buyer or the seller has the risk in the event of loss or damage to the goods. See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 10.5.1, Risk of Loss, for a thorough discussion.

"Prepaid", "Collect" or "Bill to" terms are freight payment instructions which are generally entered on the bill of lading to tell the carrier which party should be sent the freight bill.

Thus, you can have a sale which is "FOB Origin", and the freight can be either prepaid, collect or bill to a third party.

174) For Hire Trucking - Federal Regulations

Question: What type of legalization is required to transport cargo for shippers with a 1/2 ton cargo van? Load capacity is up to 1,000 lbs. Am I allowed to put any advertising or markings on sides of vehicle?

Answer: If you are transporting property of others for hire in interstate commerce (between two states), you will need to register with the Federal Motor Carrier Safety Administration (formerly the I.C.C. or the FHWA). If you are only operating in intrastate commerce (within one state) you will probably have to register with the state Department of Transportation or Public Service Commission.

State and federal regulations require that you show the number of your operating authority, name of the operator and address on the truck (usually on the driver's door). Generally you can also put advertising and/or other markings on the side of the vehicle.

175) Freezing of Perishables

Question:

The shipper marked the bill of lading "Perishable if frozen - prevent from freezing - take special precautions if weather deems necessary". Handwritten on the bill of lading, at the time of the pickup, was the notation, "trailer has no heat but has a team of drivers." The carrier does not offer a heater service. However, the driver accepted the shipment and the shipment froze enroute. Is the carrier liable?

Answer:

The fact pattern you described is similar to the case of *Fine Foliage of Florida, Inc. v. Bowman Transp., Inc.*, 698 F.Supp. 1566 (M.D. Fla. 1988), *affirmed*, 901 F.2d 1034 (11th Cir. 1990).

In that case the carrier had a filed ICC tariff which said it would not accept shipments requiring protective service, and that shipments accepted which are subject to temperature damage are accepted only at the shipper's risk and responsibility. However, the court held that the Carmack Amendment prohibits a carrier from relying on such a tariff provision to exempt itself from liability once it accepts goods for transportation that require refrigeration. Since the bill of lading clearly put the carrier on notice of the perishable nature of the shipment, and the carrier accepted the shipment, I think the carrier is liable.

176) Freight Bills - Re-Classification & Reweighing

Question: We wish to know if there are minimum guidelines that a LTL common carrier is to follow in regards to recording data for changing a shipper's Bill of Lading description.

ABF Freight apparently has all of their drivers measure shipments with a tape measure. We have someone who describes their freight specifically as :Hangers, garments, in boxes 92800 sub 6 class 100. The carriers copy of the B/L might have dimensions such as 96x100x100 hand-written on it but not the shipper's copy. No persons signature other than the driver's appears on the B/L.

At times, ABF will also issue an inspection report, we don't have a problem with that, but some times the inspection report does contradict the dimensions recorded on the carriers copy of the B/L.

It is our contention that without a valid inspection report certified by a carrier's employees name/signature that just writing dimensions on their copy of the B/L is not sufficient documentation to support re-classifying the density of a shipment. If the shipper's copy of the B/L would also be noted the same, we would feel more comfortable that they witnessed or acknowledged the dimensions.

We cannot find anything that deals with documentation requirements for changing descriptions.

Answer: I am not aware of any specific regulations that govern the documentation requirements for re-classification of freight or correction of information shown on a bill of lading under the circumstances you have described. It is likely that individual carriers may have internal procedures covering this matter.

In any event, carriers have always had the right to inspect and/or weigh freight in order to determine the correct rates that apply. This is reflected in Item 360, Sec. 3 of the NMFC, which provides:

Sec. 3. Inspection of Property. When carrier's agent believes it necessary that the contents of packages be inspected, he shall make or cause such inspection to be made, or require other sufficient evidence to determine the actual character of the property. When found to be incorrectly described, freight charges must be collected according to proper description.

I would note that if you feel there is a bona fide dispute over the density of your shipments, you should contact the National Motor Freight Traffic Association and discuss the matter with one of the classification specialists, such as George Beck at (703) 838-1813. You may also contact NMFTA through their web site at http://www.nmfta.org

177) Freight Bills - Time Limits

Question: I recently received over 100 invoices averaging $700 each, from a carrier who performed the pickup and delivery over a year ago. Some of the invoices are for services nearly two years ago. Is there a period of time within which the carrier must invoice for services rendered? And if not, is my company required to pay these within a certain length of time?

Answer: Under the Interstate Commerce Act, a motor carrier must bring a civil action (lawsuit) to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues. This statute of limitations is found at 49 USC Section 14705. You have no legal obligation to pay freight bills after the expiration of the statute of limitations.

178) Freight Bills - Time Limits for Air Freight Carriers

Question: Motor freight carriers have 180 day to submit corrected freight bills (undercharges) and shippers have the same time period to file for overcharge claims. What are the requirements on invoicing for air freight carriers? Are there any similar rules controlling the air freight industry and what statute of limitations would apply?

Answer: I am not aware of any specific statutory time limit for filing overcharge claims or for bringing overcharge suits against air carriers or air freight forwarders. There often are time limits in the air waybills or tariffs, but these would vary from one carrier to another, and you would have to check them for the specific carrier you are dealing with.

In the absence of a contractual time limit (in the air waybill or tariff), the time for bringing a lawsuit would generally be the statute of limitations applicable to contract actions in the state where the contract is made.

The 18-month statute of limitations in 49 U.S.C. § 14705 applies to motor carriers. Air freight movements are "exempt" under 49 U.S.C. § 13506, and would not be covered. However, the movement must, in fact, be an air freight movement - in other words, it cannot be a surface truck movement by a so-called "air freight forwarder". Many of these air freight forwarders are providing various kinds of expedited services ("2nd Day Air", etc.) that never see an airport. If that is the case, the 18 month statute of limitations would apply.

179) Freight Bills - Time to Contest

Question: We have a weekly shipment from our facility in Missouri to our branch in Canada. An American freight company picks up from our location, takes the shipment to Chicago where it is transferred to a Canadian company for the haul to Canada. The rates we are charged are according to the Canadian company tariff even though the American company bills us. It looks as if the American company has been overbilling us. I understand there is a 180 day rule to collect on overcharges. My question is when does the 180 days start? Is it from the day of pickup, day of delivery or day of invoice?

Answer: The "180 day rule" to which you refer is set forth in 49 U.S.C. § 13710(a)(3)(B), and states in relevant part: "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.

TIP: Shippers would be well advised to have a procedure whereby all freight bills are date-stamped on receipt.

180) Freight Bills Received After 180 Days

Question: Can freight companies collect on unpaid freight bills that are past the 180 day time limit? I have 5 bills from a company that they are saying have never been paid and I don't show them having been paid either. Are we responsible?

Answer: Yes, freight companies can collect original, unpaid freight bills that are over 180 days old. Pursuant to 49 U.S.C. § 13710(a)(3)(A), the 180-day rule only applies when the carrier seeks to collect charges in addition to the original freight charges (i.e., freight undercharges). The only time limitation that would apply to the carrier's attempt to collect its original unpaid freight charges would be the 18 month statute of limitations. For your reference the statute of limitation provision is in 49 U.S.C. § 14705(a).

Unless you have some other reason to dispute the unpaid bills, it would appear you are responsible for them.

181) Freight Charges - Setoff for Delay

Question: We are a broker and we took a load from a freight forwarder that required a team to deliver the freight. Our charges were $1450. Our truck got lost and delivered freight 2 hours late. Our customer paid us short and we got only $500 for the move. The owner of the forwarding company refuses to pay anymore. What can I do?

Answer: Essentially, what you have is a claim for freight charges, and a shipper's setoff for a delay claim.

There are a lot of factors and questions involved. Did you have any written contract or rate quote agreement, and if so, what did it provide? Was there a specific agreement or promise to make delivery at a particular time or for an appointment? Did the shipper present any kind of written claim in support of its setoff?

In view of the amount in controversy, you could try bringing a suit in your local small claims court. Note that the defendant would probably file a counterclaim for the alleged delay.

182) Freight Charges – "Pack & Ship" - Who is Liable for Charges?

Question: I had some articles shipped from Kansas City to Boston by a shipping/packaging company. I paid the required charges by cheque and got the boxes in Boston. I did not know how or by whom they would be shipping the boxes. I received the boxes and as I had prepaid, there were no more charges.

Recently I got a letter from the collection agency saying that I was liable for charges to the freight company under the Interstate Commerce Act as the Consignor had not paid the freight company (on many occasions).

The bill specifically states the "BILL TO" as the consignor and the discounted rate charged by the freight company. Since the bill is between the consignor and the freight company, am I liable to pay any charges to the freight company or their collection agency ?

Answer: Without seeing any of the shipping documents or other correspondence it is difficult to give you a definitive reply.

The "pack & ship" outfit that you dealt with could be considered as a "freight forwarder", a "broker" or as your agent. Essentially, it boils down to what kind of contract existed between the different parties. For example, did the "pack & ship" company issue you any kind of receipt or bill of lading? If so, it would be evidence that they were acting as a freight forwarder (probably illegally, because they never registered with the Federal Motor Carrier Safety Administration) and your contract of carriage is with the forwarder, not the trucking company.

183) Freight Charges - "Shipping and Handling" Charges

Question: I have recently seen questions in your "TransDigest" that pertain to charges billed to customers that are more than the actual cost of shipping the merchandise. You mentioned that as long as the shipper states on the invoice, or notice of sale, that the freight charges being invoiced do not reflect volume discounts, or use wording such as "shipping and handling charge," that the shipper is providing a proper disclosure to the customer.

My question is, how much more does a shipper typically charge in these situations? Is it usually a flat fee, or is it based on a certain percentage?

Answer: I don't think there is any "standard" practice in the industry. Many retail catalog vendors have a scale of shipping charges based on the amount of the sale or the weight of the items. Some companies add a flat handling fee per order. Some charge their customer the full "class rates" from the carrier's tariff (without discount or allowances). It depends on your product and price structure, the method of shipping (parcel, LTL, TL, etc.) and the practices in your particular line of business.

The main thing, as you have mentioned, is to provide adequate disclosure to your customer: that the freight charge shown on your invoice includes an additional handling charge, or that you may be receiving a discount or allowance from the carrier.

184) Freight Charges - Accessorial Charges

Question: We are required to use Overnite Transportation on collect basis by a customer that does $50+ million per year with us. A 28 foot pup trailer usually will haul 40 shipments and our boxes will range from a quarter cubic ft to 5 cubic feet. Because the boxes for each B/L are not together (touching one another) they charge $40.00 per bill to sort and segregate. Is this standard through out industry? If we ask for a driver to load, they say they will allow 90 minutes for 5,000 lbs., and then they will charge $1.00 per minute thereafter with a 15 min, minimum.

Answer: The accessorial charges you are complaining about should be set forth in the carrier's rules tariff. I would suggest that you ask the carrier for a copy of its rules tariff (or service guide) in order to verify both the applicability and the amount of these charges.

There is also a possibility, since your customer has selected the carrier and is paying the freight charges, that the customer has a transportation contract with the carrier. If so, the contract might govern the accessorial charges you have mentioned. Check with your customer on this.

You may want to consider some other shipping or loading arrangements. Can your shipments be palletized or stretch-wrapped? Will the carrier drop trailers and leave them for you to load?

185) Freight Charges - Accessorial Charges in Tariffs

Question: We are a manufacturer of disposable medical devices and ship all orders from one Midwestern facility. Roughly 80% of customer orders ship LTL, about 8% parcel and the remaining orders are FTL. We do not have any long-term FTL contracts; we use a few different carriers and current lane quotations from each to determine who will get the load.

Early in 1999, we made an agreement with one such carrier to include in their quoted price the added unload/driver assist charges we were regularly getting on our West Coast intermodal moves. From that point on, their invoices no longer listed those accessorial charges separately, they were rolled into the base rate. Recently, the carrier rep indicated that they had a negative balance in their accrual account and that we owed them nearly $10,000 as the result of their underestimating the amount of accessorial charges for over 100 loads. We have updated quotations for these lanes throughout that time period and have paid each invoice on time without dispute. Is there any possibility that we could be liable for these back charges? Any insight you can provide would help.

Answer: You indicate that you do not have any formal transportation contracts, but have "quotations" from various carriers. The question is whether it can be determined from the "quotation" whether the accessorial charges are included in the rate; if so, then the "quotation" would be evidence of the contractual agreement between the parties. On the other hand, if the "quotation" is silent - or worse, if it incorporates the carrier's rules tariff by reference - you may be liable for the accessorial charges.

I should note that some of the claims you refer to are time-barred under the "180 day rule" in 49 U.S.C. Section 13710(3)(A) which provides: "A carrier must issue any bill for charges in addition to those originally billed within 180 days of the receipt of the original bill in order to have the right to collect such charges."

My best advice to avoid this type of problem in the future is to enter into a properly drafted transportation agreement with each of your carriers.

186) Freight Charges - Bankrupt Carrier

Question: One of our truckers filed for Chapter 11 bankruptcy about eight months ago, at which time we owed them for some freight charges. We assumed that we would hear something from the attorneys or the court about paying the charges which were due, but didn't receive anything until a few days ago. This was a notice from the trucking company which demanded payment. Is it all right to pay the trucking company directly?

Answer: If the carrier is in reorganization under Chapter 11, it is probably considered a "debtor in possession" and may be continuing to conduct operations. Thus, if you agree on the amount owed, you should pay the freight charges.

Payment should be made to "(name of carrier), Debtor in Possession". You should also ask for a release before making payment. This is because there may be a loss of discount or other penalty

for late payment in the carrier's tariffs, and it is quite possible that the carrier may retain auditors or collection agents to try to collect late payment penalties from its shippers.

187) Freight Charges - Billing to Customers

Question: I am a volume shipper. As such I generally receive discounts from the carriers I use. Often these discounts fluctuate and, sometimes, the discount I receive is significantly larger than I anticipated in the pricing of my customer contracts. My standard sales bills contain separate charges for shipping. The shipping charge on the bill is what I anticipate the freight charge to be at the time of the order.

When I receive discounts greater than I anticipated, am I legally obliged to pass them on to my customers?

Answer: Section 7 of the Negotiated Rates Act of 1993, and former regulations of the ICC in 49 C.F.R. 1051.2 were addressed to "off bill discounting". Essentially, this prohibited carriers from paying a discount or allowance to anyone other than the payor of the freight bill and required carriers to disclose all discounts or allowances on their freight bills. Neither the statutory provision nor the regulation are still in effect, due to subsequent legislation, namely the Trucking Industry Regulatory Reform Act of 1994 ("TIRRA") and the ICC Termination Act of 1995 ("ICCTA"). It should be noted that, in any event, the statutory provisions and regulations only applied to carriers, and not to shippers.

Thus, the real question is whether a purchaser could reasonably claim commercial fraud or misrepresentation if the seller adds an amount higher than the actual freight charge to its invoices.

Some companies place a notice, either in their terms of sale or on their invoices to disclose that the freight charges being invoiced do not reflect volume discounts or incentives received from the carrier. Others use wording such as "shipping and handling charge".

The best advice is to use a notice in your terms of sale and/or invoices which constitute a sufficient disclosure to your customer to avoid such claims.

188) Freight Charges - Billing to Customers

Question: I recently discovered that a supplier has been charging us more than the actual cost of shipping merchandise. There is nothing in their sales literature that pertains to charges for shipping.

Is a manufacturer permitted to charge a customer (in this case a retailer) more than the actual cost of transporting of merchandise when there is no specific contractual understanding?

Answer: Unfortunately, the problem you describe is a fairly widespread practice and a question we often get from various parties. Many shippers charge their customers for freight in an amount greater than the shipper actually pays, and do not pass along the discounts or allowances that they are getting from the carriers to their customers. In some instances, this can be a significant profit center for the shipper.

Section 7 of the Negotiated Rates Act of 1993, and former regulations of the ICC in 49 C.F.R. 1051.2 were addressed to "off bill discounting". Essentially, this prohibited carriers from paying a discount or allowance to anyone other than the payor of the freight bill and required carriers to disclose all discounts or allowances on their freight bills. Due to subsequent legislation, namely the Trucking Industry Regulatory Reform Act of 1994 ("TIRRA") and the ICC Termination Act of 1995 ("ICCTA"), the regulations have been eliminated and the statutory disclosure requirements, now in 49 U.S.C. § 13708, have been watered down. In order to comply with the statute, a carrier need only state on its freight bill that “a reduction, allowance or other adjustment may apply.” However, it

should be noted that the statutory provisions and regulations never applied to shippers and the remaining requirements still only apply to carriers.

Thus, the real issue is whether you, as a purchaser, could reasonably claim commercial fraud or misrepresentation if the seller adds an amount higher than the actual freight charge to its invoices. We have not seen any court decisions dealing with this issue, but it would appear that you might have grounds for legal action if your vendors are misrepresenting the freight charges in their invoices to you. At the very least, you should bring this to their attention and demand that they accurately state the actual freight charges that are being included in the invoices.

When discussing this issue with shippers, our best advice is to use a notice in the terms of sale and/or invoices, which constitute a sufficient disclosure to customers to avoid such claims. Some companies place a notice, either in their terms of sale or on their invoices to disclose that the freight charges being invoiced do not reflect volume discounts or incentives received from the carrier. Others use wording such as "shipping and handling charge".

189) Freight Charges - Broker Bankrupt

Question: A broker was shipping with us and now has informed me of a chapter 7 filing leaving about $5000.00 in unpaid freight charges. Can we as the carrier of record demand payment from the broker's shippers legally. If so where can I get a copy of transportation law describing our right to do so? What rights in the future do we have against insolvent brokers if they do not pay the carrier?

Answer: Liability for freight charges depends on the facts and the relationships among the parties. Unfortunately, the "double payment" problem is very common when brokers go out of business or abscond with funds. This is a "gray area", and collection agencies and lawyers for some carriers will probably tell you that the shipper or consignee could be liable even though they have paid the broker.

However, the general rule, as supported by a number of court decisions, is that if the shipper has dealt only with the broker, and has paid the broker, the carrier cannot come back to the shipper to collect its freight charges. The legal rationale is that there is no privity of contract between the shipper and the carrier; also, that the carrier has extended credit to the broker, and not to the shipper.

I would note that if the broker was properly licensed with the FMCSA (formerly the ICC), it should have had a surety bond on file. This provides only $10,000 coverage, so if there are a lot of claims, the bonding company will probably pay the carriers on a pro-rata basis up to the limit of the surety bond. You can find out about the bond by accessing the FMCSA web site, www.fmcsa.dot.gov and selecting the "L&I System" (licensing and insurance information).

190) Freight Charges - Broker Liability When Shipper Fails to Pay

Question: We are a broker as well as a carrier, here in Iowa. We have a former customer who is filing for bankruptcy protection. They have left us owing carriers monies for loads hauled, and we have been advised that a broker is not liable to these bills, unless we are paid by the shipper.

I am hearing many different opinions on this subject. I just thought that I would see what your take on this subject is since I bumped into you on the Internet.

Answer: Unless you have some written agreement to the contrary with your motor carriers, you may be liable, even if the shipper doesn't pay you. The reason is that there are separate contractual arrangements: shipper-broker and broker-carrier. In most situations there is no "privity" or contractual relationship between the shipper and the carrier; the shipper doesn't select the carrier or pay the

carrier. Thus, the carrier has extended credit to the broker, can only look to the broker for payment, and can't collect from the shipper (whether solvent or bankrupt).

If your shipper customer is bankrupt, I would recommend that you contact the attorneys for the debtor in possession or the trustee, and promptly file a claim with the bankruptcy court.

191) Freight Charges - Broker Out of Business

Question: Is the responsible party on the Bill of Lading (prepaid vs. collect) legally responsible for the freight charges to the carrier when the Broker goes out of business, the Surety Bond is liquidated and does not pay you? Is there a section in C.F.R. 49 that covers this issue?

Answer: Liability for freight charges depends on the facts and the relationships among the parties. Unfortunately, the "double payment" problem is very common when brokers go out of business or abscond with funds. This is a "gray area", but the general rule is that if the shipper has dealt only with the broker, and has paid the broker, the carrier cannot come back to the shipper to collect its freight charges. The legal rationale is that there is no privity of contract between the shipper and the carrier; also, that the carrier has extended credit to the broker, and not to the shipper.

192) Freight Charges - Broker Out of Business

Question: I have recently read an article that someone had sent me regarding "double payment" in which you stated that this is a "gray area". My questions is how does a shipper get the collection agencies to stop bugging them? Let me take a minute and describe the situation. A shipper who had been doing business with a broker for well over 4 years has recently been notified by carriers that the broker has not paid them for freight do to the fact the broker has gone out of business and turn his affairs over to an attorney to handle his lack of monies to pay his freight bills. Now the broker was well established and had been in business for over 10 years and all of his authority and bond was in compliance at the time the freight shipped. Now the shipper obviously paid the broker as they have always did and the collection agencies are contacting the shipper for the money and these collections people are down right rude and harassing.

Answer: Liability for freight charges depends on the facts and the relationships among the parties. Unfortunately, the "double payment" problem is very common when brokers go out of business or abscond with funds. This is a "gray area", and collection agencies and lawyers for the carriers will probably tell you that you are liable even though you have paid the broker.

However, the general rule, as supported by a number of court decisions, is that if the shipper has dealt only with the broker, and has paid the broker, the carrier cannot come back to the shipper to collect its freight charges. The legal rationale is that there is no privity of contract between the shipper and the carrier; also, that the carrier has extended credit to the broker, and not to the shipper.

There is not much you can do when being harassed by collection agencies or lawyers, other than to tell them - very firmly - that you have no intention of paying them, because you have already paid the broker

193) Freight Charges - Brokered Load

Question: We are a truckload carrier trying to collect payment from a broker. Their customer has filed for bankruptcy, and is negotiating a payment plan with the broker to pay roughly 60% of the original rate. The broker says it does not have to pay us until they are paid, and they can short pay us in accordance to what they get paid. Since our business is with the broker, don't they have to pay up in full? Also, we operate a brokerage arm as well, and routinely load their trucks. Can we divert the money we owe their carrier division to cover the money their brokerage owes our carrier division?

Answer: It would seem to me that your contractual relationship is with the broker; there is no "privity of contract" between your company and the broker's customer (shipper). Assuming that you have appropriate documentation as to your agreement for the shipments in question, you should have an enforceable contract.

Please note, however, that there is some support for the broker's contention that it is not liable to pay the carrier unless and until it is paid by the shipper. In *New Prime, Inc. v. Professional Logistics Management Co., Inc.,* 28 S.W. 3d 898 (Mo.App.S.D. October 19, 2000), a Missouri trial court reasoned that if a broker is merely a "conduit" for freight charges, it's not obliged to pay the carrier unless it receives funds from the shipper

As for possible setoffs, I don't see any reason why you can't setoff mutual debts, so long as the legal entities are both the same.

194) Freight Charges - Carrier Reweighs

Question: My question has to do with carrier reweighs. We seem to be hit constantly by carrier reweighs that are incorrect. We ship both palletized and loose carton freight and no matter which way it ships we tend to see a lot of these reweighs. I understand why the carriers do this and I have no objections to them spot-checking our freight, but 99% of the time they are wrong and I have to fight with the carrier to get the added charges reversed. Sometimes they add hundreds of pounds to the shipment.

What are my rights as a shipper when I disagree with their weights? Can we just not pay them? We have done this in the past but they keep coming back with past due balances.

Answer: I have two observations:

1. If you have been understating the weight (to get a lower freight charge), the carrier is perfectly within its rights to re-weigh your freight and send a corrected bill. Question: does this have anything to do with the inclusion of pallet weights on the bill of lading?

2. If the carrier routinely is increasing weights without any real justification, it may be part of a pattern or "scam" to over-bill unsuspecting customers. If so, you should bring it to the attention of the carrier's management and/or stop doing business with this carrier.

As far as your rights when you disagree with their weights, the only suggestion I have is to "put it in writing" and file a formal overcharge claim. You can just "not pay them", but beware of possible late payment penalties, loss of discount, etc. that the carrier may have in its rules tariff.

I would strongly advise you to enter into written transportation contracts with your carriers. A properly drafted contract can cover these subjects and avoid a lot of disputes.

195) Freight Charges - Carrier Reweighs

Question: What is the law that governs carrier reweighs? The carrier tells the shipper that they have "a right to reweigh the weight shown on the bill of lading and adjust per the amount shown on their scales". They sight that this "right" comes from the fact that the carrier can be levied a fine for moving trailers overweight.

I realize that some shippers do not have an accurate means of weighing shipments. But what if a shipper has a scale, weighs the shipment and the carrier adjusts the weight after reweighing?

Which weight legally stands as the billed weight?

Answer: There is no "law" governing carrier reweighs.

For LTL shipments, where the charges are usually based on the NMFC classification of the article and the weight, the shipper normally puts the weight on the bill of lading. If the carrier finds that the weight is different than shown on the bill of lading, it may assess the charges on the actual weight.

For TL shipments, there could be a concern that the gross weight of the equipment and cargo exceed state or federal highway weight limits. Since the carrier could be subject to heavy fines and penalties, the carrier should be entitled to reweigh the truck, and to off-load cargo if it is overweight. I would also note that the Intermodal Safe Container Act of 1996, 49 U.S.C. § 5901, et seq. establishes specific requirements for intermodal transportation.

If you have a legitimate dispute over the actual weight that is used for billing purposes, your remedy is to submit an overcharge claim, with appropriate documentation or evidence as to the correct weight. If the carrier refuses to pay the overcharge claim, you may have to resort to legal remedies such as arbitration or a lawsuit.

A final observation: Carriers will tell you that some shippers intentionally put lower weights on their bills of lading in order to get lower freight charges. Likewise, shippers will tell you that there are some carriers that routinely increase the weights and overcharge their customers. In either situation, I would consider it to be a fraudulent practice subject to both civil and criminal penalties, see, e.g., 49 U.S.C. § 80116.

196) Freight Charges - Carrier Setoffs Against Overcharges

Question: I'm a 3rd party consultant to one division of a mega company. Within the last year I have gotten my client to perform a post audit that has had significant results. One carrier has taken the position that they will not refund $10,000 in overcharges (from duplicate payments) that are over a year old, because there are some outstanding invoices over 60 days. Some of the overdue charges are in dispute. Can this carrier legally withhold payment of a valid claim because there are past due bills?

Answer: Motor carriers are subject to certain federal regulations and must comply with the provisions of 49 C.F.R. Part 378, "PROCEDURES GOVERNING THE PROCESSING, INVESTIGATION, AND DISPOSITION OF OVERCHARGE, DUPLICATE PAYMENT, OR OVERCOLLECTION CLAIMS". It is possible that this carrier may be in violation of the applicable regulations. If so, you could file a complaint with the Federal Motor Carrier Safety Administration and request them to enforce the regulations (ha, ha).

However, as a general rule, it is not “illegal” to withhold payment where there are mutual debts.

You could bring a suit to collect the overcharges, and you should prevail. Note, however, that it is likely the carrier would interpose a counterclaim for the unpaid freight bills.

197) Freight Charges - Consignee Liability when “Prepaid”

Question: A consignee received expedited shipments from their vendor last February and the freight charges were “prepaid.” Now, the delivering carrier has rebilled the consignee for the charges because the vendor has declared bankruptcy, and the carrier says that the consignee is now liable for the freight charges. Is this true, even if the vendor is still operating (although it is in Chapter 11 bankruptcy)?

Answer: In general, a carrier is entitled to be compensated for its services. Since the consignee received the shipment, the consignee received the benefit of the carrier's services. Therefore, even for "prepaid" shipments a carrier MAY be able to recover from the consignee.

However, a consignee cannot be forced to pay twice. There is a line of cases holding that a carrier should be "estopped" from collecting from a consignee on "prepaid" shipments, where the consignee has already paid the shipper for the goods. For example, if the invoice to the consignee reflects "prepaid and add" or "shipping and handling", or the invoice is simply for a delivered price, the consignee is actually paying the freight charges when it paid the shipper's invoice and should not have to pay twice. Thus, the key to the estoppel defense is showing that the consignee has paid for the freight charges in some manner, even though the shipment was "prepaid".

I think you are confusing bankruptcy with "liability". "Liability" for a monetary debt simply means that one person owes another person money for services rendered. If a person is "liable" for a debt, filing bankruptcy does not relieve that person of the liability. The person will remain liable; the only thing bankruptcy will alter will be the person's ability to pay (or satisfy the liability).

Thus, regardless of whether the shipper is in bankruptcy or not, the shipper's liability for the freight charges will not change. The carrier, as an unsecured creditor of the bankrupt shipper, should file a claim with the Bankruptcy Court and pursue his remedies there.

198) Freight Charges - Consignee's Liability on Prepaid Freight

Question: When a shipper/vendor goes out of business, what protection does the consignee have against unpaid, pre-paid freight charges?

Several of our retail stores are the consignees of freight shipped prepaid by the shipper. The bills of lading are marked prepaid. The shipper/vendor went out of business and failed to pay the carrier. After we paid our last invoice to the shipper/vendor for the merchandise, we began to receive collection letters for unpaid freight charges from their contracted carrier. However, we paid the charges for freight as embedded in the cost of goods.

I know what the case law says, and realize we may have no other alternative. What can we do to prevent such from carriers used by other vendors who go out of business and fail to pay freight bills? Is there some protection for consignees similar to that under Section 7 rules for shippers who ship collect? What, if any, language can we force onto a bill of lading? Or is it a matter of good faith between our company and our vendors?

Answer: A consignee may be liable for freight charges on the theory that it has received the benefit of the transportation services.

However, there is a well-established line of court decisions in which the principle of “estoppel” has been applied. Where goods are shipped on a “prepaid” bill of lading, and the consignee-purchaser has paid the shipper-seller for the goods (including the transportation charges), this principle protects the consignee against “double payment” liability for the freight charges.

I would note that the freight charge need not be separately shown on the vendor's invoice for this principle to apply. If you purchase on a delivered price basis, that includes the cost of transportation in the invoice price for the goods, the estoppel defense is still applicable, and you should not have to pay the carrier.

“Section 7” is the non-recourse provision on the Uniform Straight Bill of Lading and refers to the terms and conditions on the reverse side of the long-form bill of lading in the Classification. It is used by the shipper, if the charges are to be collected from the consignee without recourse to the shipper. There is no similar provision that would protect the consignee.

There is not much you can do to prevent carriers or their collection agents from trying to collect freight charges when they haven’t been paid by the shippers. The only protection I can suggest is to use due diligence in checking the credit of companies you deal with.

199) Freight Charges - Costs of Unloading

Question: We manufacture plastic mugs and sport bottles. We ship out many truckloads that are floor loaded. Some of our customers require the driver to unload when he arrives at their dock. We tell them upfront that they are responsible for unloading, or to hire lumpers when available, which we reimburse them for. We occasionally get drivers who upon reaching their destination, refuse to unload. If no lumpers are available, our customer ends up having to find people to unload the truck and then they are mad at us. Do we have a right not to pay the trucking company if they agree to the unloading and then the driver does not perform the task?

Answer: If the rate that you have negotiated with the carrier includes unloading, then the carrier (driver) is supposed to perform this service. If the carrier fails or refuses to unload, I would think you should be able to deduct the reasonable cost of unloading from the freight charges.

200) Freight Charges - Defunct Broker

Question: We are a logistics firm engaged in moving the freight of our client. We are not a broker and are not paid per load.

When we tender a load for movement by a truckload carrier, we fax a load tender showing origin and destination, agreed rate, product type, and the billing address a third party freight payment service.

We had used a truckload carrier in the past whose practice it was to broker some of the freight we gave them that they couldn't cover with their own fleet. We never had visibility to the actual carriers on these brokered loads, and dealt solely with our own carriers dispatchers.

This trucking/brokerage company has since closed its doors (not filing for bankruptcy, merely closing). They have left bills unresolved with their carriers and these carriers are soliciting payment from our customer, and from us as the broker on these loads. Our customer is typically the receiver of the product which was moving freight collect, FOB origin.

We have paid our carrier/broker for all work performed in full. What exposure do our customer and we have to lawsuits and collections efforts on the part of these carriers?

Answer: 1. Your liability as an agent of the shipper: Liability for freight charges depends on the facts and the relationships among the parties. Unfortunately, the "double payment" problem is very common when brokers go out of business or abscond with funds. This is a "gray area", and collection agencies and lawyers for the carriers will probably tell you that you are liable even though you have paid the broker.

However, the general rule, as supported by a number of court decisions, is that if the shipper has dealt only with the broker, and has paid the broker, the carrier cannot come back to the shipper to collect its freight charges. The legal rationale is that there is no privity of contract between the shipper and the carrier; also, that the carrier has extended credit to the broker, and not to the shipper. I would think that these principles would apply equally to a an agent of the shipper.

2. Your customer's liability as the consignee: A consignee may be liable for freight charges on the theory that it has received the benefit of the transportation services.

However, there is another line of court decisions in which the principle of "estoppel" has been applied. Where goods are shipped on a "prepaid" bill of lading, and the consignee-purchaser has paid the shipper-seller for the goods (including the transportation charges), this principle protects the consignee against "double payment" liability for the freight charges.

201) Freight Charges - Delayed Shipment

Question: We are a transportation broker. A frequent customer of ours was a poultry trader based in PA. They hired us to find a truck to haul a load of fresh chicken from AL to MA. They requested the load to be picked up on 1/31 and delivered on 2/2. The closest truck we could find did not arrive at the shipper until past their loading cutoff and had to be loaded the next day. The truck was not loaded and on its way until after noon on 2/1 (the consignee is 1286 miles from the shipper). We communicated all of this information as it occurred, to our customer, the trader. The truck was not able legally or physically to make delivery on 2/2, our customer informed us then that their might be a problem because the market had dropped on chicken .10 cents per lb. and their receiver was looking for a reason to reject the load and buy at the lower price. The truck arrived at the receiver at 5:00 am on 2/3 and was unloaded and the bills of lading signed without any notation. On 2/7 we received a fax from our customer saying they were charging us .11 cents per lb. ($4400.00) because we delivered late plus $150.00 for late pick up. The freight rate on this load was only $1650.00 they withheld the balance of this "deduction" from monies due us on previous loads we hauled for them. My question is what can I do to recover this money?

Answer: There are a number of legal issues here.

First, you are entitled to be paid the agreed freight charges since you performed the contract for transporting the shipment.

Second, the customer is asserting a claim for delay. Claims for loss, damage or delay are subject to different legal principles. In this situation, your legal obligation is to transport with "reasonable dispatch", unless there is some other special agreement. Normally, from the limited facts you have given, a carrier would not be liable for the market decline and the damages sought by the shipper would be considered "special damages". On the other hand, if you had agreed to deliver by a certain date or time, and the shipper had given you actual notice that there would be damages if the shipment were delayed, you could be liable. (I would note that these subjects are discussed in depth in *Freight Claims in Plain English* (3rd Ed. 1995), and suggest that you get a copy.)

If you cannot resolve this dispute, your recourse is to bring a suit against the shipper to recover your freight charges. You can either hire an attorney or try to handle the matter yourself in a small claims court. Be aware, however, that the shipper will interpose a counterclaim for its delay claim; whether the counterclaim will be sustained depends on the factors discussed above.

As an observation, I note that your agreement with the customer appears to be entirely verbal. If you want to avoid this kind of problem in the future, you should enter into written transportation contracts with your shippers.

202) Freight Charges - Detention -Free Time for Loading

Question: I ship to my customer via a freight consolidator in Los Angeles and I pay freght charges to the consolidator for the pick up. I must allow for a four hour pick up window, however the consolidator will not wait more than 5 minutes for the load. Are there any laws concerning the time allowed to load for consolidator pick up?

Answer: There are no "laws or regulations" governing the time allowed to load for a consolidator pick up. Sometimes motor carriers will include provisions in their tariffs governing detention time or or other accessorial charges for loading or unloading, but I don't think that is your problem.

My suggestion would be to talk to the consolidator and try to come to a reasonable agreement. If they won't cooperate, take your business elsewhere.

By the way, you should have written contracts with carriers or consolidators. Then, you can spell out all of the obligations, terms and conditions which have been agreed to by the parties.

203) Freight Charges - Disputes - Time Limits

Question: What law was it that said a freight invoice dispute must be settled within 9 months of the transaction or there is no longer any legal grounds to dispute the claim.

Answer: I am not aware of the "law" you are referring to. The only nine-month time limit with which I am familiar is the time limit for filing loss and damage claims which is found in Section 2(b) of the Uniform Bill of Lading.

If you are asking about the time limits for filing overcharges with motor carriers, I would refer you to 49 U.S.C. § 13710 which provides:

> "If a shipper seeks to contest the charges originally billed or additional charges subsequently billed, the shipper may request that the [Surface Transportation] 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."

Most motor carriers interpret this section to mean that overcharge claims must be submitted within 180 days or they will be time-barred.

204) Freight Charges - Double Payment Liability

Question: I have recently read an article that someone had sent me regarding "double payment" in which you stated that this is a "gray area". My question is how does a shipper get the collection agencies to stop bugging them? Let me take a minute and describe the situtation. A shipper who had been doing business with a broker for well over 4 years has recently been notified by carriers that the broker has not paid them for freight due to the fact the broker has gone out of business. The broker was well established and had been in business for over 10 years and all of his authority and bond was in compliance at the time the freight was shipped. Now the shipper obsviously paid the broker as they have always did and the collection agencies are contacting the shipper for the money, and these collections people are down right rude and harrassing. Thank you for taking the time to answer my question.

Answer: Liability for freight charges depends on the facts and the relationships among the parties. Unfortunately, the "double payment" problem is very common when brokers go out of business or abscond with funds. This is a "grey area", and collection agencies and lawyers for the carriers will probably tell you that you are liable even though you have paid the broker.

However, the general rule, as supported by a number of court decisions, is that if the shipper has dealt only with the broker, and has paid the broker, the carrier cannot come back to the shipper to collect its freight charges. The legal rationale is that there is no privity of contract between the shipper and the carrier; also, that the carrier has extended credit to the broker, and not to the shipper.

There is not much you can do when being harrassed by collection agencies or lawyers, other than to tell them - very firmly - that you have no intention of paying them, because you have already paid the broker.

205) Freight Charges - Factored Load

Question: A truckload shipment was consigned to a freight broker (B1) by the shipper. That broker in turn gave it to another broker (B2) who gave it to a trucking company (T1), who then gave the load to another trucking company (T2). The last trucking company (T2) delivered the load and was paid by its factoring company. The shipper paid the first broker (B1), who then paid the second

broker (B2), who then paid the first trucking company (T1). The factor billed the first trucking company (T1), which has been paid by the second broker (B2) but is now out of business or filing chapter 11. What recourse does the factor have and whom can the factor seek payment from?

Answer: It appears that the bill of lading was "prepaid" and the shipper paid the broker. I also assume that the consignee paid for the goods that were shipped, including the cost of delivery. If so, as a general rule, both the shipper and consignee are protected against a "double payment".

As I see it, the factor has an agreement with its own customer (T2), who has assigned its receivables to the factor. Thus, depending on the agreement, it can either try to get its money back from the 2nd trucker (T2), or file a claim in the bankruptcy court against the 1st trucker (T1).

206) Freight Charges - Federal Laws

Question: What federal laws allow a carrier to attempt to collect transportation charges from a receiver even if the bill of lading indicates to bill the sender - vis a vis 1) surface transportation and 2) air transportation? Doesn't Title 49 § 13707 of the US Code allow this, at least for surface transportation? My wish is to bill receivers when the senders (my customers) are out of money or simply are being "deadbeats" and not paying their bills.

When it is a bill third party situation, does the carrier have any more room to attempt to collect from the receiver?

Answer: As to your first question, the Interstate Commerce Act (Title 49, U.S. Code Sections 10101 et. seq.) does not prescribe who shall be liable for freight charges.

There are some specific provisions that are applicable to a limited number of situations. One such provision is 49 U.S.C. § 13706 (formerly 10744), Liability for payment of rates. This section recognizes that there may be persons named as consignees on a bill of lading that are really not principals to the contract of carriage, but are merely acting in an agency capacity for the real party in interest. This section typically would apply to a warehouseman or port facility that receives goods on behalf of the shipper, and then diverts or reconsigns the goods as agent for the shipper, and does not wish to be liable for the additional freight charges accruing on the shipment. By giving the carrier proper written notice, the agent can avoid liability and shift the responsibility to the shipper, consignee or beneficial owner of the goods. This section is generally misunderstood, rarely invoked, and there are few court decisions dealing with its application.

As to your second question, a consignee may be liable for freight charges on the theory that it has received the benefit of the transportation services.

However, you should be aware of a line of court decisions in which the principle of "estoppel" has been applied. Where goods are shipped on a "prepaid" bill of lading, and the consignee-purchaser has paid the shipper-seller for the goods (including the transportation charges), this principle protects the consignee against "double payment" liability for the freight charges. The "estoppel" defense has been applied in both surface and air freight cases.

As a practical suggestion, if you want to avoid this type of problem in the future, check the credit of the companies that you deal with. If you fail to do this, you are assuming a risk that the "bill to" party may default in paying its freight bills.

207) Freight Charges - Freight Held Hostage

Question: We had encountered an issue where there was a discrepancy on several invoices that were not paid to the carrier pending the submission of additional paperwork, these invoices represented a small amount of the total outstanding and the invoices were 49 and 83 days past the invoice date. The carrier accepted another load, parked the truck and indicated the load would be

delivered when we sent a certified check or wired the funds necessary to close the account. Due to time constraints the order was cancelled and instructions were submitted to the carrier to return the truck to the terminal and a check for the full amount of the balance due would be provided to the driver on delivery of the load intact. The freight company then informed us that we would either wire the money or never see the load. I was under the impression this was illegal. After reading some of your other responses, am I correct in assuming that I may withhold payment sufficient to cover a claim for the missing paper.

Answer: As to your first question, a motor carrier has a "carrier's lien" for its freight charges, but the lien is only on the particular shipment and only for the charges due on that shipment. In other words, a carrier can't hold shipment "A" hostage for charges due on shipments "B" or "C". If you tender the charges due on shipment "A", the carrier must release the shipment, or it will be guilty of conversion.

As to the second question, it is legal to setoff a claim for loss or damage against freight charges which may be due to a carrier. However, beware that carriers may have tariff items that provide for a loss of discount or other penalty for late payment.

208) Freight Charges - Interline Shipments

Question: I currently have a contract with the LTL carriers I do business with. In the body of the contract it is clearly specified under a section entitled "Interlining" that "if a shipment is handled by the carrier and a connecting carrier, it will be considered "convenience" interlining and such shipments will transported at the rates and discounts set forth in the contract."

My question is, "if the carrier signed the contract, is the carrier legally bound to honor the standard rates and discounts for the interline shipment or do they have the right to change the rate and discount for interline shipments"?

Answer: If you have a fomal written transportation agreement, and it contains the provisions you have described, it should be enforceable. The only question I would have is whether you may have incorporated the carrier's tariffs into your contract by reference. If you did, it is possible that the carrier's rules tariff may have some provisions governing interline shipments.

If you need a more definitive answer, I would have to review your actual contract.

209) Freight Charges - Late Pay Penalty by Railroad

Question: One of our customers is being invoiced by the Burlington Northern Santa Fe Railway Company for finance charges, which apparently are now being automatically assessed if payment isn't received within 15 days.

The BNSF tells us that CSX is coming out with the same thing soon.

Is this legal and has it been cleared through the STB?

This practice seems to be entirely contrary to the strict regulations motor carriers must comply with regarding late payment penalties.

Answer: What you are seeing is just the tip of the iceberg. Railroads are including more and more offensive and unreasonable provisions in their exempt circulars/tariffs all the time. In theory, the STB could revoke or modify the exemptions for a particular class of rail transportation (such as COFC/TOFC, or boxcar) under 49 U.S.C. § 10502(d), but someone would have to petition for a revocation under that section. Until that happens, shippers using the typical exempt bill of lading, or a contract that incorporates the exempt circulars, are probably bound by those terms and conditions.

210) Freight Charges - Liability

Question: In past answers you have stated that carriers are extending credit to the broker and that no binding contract exists between carrier and shipper therefore preventing any liability to carrier for payment. I have also read that the bill of lading actually is a contract between the shipper and carrier and preserves the right of recourse to shipper for nonpayment of charges by the broker. Do we as a carrier have any right to collect for freight charges from anyone other than the broker? Also how does a shipper going bankrupt affect my collecting freight charges?

Answer: As you have noted, the general rule, supported by a number of court decisions, is that a carrier can't collect from the shipper or consignee, if the broker has been paid, but then fails to pay the carrier. I would note that the decisions are somewhat fact-specific, so there might be situations where the result could be different.

Where a shipper has filed for bankruptcy and has not paid the carrier, the question usually is whether the carrier can collect from the consignee. This is a different situation. If the freight charges were “prepaid” and the consignee/buyer has paid the shipper/seller for the goods, you probably can’t collect from the consignee. If the freight charges were “collect”, the consignee would be liable.

211) Freight Charges - Liability for Demurrage

Question: If a delivery is made outside of the NOR time given by a fuel supplier to the purchaser, and as a result, demurrage is incurred by the purchaser of the fuel (e.g., because there were other vessels at the port when the vessel actually arrived and so the vessel delivering the fuel had to wait), who is responsible for demurrage expenses if it's not addressed in the contract?

Answer: Obviously the carrier wants to collect its demurrage from someone - either the shipper or the consignee - and doesn't really care about the contractual relationship between seller and purchaser.

This really is something that should be covered in the terms and conditions of sale as between seller and purchaser. However, if the contract is silent, the normal rule is to look to the custom and usage of the particular trade, or the prior course of dealings between the parties. Without knowing the custom of your particular trade, I would assume that the party responsible for paying the freight charges would also be responsible for the additional demurrage.

212) Freight Charges - Liability for Payment

Question: I would like to know how we can be held responsible for the payment of the freight bills for the following.

The delivery receipt was marked “prepaid” on a shipment we received. The original bill of lading shows a third party billing collect. The carrier is now coming to us for payment since the third party will not pay and the original bill of lading was also marked collect.

We also had a shipment come in collect that we were refusing. The driver got off the phone with his dispatcher and said it was changed to prepaid. He crossed out collect on the DR and wrote prepaid. Both parties signed. Again they are coming to us for payment saying "they" were not authorized to change the terms.

In both cases the documents we signed does not show that we accepted the freight charges but rather that the charges were prepaid. How can the trucking companies hold us responsible for payment? What happens if we don't pay?

Answer: As a basic rule, the bill of lading (not the delivery receipt) determines which party will be billed for the freight charges and would have primary liability. This is because the bill of lading is a contractual document. Notations on the delivery receipt are legally irrelevant.

The fact that you refused the second shipment does not relieve you of the obligation to pay the charges, unless your refusal was due to damage to the goods which made them substantially worthless, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 10.9.

213) Freight Charges - Liability of Consignee

Question: I provide a collection service for a large airfreight forwarder. My client recently forwarded a claim against a shipper that is experiencing severe financial problems. The shipper is refusing to pay, so I explained that as stated on the air waybill, the shipper, consignee and bill to party are all jointly and severely liable. I have seen that this is true, however, what case law is there that I may contact the consignee or bill to party (which is separate from the shipper) to revert liability. The shipments were all marked prepaid.

Answer: There are court decisions that say a consignee is liable for freight charges on the theory that the consignee has received the benefit of the transportation services. However, where the consignee/buyer has paid the shipper/seller for the goods, and there is a prepaid bill of lading, the law protects the consignee from a "double payment" of the freight charges.

214) Freight Charges - Liability of Consignee

Question: What federal laws allow a carrier to attempt to collect transportation charges from a receiver even if the bill of lading indicates to bill the sender - vis a vis 1) surface transportation and 2) air transportation. Doesn't Title 49 Section 13707 of the US Code allow this, at least for surface transportation? My wish is to bill receivers when the senders (my customers) are out of money or simply are being "deadbeats" and not paying their bills.

When it is a bill third party situation, does the carrier have any more room to attempt to collect from the receiver?

Are there any laws in the State of Illinois that allow for this?

Answer: 1. The Interstate Commerce Act (Title 49, U.S. Code Sections 10101 et. seq.) does not prescribe who shall be liable for freight charges.

There are some specific provisions, which are applicable to a limited number of situations. One such provision is 49 U.S.C. § 13706 (formerly 10744), Liability for payment of rates. This section recognizes that there may be persons named as consignees on a bill of lading that are really not principals to the contract of carriage, but are merely acting in an agency capacity for the real party in interest. This section typically would apply to a warehouseman or port facility that receives goods on behalf of the shipper, and then diverts or reconsigns the goods as agent for the shipper, and does not wish to be liable for the additional freight charges accruing on the shipment. By giving the carrier proper written notice, the agent can avoid liability and shift the responsibility to the shipper, consignee or beneficial owner of the goods. This section is generally misunderstood, rarely invoked, and there are few court decisions dealing with its application.

2. A consignee may be liable for freight charges on the theory that it has received the benefit of the transportation services. However, you should be aware of a line of court decisions in which the principle of "estoppel" has been applied. Where goods are shipped on a "prepaid" bill of lading,

and the consignee-purchaser has paid the shipper-seller for the goods (including the transportation charges), this principle protects the consignee against "double payment" liability for the freight charges. The "estoppel" defense has been applied in both surface and air freight cases.

3. As a practical suggestion, if you want to avoid this type of problem in the future, check the credit of the companies that you deal with. If you fail to do this, you are assuming a risk that the "bill to" party may default in paying its freight bills.

215) Freight Charges - Liability of Shipper

Question: If I as the shipper send out a shipment, collect or third party, and the customer refuses to pay the freight bill, am I ultimately responsible to pay the bill. Let's assume I have a customer purchase order/purchase and sales agreement that the customer directed us to ship collect.

Answer: You have to recognize that there are two separate contractual relationships involved: a contract of sale between the seller and the buyer, and a contract of carriage (usually the bill of lading and carrier's tariffs) between the seller-shipper and the carrier.

Your "deal" with your customer as to who is responsible to pay the freight charges is not binding on the carrier.

As a shipper, you could still be liable to the carrier for the freight charges even if the bill of lading is "freight collect". The only way you can protect yourself is by signing the "Section 7" or non-recourse provision that is found on the front of the Uniform Straight Bill of Lading. This requires the carrier to collect its charges only from the consignee.

Of course, if you did not use a Uniform Straight Bill of Lading (or didn't have a well drafted Transportation Contract with the carrier), you may have a problem and will have to pay the carrier.

I would observe that you still may have a remedy against your customer based on the contract of sale, if they did agree to pay the freight charges.

216) Freight Charges - Liability on Brokered Shipment

Question: A shipper tenders freight (full truckload) to a carrier (Carrier A) on a prepaid basis. Shipper's terms of sale are FOB Origin. Carrier A then hires Carrier B to move this freight to destination. The contract between Carrier A and carrier B states 45 days for payment of freight charges. Carrier A does not pay carrier B - does carrier B have any recourse on the consignee or the shipper to seek payment of their freight charges?

Answer: From your description of the facts, it sounds as though "Carrier A" did not actually transport the shipment, but brokered the shipment to another carrier. I assume, also, that the shipper paid "Carrier A", and that "Carrier A" failed to pay "Carrier B".

Liability for freight charges depends on the facts and the relationships among the parties. Unfortunately, the "double payment" problem is very common when brokers go out of business or abscond with funds. This is a "gray area", and collection agencies and lawyers for the carriers will probably tell you that the shipper or consignee could be liable even though they have paid the broker.

However, the general rule, as supported by a number of court decisions, is that if the shipper has dealt only with the broker, and has paid the broker, the carrier cannot come back to the shipper to collect its freight charges. The legal rationale is that there is no privity of contract between the shipper and the carrier; also, that the carrier has extended credit to the broker, and not to the shipper.

217) Freight Charges - Liability to Carrier When Forwarder Fails to Pay

Question: I work for a small company based out of Atlanta. We ship goods to South America. Recently we discovered that our freight forwarders were not paying the air carrier for service we had paid the forwarder for. The collections department keeps telling us that if the freight forwarder does not pay them by law we will be responsible to pay for it. My question is, is this a true law? We have the checks for all payments we made to the freight forwarder. If this is or is not true how may I obtain a copy of this law?

Answer: I am assuming that you are dealing with an air freight forwarder, that the forwarder has issued its own "house air waybill" to you, has invoiced you directly for the air freight charges, and that you have paid the invoices in full.

If this is the case, you should not be liable to the air carrier, because there is no "privity of contract". In other words, you have one contract with the air freight forwarder, and the forwarder has a different contract with the air carrier. (The forwarder ordinarily consolidates a number of small shipments and tenders a full container to the air carrier under a separate air waybill issued by the air carrier.)

Note that an exception to the above could be where the forwarder is acting as an agent (IATA agent), and not issuing its own HAWB, in which case the shipper might still be liable, although I am not aware of any court decisions directly addressing this fact pattern.

218) Freight Charges - Method of Discounting

Question: My company occasionally ships in-store signs and other promotional materials to our retail outlets via a nationally recognized small package/less-than-truckload carrier. The person in my company who is in charge of these shipments has negotiated a “deal” with the carrier’s representative by which we are given a discount on shipping this material. The problem is that the discount is not accomplished through a reduction in the carrier’s published rate for the weight of a given package, but through a deliberate lowering of the package's stated weight. For example, a 15-pound package will be labeled and invoiced by the carrier as a 5-pound package, thus reducing the rate.

My question is what potential legal liability is my company opening itself up to by silently condoning this practice?

Answer: Unless you have a good written transportation contract that specifically spells out this unusual procedure, this is NOT a good idea.

If these shipments are moving under a Uniform Straight Bill of Lading and the National Motor Freight Classification, you would be subject to a re-billing at the correct weight.

219) Freight Charges - Misclassification

Question: We are a third party logistics company. We had a customer that presented his shipment as miscellaneous auto parts and it turned out to be an entire assembled front end of a car in a crate. That changed the class and the item number and therefore the charges were increased. The customer paid in advance what we billed him based on the orginal information and when we re-billed him for the additional charges, he refused to pay. What can we do? Our court date is coming up soon. Thanks in advance for all your help.

Answer: IF you were the motor carrier that transported the shipment, and IF you were a participant in the National Motor Freight Classification, and IF the rate charged was in an applicable published tariff, and IF you complied with the applicable federal regulations regarding rebilling, and IF you filed suit within the applicable statute of limitations...

Then, the answer would be simple. (Yes, you can collect based on the actual commodity shipped.)

However, you say you acted as a third party logistics provider, which means that ordinary common law principles of the law of contracts apply. In other words, you have to prove what your contract was. If it was not in writing, or did not cover this situation, you may have a problem.

220) Freight Charges - Multiple Carriers

Question: Our customer contracted with Carrier A to come pick up the product from our facility and to deliver to their facility. Carrier A contracted with Carrier B to do the actual pick up and delivery. Our customer paid Carrier A, however, Carrier A did not pay Carrier B, and now Carrier B is billing us. Are we liable?

Answer: Without seeing the shipping documents (bill of lading) and knowing more about the "carriers" involved, I can't give you a definitive answer. For example:

1. Did "Carrier B" issue a bill of lading when it picked up the shipment? Who is shown as the carrier on the bill of lading? Was "Section 7" (the non-recourse provision) signed?

2. Was "Carrier A" only a broker, and brokered the load to "Carrier B"? Did "Carrier B" originally send its freight bill to "Carrier A" for payment? Is "Carrier A" still in business?

As a practical matter, I would suggest that you contact your customer, who made the arrangements with "Carrier A", and demand that they straighten out the matter. You should also explain the situation to "Carrier B" and ask them to pursue collection from "Carrier A".

221) Freight Charges - Ocean Freight Overcharges

Question: We have an ocean freight forwarder that overcharged us approximately $18,000 in ocean freight. They applied the wrong rates. Even after we advised them they were using the wrong rates.

I've have been working with them for the past month to recover the overcharges. Initially they said they would refund the money. Now they are telling me that refunding ocean freight is illegal under FMC regulations.

Is that true? Where can I find a reference to this?

Answer: Ocean carriers and Non-Vessel Operating Common Carriers (“NVOCC”) are required to maintain tariffs with all of their rates and charges and MUST charge the tariff rates (essentially the "filed rate doctrine"). Many shippers have "Service Contracts" that are used in place of tariff rates: the rates, terms and conditions of these contracts are enforceable.

Now, I can't tell how you determined that you were "overcharged" or whether your "ocean freight forwarder" is a forwarder or an NVOCC. But, if you were charged more than the tariff or service contract rate, you have a right to file and recover the overcharge. Note that there was (maybe still is) an informal procedure before the FMC to allow ocean carriers to pay overcharges when based on tariff publishing error or similar mistakes.

222) Freight Charges - Off-Bill Discounting

Question: Before its demise, the Interstate Commerce Commission (ICC) issued rules forbidding refunds on outbound collect freight where the shipper did not pay the bill yet wanted a refund on the revenue paid by their customer.

While distasteful to some, I know that law or rule was eliminated when the ICC sunsetted. Would you verify that there is nothing illegal for a shipper to get a refund discount on outbound collect freight at this point of time?

The ones I have seen indicate generically that an allowance may exist for the shipper or something to that effect. But the exact amount is not shown.

Answer: If you are talking about off-bill discounting, there still is a statutory provision requiring motor carriers to disclose any allowances, rebates, etc. 49 U.S.C. § 13708 provides:

> Sec. 13708. Billing and collecting practices
>
> (a) DISCLOSURE- A motor carrier subject to jurisdiction under subchapter I of chapter 135 shall disclose, when a document is presented or electronically transmitted for payment to the person responsible directly to the motor carrier for payment or agent of such responsible person, the actual rates, charges, or allowances for any transportation service and shall also disclose, at such time, whether and to whom any allowance or reduction in charges is made.
>
> (b) FALSE OR MISLEADING INFORMATION- No person may cause a motor carrier to present false or misleading information on a document about the actual rate, charge, or allowance to any party to the transaction.
>
> (c) ALLOWANCES FOR SERVICES- When the actual rate, charge, or allowance is dependent upon the performance of a service by a party to the transportation arrangement, such as tendering a volume of freight over a stated period of time, the motor carrier shall indicate in any document presented for payment to the person responsible directly to the motor carrier that a reduction, allowance, or other adjustment may apply.

The way I read it, the statute explicitly requires the carrier to disclose on the freight bill “the actual rates, charges, or allowances for any transportation service and ... whether and to whom any allowance or reduction in charges is made...”, UNLESS the allowance (rebate) is for some actual “service by a party to the transportation arrangement, such as tendering a volume of freight over a stated period of time” in which case it may be sufficient to merely state that “a reduction, allowance, or other adjustment may apply”.

223) Freight Charges - Offsetting L&D Claims

Question: One of our warehouse managers wants to withhold payment for a freight bill as "leverage" over the carrier to get them to pay a claim. I told him he could not do that and he insists on doing it anyway. I know I used to be right--but things have changed so much that I'm not as sure. Who is right?

Answer: At one time carriers were prohibited from offsetting claims against freight charges on the grounds that it could result in discrimination among their customers. However, the anti-discrimination statute was repealed in ICCTA.

However, before offsetting claims, a shipper should check the carrier's tariff rules for penalties, such as a loss-of-discount, for failure to pay freight charges within a specific time. Some carriers

prohibit offsetting in their rules tariff. Shippers can negotiate to waive these rules, and contract shippers can insert appropriate provisions in their contracts.

This subject is covered in greater depth in *Freight Claims in Plain English* (3rd Ed. 1995) at section 12.3.6, Counterclaims and Setoffs.

224) Freight Charges - Overcharge Claims on Household Goods

Question: Can you please advise the time period for the filing of overcharge claims on Household Goods shipments? I realize the 180 days applies to other than household goods. Does that mean it reverts back to the 3 years for Household Goods?

Answer: You have raised an interesting question.

Under 49 U.S.C. § 13702(c), household goods carriers are required to maintain rates, rules and practices in a published tariff. The tariff must be made available for inspection by the Surface Transportation Board (STB) and shippers upon reasonable request. Thus, the tariffs are no longer on file with a federal agency, but must be maintained at the carrier's office and made available for inspection.

Under 49 U.S.C. § 13702(a**Error! Bookmark not defined.**) a household goods carrier is required to charge and collect only its tariff rate. In other words, the carrier is still subject to the "filed rate doctrine".

Under 49 U.S.C. § 14704(b), a household goods carrier is liable "for amounts charged that exceed the applicable rate for transportation or service contained in a tariff" (i.e., an overcharge).

With respect to time limitations, you are correct the 180-day rule does not apply to household goods carriers.

Under 49 U.S.C. § 14705(b), the time period to bring a civil action (i.e., file a lawsuit) for overcharges is 18 months. But, it should be noted that this period is extended for six (6) months from the date the carrier declines the claim, as long as the initial claim was submitted to the carrier within the 18 month period.

You should also be aware that 49 U.S.C. § 14705(c) allows you two (2) years to file a complaint with the STB or Secretary of the Department of Transportation "to recover damages under section 14704(b)" (i.e., the overcharge section referenced above). You would then have one (1) year to bring a civil action to enforce a decision by the STB or Secretary. 49 U.S. § 14705(e).

You are probably wondering why Congress enacted two different time frames. Unfortunately, when Congress passed The ICC Termination Act and re-drafted the entire Interstate Commerce Act, it did a very sloppy job. Congress indiscriminately chopped several sections. As a result, there are cross-references among various sections that simply do not make sense. The time limitations for overcharge claims is just one example of this poor drafting.

To be safe, your best bet when bringing an overcharge claim against a household goods carrier is to make sure that it is filed within 18 months.

225) Freight charges - Pallet Weight

Question: Is there is a tariff or rule stating that carriers have the right to charge for pallet weight on a shipment? It does make sense that shippers should pay for this additional weight because it could prevent a carrier from putting another shipment on the trailer if everything you have is on pallets, thereby increasing the total weight on the trailer.

Answer: Item 995 of the NMFC states that: "A shipping carrier, container or package, or pallet, platform or skid constitutes part of the gross weight." If your shipments move under a Uniform Straight Bill of Lading and the carrier is a participant in the NMFC, this rule would be applicable.

Note that this rule is not applicable unless the carrier is a participating carrier in the NMFC, or it has a similar rule in its independently published tariff.

I would also point out that you can avoid this rule by incorporating appropriate language in your transportation agreement.

226) Freight Charges - Parcel Express

Question: UPS has just notified our client that they have a serious problem in that they owe some $40,000 plus dollars.

It seems that UPS was sending the transportation invoices to an address other than our client. The firm or person receiving the invoices never notified either our client or UPS that they were receiving the invoices in error.

The time span covering the invoices involved is approximately 6 months.

I have advised my client that in spite of the fact that UPS mailed the invoices to the wrong party did not relieve them of their responsibility to pay since they had utilized the service.

They also asked since these invoices are so late in being received is there any precedent for a negotiated payback, either in the form of paying less or paying over an agreed time frame.

Answer: Lots of folks seem to be complaining about UPS and its billing practices.

From the limited information you have provided, unless the bills are incorrect, it sounds as though this shipper should probably be liable for the shipping charges. The statute of limitations for motor carrier freight bills is 18 months.

I really can't speak for UPS as to whether they would be willing to accept some kind of installment payments in view of this situation, but it would be worth a try.

227) Freight Charges - Payments to Bankrupt Carrier

Question: One of our carriers filed for Chapter 11 bankruptcy about eight months ago, at which time we owed them for some freight charges. We assumed that we would hear something from the attorneys or the court about paying the charges, which were due. We didn't receive anything until a few days ago when we got a notice from the trucking company demanding payment. Is it all right to pay the trucking company directly?

Answer: If the carrier is in reorganization under Chapter 11, it is probably considered a "debtor in possession" and may be continuing to conduct operations. Thus, if you agree on the amount owed, you should pay the freight charges.

Payment should be made to "(name of carrier), Debtor in Possession". You should also ask for a release before making payment. This is because there may be a loss of discount or other penalty for late payment in the carrier's tariffs, and it is quite possible that the carrier may retain auditors or collection agents to try to collect late payment penalties from its shippers.

228) Freight Charges - Prepaid vs. Collect

Question: We are an airfreight company and we picked up a shipment that moved on a shipper's bill of lading, which did not state whether charges should be prepaid or collect to my customer (consignee). When my customer received the bill she refused the charges, my argument is with my office administrator, she says that if there is nothing stated on the bill it automatically bills collect. Is this correct? What are the rules governing bills of lading and payment terms?

Answer: First, I would note that there are many different bills of lading in use, so without seeing the actual document, I can only give you a general answer.

The current version of the Uniform Straight Bill of Lading, as set forth in the National Motor Freight Classification, contains a box which states:

"Freight charges are PREPAID unless marked collect."

"CHECK BOX IF COLLECT / /"

Thus, if the shipper used this common form, the presumption is that the shipment is "freight prepaid" unless otherwise indicated by checking the box on the face of the bill of lading.

229) Freight Charges - Prepay & Add

Question:

Is it illegal for our company to charge customers for amounts greater than the actual freight charges paid to the carrier on "prepay and add" invoices.

Answer:

Section 7 of the Negotiated Rates Act of 1993, and former regulations of the ICC in 49 C.F.R. 1051.2 were addressed to "off bill discounting". Essentially, these prohibited carriers from paying a discount or allowance to anyone other than the payor of the freight bill and required carriers to disclose all discounts or allowances on their freight bills. The statutory provision was carried forward in the ICC Termination Act of 1995 ("ICCTA"), and now appears at 49 U.S.C. § 13708, "Billing and collecting practices". The ICC regulations at 49 C.F.R. 1051.2 are no longer in effect. It should be noted that, in any event, the statutory provisions and former ICC regulations only applied to carriers, and not to shippers.

Thus, the real question is whether a purchaser could reasonably claim commercial fraud or misrepresentation if the seller adds an amount higher than the actual freight charge to its invoices.

Some companies place a notice, either in their terms of sale or on their invoices to disclose that the freight charges being invoiced do not reflect volume discounts or incentives received from the carrier. Others use wording such as "freight and handling" or "shipping and handling charge".

The best advice is to use a notice in your terms of sale and/or invoices which constitute a sufficient disclosure to your customer to avoid potential disputes with your customers.

230) Freight Charges - Published Rates

Question: When a carrier deviates from its published rates and provides transportation services for “quoted rates”, is there a format that identifies and legitimizes these rates for audit and payment purposes, as well as the agreement to them by both parties; a “spot rate quote format,” if you will?

Answer: Most large LTL carriers have class rate tariffs and offer discounts from the class rates to their customers. These may be reflected in a rate quote, a letter or a formal transportation contract.

TL carriers usually quote flat rates or mileage rates. Again, these can be set forth in a rate quote, ordinary letter or a formal agreement.

Smaller shippers and carriers sometimes do business over the phone - with verbal quotes and agreements. This is a dangerous practice, and frequently results in disputes.

We always recommend to both shipper and carrier clients that they enter into formal written transportation contracts that set forth the agreed rates AND all of the rules, terms and conditions that are applicable to the transportation services.

231) Freight Charges - Re-Classification

Question: My company opened a new account with a LTL carrier and sent multiple shipments all within 2 weeks. When I received the bills for these shipments, the freight had been reclassified from class 85 to class 250, which of course significantly increased the freight charges. When I originally set up this account with the carrier I explained to the carrier's sales representative our operations, merchandise, current class we ship at and our discounts with current carriers.

I have contacted our sales rep many times regarding this issue. In the beginning he said he would take care of it and recently he has said there is nothing more he can do except send out a field inspector.

The field inspector has been out here and I just found out from their collection department that they are refusing to change the class. All of our bill of ladings stated the merchandise was class 85.

Can they do this?? I would have thought they had to notify us prior to continuing with the shipment.

Answer: If you are shipping with an LTL carrier, using the Uniform Straight Bill of Lading, and the carrier is a party to the National Motor Freight Classification, then Item 360 of the NMFC will apply. That rule states:

> Sec. 3 Inspection of Property. When carrier's agent believes it is necessary that the contents of packages be inspected, he shall make or cause such inspection to be made, or require other sufficient evidence to determine the actual character of the property. When found to be incorrectly described, freight charges must be collected according to proper description.

If you dispute the proper classification of your shipments, you can contact one of the classification specialists at the National Motor Freight Traffic Association: try George Beck (703) 838-1813 or Dan Horning (703) 838-1820. Their e-mail is nmfta@erols.com and their website is www.erols.com/nmfta.

The best way to avoid this kind of problem is to enter into a written transportation agreement with your carriers.

232) Freight Charges - Refused Shipment Returned to Vendor

Question: Is a truckload carrier entitled to freight charges if a delivery was attempted but refused by the consignee because of damage?

In this case, the carrier supervised the loading of the trailer, which resulted in much of the load being damaged. The entire shipment was returned to the origin. The carrier does not intend to invoice freight charges for the return of the damaged shipment, but is billing for transportation to the consignee. We will be claiming for the product loss plus any refurbishing costs to salvage the good product. Again, are we legally obligated for freight charges on the unsuccessful delivery to the consignee?

Answer: One of the obligations under a contract of carriage is to deliver the shipment in good order and condition. If the shipment sustained substantial damage and was unusable or unsaleable at the time delivery was attempted, the carrier is in breach of its contract and is not entitled to its freight charges.

On the other hand, if there is only partial damage, the usual rule is that the consignee should accept the shipment, and segregate the damaged and undamaged portions in order to mitigate the loss. Of course, in many situations, the consignee is not in a position to refurbish, repackage, repair, etc., to the goods must go back to the shipper. In a partial damage situation, the carrier is not entitled to collect the pro-rata portion of its freight charges attributable to the damaged portion of the shipment. And, if the freight charges have actually been paid, the claimant can recover the pro-rata portion of the freight charges as part of its claim. See *Freight Claims in Plain English* (3rd Ed. 1995) at 7.4.9.

The answer really depends on the nature of the freight and the extent of the damage, and whether it was necessary to return the goods to the shipper. If so, I would say the carrier is not entitled to its freight charges.

I do note that the carrier voluntarily returned the shipment without charge so that the goods could be refurbished and/or salvaged. You may wish to take this into account in determining your position.

233) Freight Charges - Replacement Shipment

Question: Our company ships refrigeration equipment FOB origin, prepaid, prepaid & add, collect or third party. We try to leave it up to our customer to file claims with carrier, but often will get involved if unit is refused at destination or we accept it back for repair. Many times we will send replacement units, which brings me to my question. If we send a replacement, should this unit go prepaid, collect or free astray?

One of our carriers insists that replacement freight ships "free astray - deadhead" against the original freight bill. If we err and ship collect or prepaid, can't the expense of freight be applied as an expense to the claim? This carrier has deducted the freight from their claim noting that they would have hauled the item at no charge, since the original bill was noted as damaged. They say they have special non-revenue accounts set up for this purpose. They state that they will not pay retail costs of replacement freight by themselves or another carrier. Are they correct? What difference does it make if it moves free astray or not? In my opinion they are still liable for the added freight expense.

Answer: You have an "apples and oranges" situation here. Technically, there are two separate shipments and two separate contracts of carriage: the original shipment and the replacement shipment.

With respect to the original shipment, if it was lost or damaged in transit, the carrier would be liable for the invoice price to the customer plus the freight charges, if paid. This would be true whether or not there was any "replacement" shipment made at a later time.

The concept of a "free astray" is usually applied to shipments which are misplaced or misdelivered by the carrier. When the shipment is found it is delivered to the consignee "free astray", i.e., with no charge. This merely reflects the fact that the carrier is obligated to deliver the shipment to the named consignee under its contract of carriage.

It appears that this carrier is voluntarily agreeing to deliver a second (replacement) shipment free of charge when the original shipment is lost or damaged in transit. However, this has nothing to do with the carrier's liability for original shipment, nor the measure of damages for the loss or damage to the original shipment.

234) Freight Charges - Shipment Held Hostage

Question: I am dealing with a hostage trailer situation and would like to know what my company can do to recover product damages.

The freight was brokered in Sepember. The companies involved say each owes the other money and they wil hold our freight until they get their money. The owners of the companies involved tell me there is nothing I can do about it. The company I orginally brokered to did not show up for the freight and therefore brokered to someone else. I am not familar with the company that has our freight.

I have contacted many agencies including, local law enforcement, FBI, ODOT, and Dept. of Service & Transportation. None can assist me. I have filed a damage claim the week of 3/13 and sent it certified, however I have not received a response.

I will appreciate any assistance you can give me.

Answer: First of all, you have to find out who is holding your freight and how much the freight charges are for your shipment. A motor carrier has a "lien" for freight charges and does not have to deliver the shipment until the charges on the shipment have been paid. The carrier's lien applies only to the shipment in its possession and the freight charges on that particular shipment. If you tender payment of the freight charges and the carrier does not release the shipment you have a legal action against the carrier for "conversion" and can sue for the value of the goods and any other damages you may have incurred.

Brokers do not have a lien and there is no legal basis for a "broker" to hold freight. I can't understand why you have waited some 7 months to get legal advice on this, but you should immediately retain a qualified attorney to handle this for you.

235) Freight Charges - Shipper Liability to Subcontractor

Question:

Is a shipper liable to a truck line for freight charges owed to it by a steamship line when the ocean carrier issued a through door-to-door bill of lading, hired the truck line for the inland move, and collected freight charges from the shipper, but failed to pay the trucker?

Answer:

No. Under a through Bill of Lading, the shipper's contract is with the ocean carrier, and there is no privity of contract between the trucker and shipper. We note, however, a growing number of these occurrences due to the slow pay cycles occurring in the ocean trade.

236) Freight Charges - Shipper's Liability

Question:

I have a manufacturing client who shipped goods freight collect (clearly indicated on bill of lading and signed by carrier) to a consignee who later went bankrupt and didn't pay the freight bills. Now the carrier is coming back to the shipper for payment. I have many of your books, but I could not find information directly on point. I found information regarding brokers and freight forwarders, but not bankrupt consignees. The carrier is citing the U.S. Supreme Court decision Southern Pacific v. Commercial Metals. What do you recommend?

Answer:

It appears that you do not have any written transportation contract with the carrier in question, and that the shipment moved in common carriage under a standard bill of lading.

A shipper will remain liable for freight charges even if the bill of lading is marked "collect", UNLESS the shipper executes the "non-recourse" or "Section 7" box on the face of the bill of lading. The non-recourse provision will generally protect the shipper if the consignee fails to pay or goes bankrupt. The Supreme Court case you referred to is Southern Pacific Transportation Co. v. Commercial Metals Co., 456 U.S. 336 (1982); it is on point and supports this conclusion.

237) Freight Charges - Shipper's Liability

Question: My company ordered several containers of bowling equipments from a Texas company to be shipped to our customer in China. The contract between us and the Texas seller provides for CIF price. In other words the price included the shipping charge. Unbeknownst to us, the seller asked its forwarder to put our company on the Bill of Lading as the "shipper." But in the "Marks and Numbers" box on the B/L appears the words "Freight Prepaid." The B/L is "To Order" in the consignee box. After we paid the seller the full amount for the purchase price and after the goods arrived in China, the seller gave me the original B/L and asked me to endorse it so that our customer in China could pick up the goods. I wrote my name on the back of the B/L. However, now the carrier is suing our company saying that we owe them the unpaid freight.

If we have never authorized anyone to put our name on the B/L as the shipper, but the seller did it without our knowledge, should we be liable for the freight?

Also, the carrier admits that the Export Declaration puts the seller as the exporter. Should the carrier be on notice that the seller, not us, is the shipper?

Shouldn't the carrier issue some kind of receipt when it receives the cargo?

Answer: This is not a simple case for which I can give you a definitive answer without seeing all the documents and possibly doing some research.

This sounds typical of situations where goods are shipped by a manufacturer to a customer of another party (seller). In such cases, it is common for the manufacturer to put the seller's name on the shipping documents, so the buyer does not know the actual source of the goods.

The carrier, of course, does not know about the details of the transaction between the seller, buyer and actual manufacturer. You may be liable to the carrier, but you may also have some kind of recourse against the manufacturer in Texas.

238) Freight Charges - Shipper's Liability; "Section 7"

Question:

We are a small trucking company that hauled a number of loads to a consignee, where a Straight Bill of Lading - Short From - Original - Not Negotiable was used. All loads were delivered with "clean bills" and no claims are pending. The freight was to be "collect". The consignee has not paid us and now they are going out of business. We have contacted the shipper or consignor, invoking the Section 7 Clause on the Bill of Lading, which is unsigned, but they refuse to pay. How can we collect the money owed us without having to spend an arm and leg to do so?

Answer:

As a general rule, a shipper remains primarily liable for freight charges, even when the bill of lading is marked "collect", unless the shipper signs the "non-recourse" provision (also referred to "Section 7") on the face of the uniform straight bill of lading. The leading case on this point is the 1982 Supreme Court case of Southern Pacific Transportation Co. v. Commercial Metals, 456 U.S. 336 (1982).

You may try citing the Commercial Metals case to your shipper, but if that doesn't work, your only recourse is probably in court. Depending on the location of the shipper, the amount, and whether you are a small business, you may be able to bring suit in your local small claims court.

239) Freight Charges - Shipper's Liability; "Section 7"

Question:

If a carrier agrees to deliver freight to a customer on a collect basis and the consignee goes out of business before paying the freight charges, who is then responsible for paying the freight charges?

Answer:

The general rule is that the shipper is primarily liable for payment of freight charges. A shipper may be able to protect himself on a collect shipment by signing what is referred to as the "non-recourse" or "Section 7" provision - a box on the front of the uniform straight bill of lading. Unless this is done, however, and the consignee fails to pay, the carrier can go back to the shipper for payment.

240) Freight Charges - Statute of Limitations

Question:

What is the applicable statute of limitations for a trucking company to collect freight charges, when the shipper paid the broker and the broker went "belly up" and never paid the trucker? The trucker says it is the 5 years, which is the statute of limitations in our state. The shipments in question moved from New York to Nebraska.

Answer:

The applicable statute of limitations is the 18 month time limit in 49 USC 14705.

Prior to the ICC Termination Act (effective 1/1/96) there were other statutes of limitation in effect, see former 49 USC 11706. For many years the statute of limitations was 3 years; it was shortened by the Negotiated Rates Act of 1993 in two phases - first to 2 years, then to 18 months. You might try researching former section 11706 for additional case law.

Note: The only exception that comes to mind is if the carrier was acting as a contract carrier (as opposed to a common carrier) in which case the parties could have included some other time limit for bringing suit in their contract.

I would also observe that there is a body of case law which supports the position that a shipper which has paid a broker cannot be liable ("double payment") to the motor carrier.

241) Freight Charges - Statute of Limitations

Question: A non-contracted carrier is sending us a corrected freight bill that dates back to 1997 for fuel surcharge and s/s charges. Do we have to pay this?

Answer: The statute of limitations for a carrier to bring a lawsuit to collect its freight charges is 18 months from the date of delivery, see 49 U.S.C. Section 14705. Thus, you have no legal obligation to pay the bill that you have described.

242) Freight Charges - Tariff Rules

Question: We have an agreement with a particular carrier, which references a specific tariff. We also have a letter from the carrier's account manager that specifically addresses a particular issue (basically the letter states that there will be no charges based on lineal feet). Now this carrier has "gone-back" and reviewed paid freight invoices and brought new and/or additional charges, citing lineal feet and line-haul charges of certain shipments.

My question is: does the carrier have the legal right to void the letter, and use the tariff to charge us? Can you point us in the right direction on this?

Answer: Without seeing your "agreement" (is it a formal written transportation contract?), I can't give you a definitive answer. Assuming you have a written contract, it sounds as though the letter from the carrier's account representative could be a modification or amendment to the contract. If so, the contract, as modified, would be binding on the carrier and the carrier cannot unilaterally revert to the tariff rule.

As a general comment, I would note that this problem could have been avoided by a properly drafted transportation contract. Also, it is generally not a good practice to refer to carrier's tariffs or incorporate them by reference into a contract.

243) Freight Charges - Terms of Sale and Bill of Lading

Question: If I make a shipment collect or third party, and the customer refuses to pay the freight bill, am I ultimately responsible to pay the bill? Let's assume I have a customer purchase order/purchase and sales agreement that the customer directed us to ship collect.

Answer: You have to recognize that there are two separate contractual relationships involved: a contract of sale between the seller and the buyer, and a contract of carriage (usually the bill of lading and carrier's tariffs) between the seller-shipper and the carrier.

Your "deal" with your customer as to who is responsible to pay the freight charges is not binding on the carrier.

As a shipper, you could still be liable to the carrier for the freight charges even if the bill of lading is "freight collect". The only way you can protect yourself is by signing the "Section 7" or non-recourse provision that is found on the front of the Uniform Straight Bill of Lading. This requires the carrier to collect its charges only from the consignee.

Of course, if you did not use a Uniform Straight Bill of Lading (or didn't have a well drafted Transportation Contract with the carrier), you may have a problem and will have to pay the carrier.

I would observe that you still may have a remedy against your customer based on the contract of sale, if they did agree to pay the freight charges.

244) Freight Charges - The "Non-Recourse" Provision

Question: Many of our consignees place their order as customer pick up and then contact either through a 3rd party logistics firm, or by their own distribution department a carrier to come in and pick up their order. Carrier calls our DC and makes an appointment based on PO number given to them by consignee. We issue a bill of lading with Customer Pick up in the routing section.

If a consignee would default in paying their carrier, would that carrier have recourse against the shpper.

Answer: If you are shipping by a common carrier and using some version of the Uniform Straight Bill of Lading, there is usually a box on the right side of the BOL which refers to " Section 7" or the "non recourse" provision.

As a general rule, if the shipper signs in the space provided in the non-recourse box on the bill of lading, the carrier can only look to the consignee for payment of its charges. In other words, if this is signed, you should be protected in the event the customer doesn't pay, goes out of business, etc.

245) Freight Charges - The "Non-Recourse" Provision

Question: When is the shipper responsible for the freight bill if it is a collect load and the consignee declines to pay for financial reasons?

Our problem: The shipper sent this load collect and signed off on the section 7 part. The consignee refuses to pay due to financial difficulty. They have not filed for bankruptcy yet. The shipper states also that they have been told by the consignee that they won't get paid for the product, which the shipper states to us is a second reason why they won't pay for the freight.

We have reason to believe that the consignee ordered this product with the intention of not paying for the product or the freight charges, but we haven't any proof, this was through word of mouth. Is there any recourse at all?

Answer: I assume that your company is a motor carrier, and you are attempting to collect your freight charges.

The general rule is that when the shipper signs "Section 7" (the "non-recourse" provision on the face of the Uniform Straight Bill of Lading), the carrier must collect its freight charges from the consignee.

Unfortunately, it would appear that your only recourse is against the consignee. You may have to retain counsel and bring a lawsuit if you have trouble collecting your freight charges.

246) Freight Charges - The "Non-Recourse" Provision

Question: When shipping with a standard bill of lading, does the Section 7 "non-recourse" provision also apply when the carrier is instructed to bill the freight charges to a "third-party?"

Answer: The language of Section 7 of the Uniform Straight Bill of Lading says "without recourse on the consignor..." To my knowledge, there are no court decisions which discuss your question, but I don't see why the "non-recourse" provision would not apply if the charges were billed to a "third party" (a party other than the consignee).

I would qualify my answer by suggesting that if the "third party" were an agent of the shipper (such as the shipper's freight bill audit and payment company), the carrier could still come after the shipper to collect unpaid charges.

247) Freight Charges - Third Parties & Offsets

Question: We are a freight broker and we have a customer who is a “third party bill to”. They have been doing business as an “agent” for various customers that they have. They arrange shipments with various carriers, with all freight charges billed to them. They are operating as a freight forwarder, even though they do not have any ICC authority as a Broker, Freight Forwarder, Common or Contract carrier and no cargo insurance.

I have two questions:

1) Is there any law that allows a 3rd party or a shipper to deduct open freight claims from open freight charges without our approval, even if the freight claims are still in process or have been denied?

2) Since this 3rd party has no ICC authority and they are not paying the open freight bills or have deducted freight claims against our open freight bills, can we by law re-bill the actual shipper of record, which is their customer? At the same time since we have no rates in place with the actual shipper of record, can we re-bill at our higher rate base versus the discounted rate we originally billed to the 3rd party?

Answer: First, the definition of a "broker" is found in the FMCSA (formerly ICC or FHWA) regulations at 49 C.F.R. Part 371, and provides:

> (a) "Broker" means a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport.
>
> * * *
>
> (c) "Brokerage" or "brokerage service" is the arranging of transportation or the physical movement of a motor vehicle or of property. It can be performed on behalf of a motor carrier, consignor or consignee.

It would appear that the activities of this customer ("agent") fall within the definition of a "broker". Accordingly, the Interstate Commerce Act requires that it must "register" with the Department of Transportation (FMCSA), see 49 U.S.C. §§ 13901 and 13904. This registration requirement replaces the former statutory requirement to obtain a "license" from the ICC. The FMCSA has established regulations governing applications for broker registration that are published at 49 C.F.R. Part 365.

If this company is not duly registered, it is acting illegally, and you should not do business with it!

Now, as to your two questions:

1) There is no law that prohibits a 3rd party or a shipper to deduct open freight claims from open freight charges.

2) You probably cannot re-bill the actual shipper of record. The problem is that you have no contractual relationship with the shipper ("privity of contract"). In addition, if the shipper has already paid the broker for the freight charges, it generally will have a defense to your claim and will not have to pay again ("double payment").

248) Freight Charges - Time Limits

Question: What is the statute of limitations for freight bills? Is there a difference between UCC and CFR 49 during normal trade? We have a carrier that has altered our load confirmations after dispatch, and is now trying to collect unauthorized additional charges not outlined on our original load confirmations.

I was under the impression that there is an 18-month statute of limitations. Are there restrictions associated with this?

Answer: In answer to your first question regarding the statute of limitations for a carrier to recover its freight charges you are correct; the statute of limitations is 18 months. This time period runs from the date of delivery. 49 U.S.C. § 14705.

Please note, however, with respect to any charges in addition to the original freight charges, the carrier must bill these additional charges "within 180 days of receipt of the original freight bill in order to have the right to collect such charges." 49 U.S.C. Section 13710(a)(3)(A).

I'm not sure what your question is regarding the difference between UCC and CFR 49. The UCC stands for the Uniform Commercial Code. Virtually all states have enacted their own version of the UCC. The only section of the UCC that would apply to motor carrier operations is Article 7, which covers the contents of Warehouse Receipts and Bills of Lading; there are not provisions on statute of limitations.

Please note, however, that all state laws governing prices, routes and services of a motor carrier are preempted by federal statute, 49 U.S.C. 14501(c), and this preemption has been interpreted broadly by the U.S. Supreme Court. Therefore, to the extent any UCC provision is deemed to regulate a carrier's prices, routes or services, the UCC would be preempted and unenforceable.

On the other hand, title 49 of the CFR (Code of Federal Regulations), which is entitled "Transportation" and does apply to motor carrier operations. Although there is no statute of limitations section in the CFR since it is covered in the U.S. Code, the CFR does have a provision governing the payment of transportation charges -- 49 CFR Part 377. Part 377 establishes such things as the maximum credit period a carrier may extend to its customer (30 days) and rules governing the assessment of late payment charges by carriers.

249) Freight Charges - Time Limits for Billing & Collection

Question: We are a third party provider of freight payment services and other services. One of our shippers received a freight bill from a motor carrier (apparently not the popular undercharge issue) from three years ago. We have two questions:

1. What are the specific time limitations for a motor carrier to bill a shipper on a shipment, albeit that the charges were legitimate in the first place?

2. Is there a quick and easy web site that spells out time limitations/requirements for filing loss, damage and overcharge claims all modes, or do you have a handy cheat sheet that would be easy to use as a quick reference?

I need to clarify a technical point on my question. According to what we know from the shipper, the carrier never billed them for carrying the freight until now. So, this is the first bill they received rather than an additional bill. Does the same 18 months and 180 days still apply?

Answer: *Freight Claims in Plain English* (3rd Ed. 1995) contains a handy reference chart that summarizes time limitations for different modes; the text can be purchased through the Transportation & Logistics Council.

With regard to your question, the statute of limitations for a carrier to begin an action to recover charges for transportation services is 18 months. If a carrier seeks to collect charges in addition to those originally billed, it must issue a new bill within 180 days of the original bill in order to be able to collect any charges in addition to those originally billed.

250) Freight Charges - Time Limits on Corrected Freight Bills

Question: A non-contracted carrier is sending us a corrected freight bill, which dates back to 1997, for fuel surcharge and s/s charges. Doesn't the statute require a carrier to issue a corrected freight bill in 180 days?

Answer: You are correct that 49 U.S.C. § 13710(a)(3)(1) requires that a carrier "must issue any bill for charges in addition to those originally billed within 180 days of the receipt of the original bill in order to have the right to collect such charges." Note that if a carrier has complied with the

above, it must then bring a lawsuit to collect its freight charges within 18 months from the date of delivery, see 49 U.S.C. § 14705. Thus, you have no legal obligation to pay the bill as you have described it.

251) Freight Charges - Time Limits on Railroad Freight Bills

Question: We process railroad freight bills as a 3rd party for clients. Recently, one rail line has issued billings for shipments over 3 years old. Most of the billings are for regulated traffic moving interstate and a few are for demurrage at the receiving location. Neither we or the client can find any record of having paid these bills.

Has the Statute of Limitations expired in these cases preventing the railroads from collecting on shipments over 3 yrs. old.

Answer: 49 U.S.C. § 11705(a) provides: "A rail carrier providing transportation or service subject to the jurisdiction of the Board [the Surface Transportation Board] under this part must begin a civil action to recover charges for transportation or service provided by the carrier within 3 years after the claim accrues." Subsection (g) states that the claim accrues "on delivery or tender of delivery by the rail carrier."

It would appear that the billings you have described are time-barred by the statute of limitations.

252) Freight Claims - "Lost" Shipments

Question: We shipped 6 pallets of go-karts to a major customer on September 9th from our outside warehouse in Las Vegas, NV. This was shipped "FOB Origin Collect" via an LTL carrier who signed the "DLDC" bill of lading as SLC. The shipment was never delivered to the consignee so they refused payment on the invoice.

We made several attempts to obtain a proof of delivery from the carrier, but never received it. A claim was filed with the carrier on October 29th.

The carrier responded on December 29th stating that the shipment was loaded on a trailer destined for the delivering terminal. It remained there until the trailer was returned to their terminal on December 22nd. They indicated the merchandise was in good condition and is being held in a "Refused On Hand" status awaiting disposition.

In my reply to them I stated that, due to their negligence, we had lost the sale of the five pallets of go-karts and asked that they pay the claim in full. There was no replacement order shipped to this store. Not only did we lose the sale, but we forfeited any profit we would have made from the sale of these units.

In a letter dated January 28th their Claims Dept. states "we wish to apologize for our portion of this problem. However, this merchandise remains "On-Hand-Refused" awaiting your disposition. If disposition is not received within 15 days, we will have no choice but to dispose of this merchandise in accordance with the bill of lading contract."

It wasn't until after we filed a claim that the carrier even attempted to locate this shipment. We have lost the sale due to their negligence and I don't see how they can get by without paying the claim in full.

Do you have any suggestions on how to reply?

Answer: I appreciate the situation, but you do have to realize one thing. There is an obligation to "mitigate the loss", see *Freight Claims in Plain English* (3rd Ed. 1995) at 7.1.4.

Even though the go-karts were missing for over 3 months, they have now been found and have some value. If you just abandon the shipment to the carrier, then the carrier will auction it off, deduct its freight charges, storage, expenses, etc. and you may get little or nothing. Since this is a

product that you manufacture, it would be better to have them return the shipment (at their expense) and try to find another buyer.

Then, I think you would be entitled to collect the difference between your original invoice price to the customer, and the amount realized from the sale.

253) Freight Claims - "Used" Machinery

Question: Do I have much of a case to pursue?? I have a claim filed with Central Transport Intl. for $25,250 for damage to a machine that was not used in production, but used for testing and limited "fine tuning". The machine was damaged while being shipped back to my client's plant from the "fine tuner".

CTI has declined in full, based on: (1) clear delivery receipt; (2) no invoice substantiating amount being claimed; (3) no evidence of total loss; (4) improperly packaged; and (5) liability limited to 10 cents per lb for "used" machinery. (Is tested machinery "used"?)

My available details:

There is no notation of damage by my client on the delivery receipt, however, there is an internal "dock report" from CTI dated 1 day prior to delivery that notates damage.

The machine was loaded by shipper and attached to the floor and side of the trailer. There was minimal packaging. The freight was loaded to "ride".

The freight traveled on at least two trailers (numbers on file).

My client will provide substantiation of amount being claimed, I am recommending replacement costs as the basis for cost.

Answer: There are a number of issues here.

First, the clear delivery receipt creates a rebuttable presumption that the shipment was delivered in good order and condition. You can overcome this with proper evidence to show that the damage existed at delivery, and did not occur afterwards. The CTI internal document might be helpful to show that the carrier had noted some damage prior to delivery.

Regarding the "improper packing" defense, although it is arguable that the shipper should have crated or otherwise protected the machine, the fact is that the carried accepted it for transportation, and therefore assumed the risk.

As to the "used machinery" issue, I assume the carrier is referring to a liability limitation found somewhere in one of its unfiled rules tariffs. If the bill of lading properly incorporated the rules tariff, and there was adequate notice and a choice of full vs. limited liability rates, the limitation may be enforceable. Of course, this would only apply is the machinery is in fact "used". Under the Classification (and most carrier rules tariffs), a machine which has been "rebuilt, refurbished, remanufactured or reconditioned in any way" will be treated the same as a new machine. See Item 425, NMFC 100-Z.

Lastly, unless this machine had been sold and was damaged during delivery to a customer, the "replacement cost" is probably a proper measure of damage.

254) Freight Claims - Acceptance vs. Rejection of Damaged Shipments

Question: When an LTL commercial carrier tendered a shipment of 19 swing sets to one of our distribution centers 3 of the 19 were damaged. Note that the damage was to the outside cardboard packaging and not the swing set. We are a wholesale company that sells to retail stores. We know from past experiences that store owners will not accept orders if the exterior cartons are damaged because they are unappealling to the regular every day shopper and won't sell.

Does the distribution center have to, by law, accept the damaged goods or can we accept only the 16 good sets and refuse to accept the 3 damaged sets?

Answer: As a general rule, a consignee should accept partially damaged shipments and mitigate the loss to the best of its ability, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 10.9, Rejection vs. Acceptance of Damaged Shipments. If a shipment is damaged and is "practically worthless" (considering the cost of repair, repackaging, salvaging, etc.), the consignee is justified in rejecting the shipment.

As a practical matter, damage to the exterior packaging can often make merchandise virtually unsaleable in a retail store. This leaves the consignee with a choice of repackaging the goods, selling them as distressed merchandise, or rejecting the goods to the carrier - which may or may not attempt to sell them as salvage.

If you are not in a position to repackage the merchandise, and do not have access to buyers of distressed merchandise, I see no reason why you would not be justified in accepting the "good" sets, rejecting the damaged ones to the carrier, and filing a claim for their full value. Then, if the carrier pays your claim, it would be entitled to sell the goods and retain the salvage proceeds.

255) Freight Claims - Accepting Partial Payment

Question: If a freight company pays a claim short and the check is deposited. Does the deposit mean that the claim is paid in full and the company that filed the claim accepts this payment and the claim is closed?

Answer: By accepting and depositing a partial payment on a loss and damage claim, you may be waiving your right to re-open the claim and contest the amount at a later date. The answer depends on the facts (whether the check says "full and final payment" or words to that effect, whether the endorsement is "under protest", etc.) and the laws of the state, which vary among the states. See, e.g., *Khoury v. Bekins Moving & Storage Co.*, 2000 WL 1073607 (Tex.App.-Dallas, July 24, 2000).

TIP: The best practice is not to deposit the check until transportation personnel have checked it, unless you are willing to accept partial payments in satisfaction of your claims.

256) Freight Claims - Act of God

Question: What is the responsibility of the carrier in the event of freight damage from a tornado or sudden violent weather conditions?

Answer: Both under the common law and under the Uniform Straight Bill of Lading, which is in common use, a carrier has a defense against liability if it can establish that the cause of the loss or damage was an "Act of God", and that it was free of any negligence.

The case law defines an "Act of God" as "an occurrence without intervention of man or which could not have been prevented by human prudence. It must be such that reasonable skill or watchfulness could not have prevented the loss..." Generally, only extraordinary events such as tornadoes or hurricanes would qualify, and ordinary bad weather, rain, snow, etc. would not be considered an "Act of God".

This subject is discussed in detail in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 6.3, Act of God.

257) Freight Claims - Additional Installation Charges

Question: We manufacture executive office furniture that is custom made to order. Our terms of sell are FOB origin freight prepaid. We will on occasion ship direct to the job sites for installation. When product is damaged a claim is filed and a replacement order entered. My question is once the replacement is ready for shipment is there any recourse on the carrier for additional installation charges to have the crew go back to the site to install the replacement product? Also, could the carrier be held liable for any expedited freight charges in order to get the replacement shipment to the install site?

Answer: First, since you ship FOB origin, it is your customer that has the "risk of loss" in transit and should be filing the claim. See Section 10.5.1 of *Freight Claims in Plain English* (3rd Ed. 1995).

Ordinarily the carrier is liable for damage to the shipment, and not consequential or "special damages". The fact that you may be obligated to ship a replacement is a matter of a separate agreement or understanding between the seller and the buyer; the carrier is not a party to that agreement.

If you give the carrier notice at the time of shipment as to the consequences of damaging the goods - namely that you will have to send a replacement and have the crew go back to install the replacement - you may then be able to recover special damages. The subject of special damages is discussed extensively in FCIPE at Section 7.3.

258) Freight Claims - Administrative Costs

Question: I would like to know what expenses that occur in a freight claim can be filed. Only the cost of the product, and freight charges incurred. What about administrative costs incurred?

Answer: It is generally permissible to include in your freight claim any reasonable expense incurred in the mitigation of the loss such as sorting, segregating, repackaging, inspection, etc. See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.0 for a comprehensive discussion of "damages".

Administrative expenses, in theory, should be legitimate damages and includable in a claim. However, most carriers refuse to pay the claimant's administrative expenses incurred in processing or filing claims.

I would note that, if you have a written transportation contract, you could include express provisions allowing the recovery of such expenses.

259) Freight Claims - Administrative Costs

Question: Does the claimant have the right to charge "administrative" fees? It seems that they would be included into the right to add on overhead charges. Is this true?

Also what to do if a carrier (common or water) refuses to pay the additional fee?

Answer: This subject has been much discussed and often disputed between shippers and carriers. In theory, your "actual loss" in a cargo loss & damage situation would include all reasonable and foreseeable damages resulting from the breach of the contract of carriage. Thus, if a shipment is partially damaged, the cost of inspection, segregation, repair, refurbishing, repackaging, etc. may be included in a claim, and such expenses could include material, labor and overhead. See generally, Section 7, *Freight Claims in Plain English* (3rd Ed. 1995).

Certainly you can make the argument that, if goods are lost or damaged in transit, it foreseeable that the shipper will incur some reasonable and necessary expense in preparing and filing a claim with the carrier. Some shippers do add an administrative expense to their claims, and

some carriers do pay it. On the other hand, many carriers object and consider such administrative claim expenses to be "special damages" (which they are not), and refuse to pay them.

As with any disputed claim, your remedies are limited: negotiate a settlement, submit to arbitration, or litigate in court.

260) Freight Claims - Administrative Expenses

Question: We are having a dispute with a motor carrier as to whether administrative expenses in connection with a claim are proper. Attached are two letters where I returned a claims payment check to a motor carrier and referred to the case of Vacco v Navajo Freight Lines. Could you please comment. Also as a footnote, our contract holds the carrier liable as a common carrier for all loss and damage.

Answer: The carrier did not correctly read the Vacco decision. The case does not say that there was a contract with the carrier; it says that Vacco had various contracts with the government in which it charged overhead and G&A on direct labor costs, see Appendix 114 in *Freight Claims in Plain English* (3rd Ed. 1995) for text of decision.

Unfortunately, Vacco does not really say anything about administrative costs in connection with the filing or processing of freight claims, and I am not aware of any decisions which explicitly deal with this subject and I don't think it has actually been litigated.

On the other hand, it is quite forseeable that there will be costs associated with investigating, preparing and filing a claim when a shipment is lost or damaged. Thus, such expenses should be legitimate "general damages" (not "special damages) and the carrier should be liable. See discussion of general v. special damages in FCIPE at Section 7.3.1 et seq.

261) Freight Claims - Administrative Expenses

Question: I would like to know what expenses that occur in a freight claim can be filed. Only the cost of the product, and freight charges incurred? What about administrative costs incurred?

Answer: It is generally permissible to include in your freight claim any reasonable expense incurred in the mitigation of the loss such as sorting, segregating, repackaging, inspection, etc. See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.0 for a comprehensive discussion of "damages".

Administrative expenses, in theory, should be legitimate damages and includable in a claim. However, most carriers refuse to pay the claimant's administrative expenses incurred in processing or filing claims.

I would note that, if you have a written transportation contract, you could include express provisions allowing the recovery of such expenses.

262) Freight Claims - Amending Claims

Question: I have filed a freight claim with a carrier for damages. It has come to my attention that there are additional charges because of this damaged shipment. Our VP of manufacturing thinks I can file a correction to the first freight claim and add the additional charges that we paid in overnight freight to get new product to the customer.

I have been reading your book and searching the web for any similar situations and have not come up with anything close.

Answer: 1. You can amend a claim after it is filed if there are additional damages.

2. Your damages arise out of the contract of carriage for the shipment that was lost or damaged in transit. You cannot ordinarily collect the cost of shipping some other replacement shipment to your customer, see cases discussed in Section 7.3.2, *Freight Claims in Plain English* (3rd Ed. 1995).

263) Freight Claims - Bill of Lading Not Signed by Driver

Question: I have a claim that was filed against a carrier for a shortage. We have a BOL signed by the customer (consignee), however, the BOL was not signed by the carrier's driver. I am trying to determine who can be held legally responsible for the shorted cases.

Can the carrier be held responsible for the load even though the driver did not sign for the load?

Should we file the claim with our warehouse who released the product to the carrier without the driver's signature.

Answer: Normally, the truck driver will sign the bill of lading at the time the shipment is picked up and this will constitute "prima facie evidence" of the receipt of the goods as described on the bill of lading. There are some exceptions: for example, if the packages are palletized and stretch-wrapped, many carriers will only sign for the number of pallets and not the carton count because there is no opportunity to verify the number of cartons on each pallet.

If the driver does not sign the bill of lading, the shipper has an additional burden of proving what was actually tendered to the carrier. This can be done with appropriate shipping records and/or actual testimony of the person who prepared the shipment for transportation, such as the shipping clerk or supervisor.

In your situation you should conduct an investigation to determine what was actually shipped, and get a statement from someone in the warehouse or shipping department who has actual knowledge of the facts. If you are reasonably certain that the shortage occurred in transit, then file your claim with the carrier.

As far as the warehouse is concerned, you should establish procedures and rules in your contract with the warehouse that they will not ship any goods without obtaining a signed bill of lading or receipt. Then, if there is a question as to where a shortage arises, you can hold the warehouse responsible.

264) Freight Claims - BMC 32 and Contract Carriers

Question: We provide cargo coverage for contract haulers. A $50 claim has been submitted to us against one of our insureds for a shortage loss on a shipment. The claim was denied for 2 reasons. The loss is below our insured's $1000 deductible and also there is a specific exclusion for shortage claims. The claimant has come back and demanded payment under the BMC 32 Endorsement which supposedly states that regardless of deductibles or exclusions, the insurer must pay the loss up to $5000. I have researched this BMC 32 Endorsement and found occasional references to it but no actual endorsement. Our policyholder never requested any such endorsement nor have we ever seen one available. There is no ISO or DOT requirement of such an endorsement. Could you explain and also tell me where I can find the actually endorsement for my review.

Answer: The BMC 32 endorsement coverage for "contract" carriers is a controversial subject.

Even though the ICC Termination Act of 1995 eliminated the distinction between "common" and "contract" carriers almost six years ago, the Federal Motor Carrier Safety Administration (successor to the ICC) has not yet gotten around to revising the cargo insurance regulations and forms (49 C.F.R. Part 387) and they are still allowing new carriers to register as "common" and "contract" carriers, in violation of the Act and the intent of Congress.

We take the position that ALL for-hire motor carriers should be required to have BMC 32 endorsement coverage. Attorneys for some insurers are taking the position that, until the FMCSA changes the regulations to comply with the ICC Termination Act, "contract" carriers don't have to comply with the cargo insurance requirements, and shipments moving under "contract carriage" agreements aren't covered by the BMC 32. I should note that this issue is presently in litigation.

265) Freight Claims - BMC-32

Question: Does the carrier's insurance company have the right to decline a claim presented under the BMC Endorsement because of a high deductible? The carrier's deductible is $100,000 and the claim amount is $6,522.23.

Answer: The insurer's obligation under the BMC-32 endorsement is independent of any policy restrictions or deductibles contained in the motor carrier's underlying cargo legal liability insurance policy. In other words, the insurer is obligated to pay (up to the $5,000 limit per shipment) under the BMC-32, regardless of any deductible that may exist in the cargo policy. I would suggest that you refer the insurer to the federal regulations at 49 C.F.R Part 387.

266) Freight Claims - BMC-32

Question: We are trying to wrap up all of the issues on our carrier contracts, and we do still have a few questions about the BMC-32 endorsement and warehouseman's liability. As I read the literature regarding the BMC-32, it just requires that if the carrier is liable for the loss, then the carrier's insurer must pay it up to $5,000 per occurrence regardless of any deductibles or policy exclusions. If the claim exceeds $5,000, the exclusions and deductibles in the carrier's policy would only apply to the amount above $5,000.

Our questions have to do with the situation we had in Houston last year. In June of 2001, we had a large quantity of product destroyed by flooding resulting from the intense rainfall associated with a tropical storm. This product was located at a 3PL facility with which we have contracted to deconsolidate our freight, sort by store, and ship it to our various retail outlets in their area. The freight was in the 3PL facility preparatory to being shipped to the stores in the Houston market. Our questions are; First, was the 3PL acting as a warehouseman at the time of the damage? I do not believe so, since there were further steps they had to take to complete the deliveries, but we wanted to be sure. If they were acting as a warehouseman, will we need to put some text in the contract stating that the 3PL's liability will always be that of a carrier, not a warehouseman?

Second, would a BMC-32 endorsement have helped in this situation? Since the 3PL claimed that the damage was due to an Act of God, they would not have been liable and therefore, as I read the BMC-32 language, the insurer would not have to pay.

Answer: 1. The BMC 32 only applies to motor carriers, not warehousemen.

2. If your "3PL" was a motor carrier, and was incidentally providing some kind of consolidation or distribution services as part of their transportation services, I would say that their BMC 32 (if they had one) would be applicable to this loss.

3. Intense rainfall, a severe storm, etc. is NOT an "act of God" - It must be an "ACT OF GOD" (a bona-fide hurricane, tornado, typhoon, etc.). Also, there can be no contributing negligence on the part of the carrier, see *Freight Claims in Plain English* at Section 6.3.

4. You should find out if your "3PL" is licensed as a motor carrier, broker, freight forwarder, etc. If it is a motor carrier or a freight forwarder, it must comply with the FMCSA minimum cargo insurance regulations. If it does not, you should not be doing business with them, because they are acting illegally.

3. Yes, you should cover matters such as this in your transportation and logistics services agreements.

267) Freight Claims - Burden of Proof

Question: Our company is a air and surface freight forwarder. We tendered 2 skids with 93 pieces as being annotated on the bill of lading that were banded with seals. A comment was made "If bands or seals is tampered with, inspection at carrier is required."

Upon receiving the freight from LAX to ORD, our driver picked up the freight from the carrier and visually noticed something wrong with the shipment. He then counted the freight individually, and made the following comment, "I busted down 1 skid found 1 empty box, bands were intact." KC. He also made comment "1 empty box 3 totally gone."

We had a declared value of $10,000 on the shipment. The carrier denied the claim on the following basis:

"According to the Bill of Lading it states "If the band or seals is tampered with inspection at carrier is required". Your employee R. Calihan states "I busted down one skid found 11 empty box - Bands were intact." Since there was absolutely no tampering with the bands/seals, the shortage must have occurred prior to us handling the freight.

I replied to them indicating that the bands were still on the freight, however; they were loose. After reviewing with the local manager, we found that the reason that the driver checked further was due to the cardboard wrapping on top and on the sides were missing when received and that the bands were loose and that the seals were on the straps but not where they were originally placed. We inspected the shipment at the carriers dock and they are still refusing the claim because of not having more detailed information put onto the delivery receipt.

Are we within our rights, and exactly what is necessary when we determined loss upon termination of the shipment at destination?

Answer: Clearly, if the loss occured while the shipment was in the possession of the carrier, they would be liable.

However, your question really involves factual issues more than legal issues. Your burden of proof is to establish that the shipment was in good order and condition when you gave it to the carrier in LAX, and that there was shortage when the carrier delivered it at ORD. In order to do this, you need a statement or affidavit from someone with personal knowledge, who actually saw or inspected the shipment, at both the origin and the destination.

Whether or not the full particulars were noted on the delivery receipt is not controlling, so long as you can reasonably establish that the shortage could not have occurred either before or after the carrier was in possession of the shipment.

I would recommend that you pursue this claim and, if necessary, take legal action.

268) Freight Claims - Burdens of Proof

Question: We haul refrigerated freight to the Midwest. We seem to get more claims due to overages, damages, and shortages than we have ever had before (in the last two years we starting picking up from a different warehouse). One of the claims we recently received was for some damaged cases. We delivered to a customer and had 4 cases damaged and refused. The driver

called and reported the damage right away. He stated that the 4 cases were wet. We returned the product back to the warehouse free astray. The warehouse now has said the product was not salvageable and sent us a claim for the damaged product. These 4 cases were the only cases that were wet. I have requested a pick ticket and a loading diagram for this load. I don't believe the product was damaged by our driver. Is there anything else we can do? If we have to pay for the product should we be able to take possession of this product? What kind of rights do carriers have when it comes to discrepancies and claims and shouldn't the shipping warehouse also have some of the burden of proof?

Answer: Let me start with the shipper's burden of proof. The shipper must prove three things: that the freight was in good order and condition when tendered to the carrier at origin, that it was damaged (or short) when delivered at destination, and the amount of its damages.

Once the shipper meets this basic burden of proof, the carrier will be liable for any loss or damage in transit unless it can prove that the sole cause of the loss is one of the common law exceptions such as an 'act of God' or an 'act or default of the shipper'.

This subject is discussed fully in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 5.0.

As to salvage, the parties have a duty to mitigate the loss, and if the carrier pays the shipper's claim in full, it would normally be entitled to take the goods and try to sell them for salvage. On the other hand, particularly with food products, if there is any possibility of contamination or spoilage, it will probably be necessary to destroy the goods.

It is always best to prevent loss or damage, but when it occurs, all of the facts should be promptly investigated and documented. As a carrier, however, you must remember that you are held to a high standard of liability for loss or damage to the goods in your possession.

269) Freight Claims - Carrier Inspection

Question: Can a carrier claim they were not given an opportunity to inspect damage even if the material remains in their possession for a period after the discovery of the damage?

I have a claim involving a "Protect From Freeze" that wasn't, and for this reason the consignee refused the shipment. The damage was noted on the delivery receipt and the material was returned to the shipper. A damage notation was also printed, by the carrier, on the return delivery receipt.

Upon return to the shipper, the material was determined to have been frozen, deemed worthless and was disposed. The carrier is now claiming they did not have an opportunity to inspect. I believe they were informed of the damage when it was first refused and had ample opportunity to inspect the damage when it came back across their dock(s) en route to the ship point. Your thoughts?

Answer: It is **always** good practice to request the carrier to make an inspection (joint inspections are recommended), and you should always make such requests in writing, so you have a record.

However, the failure or inability of the carrier to make an inspection does not affect the carrier's liability.

The claimant has the obligation to prove that the material was in good order and condition when tendered to the carrier at origin and was damaged at the time of delivery. If you have adequate documentation that the material was damaged by freezing, such as a laboratory report or a quality control inspection, the carrier should accept this as sufficient evidence of the damage.

270) Freight Claims - Carrier Offset for Overages

Question: I have filed a freight claim with LTL carrier for shipment which delivered short. Carrier wishes me to give them credit allowance for a shipment which delivered with an overage. The shipment which delivered with an overage was made and deliver in the same time frame as shipment my claim is filed on. What is the law regarding allowing carriers credit on overages?

Answer: The carrier has an obligation to investigate all claims, see the FMCSA claim regulations at 49 C.F.R. Part 370 (formerly Part 1005).

As a general rule, the carrier is liable if it doesn't deliver what it picked up and signed for on the bill of lading. An "overage" on some other shipment does not relieve the carrier of its liability for failing to deliver in accordance with the bill of lading contract.

It is not clear that anyone has really looked into the facts. Are the goods that were "short" the same type and quantity as the goods that were "over"? Were they consigned to the same or different consignees? Were there separate bills of lading? Was there perhaps just some error in the paperwork? It seems to me that further investigation is needed.

271) Freight Claims - Carrier Out of Business

Question: We are a broker and hire contract carriers to move the loads that we get.

I received a claim from my customer for 160 cases short on a load, which is noted on the proof of delivery and we have a proof of pick up that the driver signed showing he picked it up.

I have talked to our carrier numerous times trying to get this claim paid. It is clear-cut that we owe our customer this claim, however the carrier refuses to pay stating the following reasons:

1. They were not allowed on the dock to count product; and
2. Product was shrink-wrapped, making it impossible to count and inspect.

Further investigation showed that the driver is allowed on the dock to count and inspect, and it is easy to see the product on the shrink-wrapped pallet to count. These loads are not marked shipper load & count and the driver never indicated any problems. It is my understanding that the carrier is responsible for the loss.

I have now turned the claim over to the carrier's insurance company. We have a valid insurance certificate showing the carrier was insured at the time the incident occurred. The insurance company is refusing to deal with the claim because they are unable to contact the insured (carrier) to verify the insurance and to find out any information regarding the load. All mail sent to the carrier is returned unclaimed. So without the information from the carrier, we cannot get the claim paid by the insurance.

Answer: It appears that you have two options.

1. Turn the claim over to an attorney (someone who is knowledgeable about transportation law) and, if necessary, commence a lawsuit against the carrier.

2. File a claim under the carrier's BMC 32 endorsement directly with the insurer. Under the BMC 32, the insurer is liable for up to $5000 with no deductibles or exclusions, and whether or not the carrier is still in business. (See *Freight Claims in Plain English* (3rd Ed 1995) at Section 12.1.1.1 for an explanation of the federal mandatory cargo insurance requirements for interstate motor carriers.) You can get the name and address of the insurance company from the FMCSA web site.

I would observe that, as a broker, you normally should not have liability to the shipper for loss or damage.

272) Freight Claims - Carrier Setoffs Against Open Freight Charges

Question: I am aware of the legal implications of a shipper withholding unpaid cargo claims from freight charges due a carrier. However, what about the reverse. What are the legal implications of a carrier who, instead of paying a valid cargo claim where liability has been established, acknowledges carrier liability but instead deducts that claim payment from the monies due the carrier for unpaid freight charges?

One follow up, does the bankruptcy of a shipper happen to throw a monkey wrench into this? Could a carrier hold back claim payments if a shipper is in a bankruptcy status? I am guessing it may depend on the specifics of the bankruptcy case but in general any advice you might have on this?

Answer: I believe the answer to your question lies in the FMCSA (formerly ICC) regulations at 49 C.F.R. Part 370, PRINCIPLES AND PRACTICES FOR THE INVESTIGATION AND VOLUNTARY DISPOSITION OF LOSS AND DAMAGE CLAIMS AND PROCESSING SALVAGE. The relevant provision states:

> 370.9 Disposition of claims.
>
> (a) Each carrier subject to 49 U.S.C. subtitle IV, part B which receives a written or electronically transmitted claim for loss or damage to baggage or for loss, damage, injury, or delay to property transported shall pay, decline, or make a firm compromise settlement offer in writing or electronically to the claimant within 120 days after receipt of the claim by the carrier...

The language “pay, decline, or make a firm compromise settlement offer” only allows three options.

It would appear that, if you have a valid cargo claim where liability has been established and carrier liability has been acknowledged, the carrier would have to pay the claim. I don’t think a setoff against unpaid freight charges would qualify as a “firm compromise settlement offer”.

I realize that shippers sometimes withhold payment of freight charges or setoff freight charges against unpaid cargo claims, so this result may seem unfair. However, the federal regulations are only binding on carriers, and not on shippers.

Bankruptcy does introduce different rules and considerations.

Most likely the debtor-in-possession or trustee will consider unpaid claims as assets of the bankrupt and, if necessary, bring an adversary action to collect them. However, as a general rule, you can offset mutual claims or debts in an adversary action in bankruptcy court.

273) Freight Claims - Carton Damage

Question: When a less-than-truckload commercial carrier tendered a shipment of 19 swing sets to one of our distribution centers, 3 of the 19 were damaged. Note that the damage was to the outside cardboard packaging and not the swing set. We are a wholesale company that sells to retail stores. We know from past experiences that storeowners will not accept orders if the exterior cartons are damaged because they are unappealing to the regular every day shopper and won't sell.

Does the distribution center have to, by law, accept the damaged goods or can we accept only the 16 good sets and refuse to accept the 3 damaged sets?

Answer: As a general rule, a consignee should accept partially damaged shipments and mitigate the loss to the best of its ability, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 10.9, Rejection vs. Acceptance of Damaged Shipments. If a shipment is damaged and is "practically worthless" (considering the cost of repair, repackaging, salvaging, etc.), the consignee is justified in rejecting the shipment.

As a practical matter, damage to the exterior packaging can often make merchandise virtually unsaleable in a retail store. This leaves the consignee with a choice of repackaging the goods,

selling them as distressed merchandise, or rejecting the goods to the carrier - which may or may not attempt to sell them as salvage.

If you are not in a position to repackage the merchandise, and do not have access to buyers of distressed merchandise, I see no reason why you would not be justified in accepting the "good" sets, rejecting the damaged ones to the carrier, and filing a claim for their full value. Then, if the carrier pays your claim, it would be entitled to sell the goods and retain the salvage proceeds.

274) Freight Claims - Clean Delivery Receipt

Question: A claim for $8,955 was filed with our broker for a damaged shipment. The original value of the shipment was about $12,000, but we filed the claim for the actual, unsalvageable loss. The consignee, not knowing any better, took very good pictures of the damaged shipment while it was still on the truck, but did not note any exceptions on the delivery receipt. The claim was denied due to a clear delivery receipt. Do we have any recourse: Do you have any suggestions as to how we may be able to persuade them to reconsider a claim such as this one.

Answer: A clear delivery receipt is sometimes referred to as "prima facie evidence" of delivery in good order and condition and would ordinarily have some evidentiary value if you were to be involved in court litigation.

However, from what you say, there is undisputable evidence that the goods were damaged at the time of delivery. Certainly the photographs, together with a statement from the persons who actually saw the condition of the shipment, should be sufficient to nullify any presumption of clear delivery.

I suggest that you get a written statement from the receiver, and re-submit your claim with the statement and photos to the carrier. Remind them of the federal claim regulations at 49 C.F.R. Part 370 that require the carrier to make a "prompt and thorough investigation" of the facts.

If they still refuse to honor your claim, you may have to consider legal action, or referring the claim to the Transportation Arbitration Board for arbitration.

275) Freight Claims - Clear Delivery Receipt

Question: I am an Account Manager with a 3PL in Kansas. We have a client here that participates in our Freight Management Program. We have negotiated pricing on their behalf, established contracts between this client and their carriers, and provide numerous other services relating to their inbound and outbound transportation needs.

They recently purchased a new $15520 labeling machine from a vendor in Southern California. Weighing 700 lbs., the machine was completely crated. The machine, which was to go into immediate production once it was delivered, was in an "all short - bill/no freight" status for a number of days and ultimately delivered well beyond the expected delivery date. Unaware of any damage at delivery the crate was accepted and signed for without any noted exceptions. Warehousemen began uncrating the machine and discovered a cross brace/support had broken under the bowing of the slatted wood top panel. The broken brace in turn impacted a component of the machine. Within 30 minutes of the driver's departure, the local terminal was notified of the concealed damage. Our client was advised that an inspection service would be contacted to assess and document the damages. The machine remained untouched and the inspection service documented specifics concerning markings, packaging and materials, etc. The report noted that the "top of the crate has a cracked area and visible hole.... removing the top panel of crate shows that top crossing slat was crushed downward and broken.... top

of the machine is visibly impacted along the same area. The head unit along the damaged area is crimped, bent, and out of alignment." The noted "visible hole" is the size of a large coin and resembles a knot in the lumber used to construct the crate.

A claim was filed for the cost of the machine and later revised for the cost of replacing the damaged component. This reduced the original $15,520 claim to $6,143.

The carrier contends the damage was concealed. As there were no notations on the delivery receipt, the carrier has offered 1/3 of the mitigated amount or approximately $2050.

Given the damages were identified and reported with 30 minutes of the delivery, is there a justified basis for the concealed damage settlement offer? The contract we have in place between this client and carriers allows for arbitration if necessary although it is an option we prefer to avoid.

Answer: If damage is not noted on the delivery receipt at the time of delivery, the claimant has a greater burden, namely to show that the damage did not occur after delivery. In other words, the clear delivery receipt creates a rebuttable presumption that the shipment was in good order and condition at the time of delivery.

There is no legal basis for the 1/3 settlement offer. The carrier either is liable or it is not liable. The only justification for a compromise settlement is when it is uncertain where the loss occurred, or, in disputed cases, the potential expense of litigation.

The claimant always has the basic burden of proof: that the shipment was in good order and condition when tendered to the carrier at origin, and that the shipment was damaged at the time of delivery. See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 5.0, Burdens of Proof.

Question: Thank you so much for your quick response, but if I may request just a bit more clarification:

1. Is it correct in saying that damages, whether documented at the time of delivery or reported shortly thereafter once they are discovered, bear equal liability on the part of the carrier?

2. There is no legal basis for the 1/3 settlement offered by the carrier? Can this can be construed as a "goodwill gesture" (their term, not mine) or initial settlement offer?

3. No doubt the damage took place while in transit. Given the circumstance outlined, are you saying the carrier needs to produce evidence contrary to this?

Answer: Whether or not the damage was "concealed" only creates an evidentiary issue as to where the damage occurred. Under the circumstances you describe, it is apparent that the damage occurred in transit and not after delivery by the carrier. (It sounds as though the carrier top-loaded other freight on the crate.)

Unless there is some reason to believe that the damage occurred either before tender to the carrier (at the shipper's facility) or after delivery (at the consignee's facility), the carrier should pay the claim in full.

276) Freight Claims - Concealed Damage

Question: Do Items 300125-300150 of the National Motor Freight Classification (NMFC) still apply when filing for concealed damage claims? I do not have a current copy of the NMFC and I did not know if the wording had changed since 1987. We do not have any signed contracts with any of the carriers. I had a shipment that delivered to my customer and the delivery receipt was signed for clear. To my knowledge, the carrier was not contacted, nor did the carrier make an inspection of the product. The consignee filed a damage claim, not a concealed damage claim, with the carrier and the carrier denied the claim because of the clear delivery. I spoke with the claims representative and was informed that they would not pay the claim (even 1/3) because the burden of proof was to prove the carrier caused the damage. I do not know if the original packaging is available for inspection on this shipment. Shipment delivered on 3-1-00 and the claim was filed on 3-9-00. Does the consignee have any recourse?

Answer: In 1972, following an extensive investigation in Ex Parte No. 263, Rules, Regulations, and Practices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims,

the ICC issued a set of regulations, which were served February 24, 1972. These regulations were originally published in 49 C.F.R. Part 1005 and, after the demise of the ICC, were transferred first to the FHWA and then to the FMCSA. The regulations - virtually unchanged - are now found at 49 C.F.R. Part 370.

The National Motor Freight Classification (NMFC) contains two sections pertaining to loss and damage claims:

1. Items 300100-300122, Principles and Practices for the Investigation and Disposition of Freight Claims
2. Items 300125-300155, Regulations Governing the Inspection of Freight Before or After Delivery to Consignee and Adjustment of Claims for Loss or Damage

The first of these two sections is essentially drawn from the FMCSA (formerly ICC/FHWA) regulations, 49 C.F.R. Part 370, Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage. To the extent these provisions reflect the federal regulations, they are binding on all motor carriers and freight forwarders.

The second of these two sections is not found in the federal regulations. These rules would only be binding on motor carriers that are participants in the National Motor Freight Classification.

Provisions of the NMFC become binding on a shipper if they are "incorporated by reference" into the contract of carriage - either through the use of a Uniform Straight Bill of Lading or by language in a transportation contract.

Now, with respect to concealed damage, the basic issue is always a question of fact. Did the loss occur while the goods were in the possession of the carrier, or after delivery to the consignee had been made? A clear delivery receipt is only presumptive evidence that the goods were delivered in good order and condition. The presumption can be rebutted by evidence that the damage could not have occurred subsequent to delivery. Usually this is in the form of testimony or affidavits from the receiving people who have actual knowledge of how the goods were handled after delivery.

Obviously it is good practice to notify the carrier promptly upon the discovery of concealed damage, to request an inspection, and to retain all packaging materials. The more time that passes between delivery and notification of damage, the more difficult it is to convince the carrier that the loss occurred in transit.

Regardless of the clear delivery receipt, or how many days have passed before notification of the damage, the carrier does have a duty to "promptly and thoroughly" investigate the claim. If the consignee can meet its burden of proving, with reasonable evidence, that the damage did not occur after delivery of the shipment, the carrier should pay the claim.

277) Freight Claims - Concealed Damage

Question: A $15,000 labeling machine was purchased from a vendor in southern California and shipped to Kansas. This machine weighs 700 pounds and was completely crated for shipment. Unaware of any damage, the crate was accepted and signed for without any noted exceptions. When the consignee began uncrating the machine right after delivery, it was discovered that a cross brace/support had broken inside the crate and damaged the machine. The terminal was notified of the concealed damage within 30 minutes of the driver's departure and an inspection was arranged. The inspection report noted the damage and a claim was filed to replace the damaged component, roughly $6,000.00.

The carrier has offered to pay 1/3 of the amount, asserting that this was concealed damage because there were no notations on the delivery receipt. What are our rights and our obligations?

Answer: Whether or not the damage was "concealed" only creates an evidentiary issue as to where the damage occurred. If damage is not noted on the delivery receipt at the time of delivery, the claimant has a greater burden, namely to show that the damage did not occur after delivery. In

other words, the clear delivery receipt creates a rebuttable presumption that the shipment was in good order and condition at the time of delivery.

Unless there is some reason to believe that the damage occurred either before tender to the carrier (at the shipper's facility) or after delivery (at the consignee's facility), the carrier should pay the claim in full. Under the circumstances described, it is apparent that the damage occurred in transit and not after delivery by the carrier. (It sounds as though the carrier top-loaded other freight on the crate.)

There is no legal basis for the 1/3 settlement offer. The carrier either is liable or it is not liable. The only justification for a compromise settlement is when it is uncertain where the loss occurred, or, in disputed cases, the potential expense of litigation.

The claimant always has the basic burden of proof: that the shipment was in good order and condition when tendered to the carrier at origin, and that the shipment was damaged at the time of delivery. See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 5.0, Burdens of Proof.

278) Freight Claims - Concealed Damage Notification

Question: One of our major customers takes a deduction on our invoice due to concealed shortage on a shipment. When we file a claim with our carrier, the carrier denies the claim on the basis of an agreement between the consignee and the carrier that the consignee must notify the carrier within 48 hours of any concealed shortage. Our freight claim is denied because our customer (the consignee) failed to notify the carrier within the specified time.

If the bill of lading is a contract between the carrier and the shipper, does it include any side agreement between the carrier and the consignee? Isn't the carrier still liable for the shortage if all other requirements are met, other than the conditions of the side agreement.?

Answer: I am assuming that this was not a "customer pickup" situation where the customer selected the carrier, made all the arrangements and paid the carrier.

As a general rule, the contract of carriage is between the shipper and the carrier, and it is usually evidenced by the bill of lading, which may or may not incorporate terms and conditions (from the reverse side of the Uniform Straight Bill of Lading in the NMFC or from the carrier's rules tariffs). I would doubt that there was anything in your bill of lading or the carrier's tariffs that imposed a 48 hour rule for asserting a concealed damage claim.

Thus I would agree that a side agreement between the carrier and a third party (your customer) would not be binding on your company as the shipper.

279) Freight Claims - Concealed Damage, Set-offs & Storage Charges

Question: We have an account that had us pick up a machine with a van carrier that was tarped and crated to come back to them. One week after the machine delivered, signed clear, they called and said that it was rusted and would require a little over $13,000 to repair. The machine was valued at $ 173,000.

We've always handled new machines for them in the past, but this one turned out to be a used machine. The carrier is going to deny payment because it was signed clear, delivered in 7 calendar days (slim chance for it to get that rusted that quick), and it took a week for them to notify us. An employee at the company also told us that the machine sat outside at the shipper's location for three months waiting to be brought back.

Before we were notified about this "damage", we handled another machine to the state of Washington. The customer refused it because they didn't want it. We've been holding it in a warehouse in WA for the last two months waiting for the okay to send it back or to somewhere else. We've been paying the monthly storage charges and invoicing our account.

Now this account owes us over $8,900 (the total for various shipments), with no conversation about paying us in the near future. What can we do? As a logistics company, can we send them a notice telling them that they have until a certain date to give us disposition and pay us for various invoices or we will have it sold for what is owed to us? Can we send it back to them in Pennsylvania and file in small claims court for all the charges owed to us, including the return? Any other suggestions?

Is it correct that they can not hold back payment on all the shipments due to their claim about one of the shipments? Is it correct that when the carrier declines payment for the reasons listed above that we can demand payment for that shipment because the carrier performed their responsibility and we performed our service?

Answer: You have a mix of questions here.

First, if you are acting as a broker, you should not have liability for loss or damage to the goods (unless you have contractually assumed liability as a common carrier or you were negligent and your negligence caused or contributed to the loss).

Second, if the shipper has a claim for loss or damage, it should be submitted to the carrier that actually transported the goods.

Third, it is not "illegal" for shippers to withhold payment or to setoff loss & damage claims against freight charges - whether they are due to a broker or to a carrier. However, you have a contract with the shipper: if the shipper has agreed to pay you freight charges for transportation services, that is an enforceable contract and you can, if necessary, bring a legal action to collect your money.

Fourth, you should not have taken possession or responsibility for the refused shipment. Now that you have volunteered to do so, you may have assumed legal liability as a bailee. At the very least, you should notify the owner of the machine (in writing) that the goods are “on hand”, that storage charges are accruing, that you need disposition instructions, and that if nothing is done within some reasonable time, the goods may be sold at a public auction.

280) Freight Claims - Concealed Shortage

Question: One of our carriers delivered a large shipment (~2000 cartons) to a customer, who in turn, signed the delivery receipt with no exception(s)noted. The consignee then sent an Inspection Report to the shipper noting a shortage. My questions are: (1) Should the consignee have contacted the carrier directly requesting an inspection? Since the "15 day rule" was found unlawful, what would be considered reasonable? (2) If there is, in fact, a shortage, is the carrier liable even though he has a clear POD signed by the consignee? All of the reference material I've read relates only to concealed damage.

Answer: There is really no difference between "concealed damage" and "concealed shortage". In both cases the claimant has a more difficult burden of proving that the damage or shortage occured during transit, and not before or after the shipment was in the possession of the carrier. A clear delivery receipt is prima facie evidence of delivery in good order in condition. However it merely establishes a presumption which may be rebutted by appropriate factual evidence.

It is not clear from your question as to whether this was a full truckload, whether it was "SL&C" (Shipper's Load & Count), whether the trailer was sealed, etc. or whether it was an LTL shipment, and whether the cartons were palletized, shrink wrapped, etc. You also have not indicated the magnitude of the shortage, i.e., how many cartons out of the 2000 were missing. This is critical, because the question of carrier liability turns on the specific facts of each case.

If this was a normal LTL situation, the consignee should have counted the cartons as they were being unloaded from the trailer and noted the shortage at time of delivery. If this was not done, and the shortage was discovered after the truck left, the consignee should have immediately notified the carrier, requested an inspection, and retained all packaging materials.

There is no absolute rule as to the consequence of failure to notify the carrier in a timely manner. However, the longer the consignee waits, the more difficult it is to prove that the damage or shortage actually occured in transit.

281) Freight Claims - Contaminated Food Packaging

Question: We manufacture packaging for the food industry. On occasion our customers will refuse a shipment because the LTL carrier hauling the goods may also have items like flammable liquids commingled with the load and/or there is an odor in the trailer. The carrier denies the claims we submit even though we state on the bill of lading (B/L) “Food Packaging Do Not Contaminate.” What is the carrier’s liability?

Answer: Under the Interstate Commerce Act (49 U.S.C. § 14101) a carrier is required to provide "safe and adequate service, equipment, and facilities..." This requirement has been construed by the courts from time to time to mean that the carrier is responsible to ensure that its equipment is clean and free from noxious substances which would contaminate other cargo.

It is not clear from your description whether the goods were actually contaminated so as to make them unusable or unsuitable for their intended use. If so, the carrier would be liable.

On the other hand, if the goods were not actually damaged or could be salvaged in whole or in part, there is a duty to "mitigate the loss", see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.1.4, Duty to Mitigate Loss.

Salvage of damaged goods is one of those "gray" areas that depends on the facts, see generally Section 10.10 of FCIPE.

Where there is damage or possible contamination to food or drug items the answer is fairly clear that there can be no salvage because of the strict government regulations. In your case, it could be argued that the contaminated product should not be salvaged or allowed to enter the stream of commerce because of product liability exposure. In other words, if the damaged product were used, it could result in injury to a third party. If this is a legitimate concern, the product may in fact be considered "worthless", and the shipper may be able to recover the full value. The standard to be applied is set forth in Federal Food, Drug and Cosmetic Act and reads as follows:

> A food shall be deemed to be adulterated . . . if it has been prepared, packed, or **held** under unsanitary conditions whereby **it may have** become contaminated in filth, or where it may have been rendered injurious to health; . . . (emphasis added)

21 U.S.C. § 342(a)(4) See also section 11.5 of FCIPE.

282) Freight Claims - Contamination of Food Products

Question: We are a transportation broker located in Hoffman Estates, IL. We hired a carrier who violated our customers seal on a trailer. The carrier then unloaded our customers product out of the trailer, and placed 1 pallet of bubble gum and 3 pallets of an asphalt product loaded in drums in the nose of the trailer. The carrier then reloaded our customers product back onto the truck. The carrier of course had to break down a number of our customers pallets in order to accommodate the non-authorized freight. Our customer refused the load. Our customers product is bottle caps for a nationally known beverage manufacturer. The load is being refused for cross contamination concerns. The customer will request that the bottle caps be destroyed as they cannot take the chance that the bottle caps somehow get back into their system or the system of their co-packers and vendors. A claim will be filed by our customer for approximately $42,000. What are our

recourses against this carrier? Will standard cargo liability insurance cover situations like this? How will the insurance companies look at this? Are there any laws governing the violation of a seal without a customers permission? We have also come to find that the carrier we hired to move this shipment rebrokered the shipment to another carrier.

Answer: From your description of the facts, it would appear that your case is somewhat similar to that recently reported in Trucker's Exchange, Inc v. Border City Foods, Inc., 998 SW2d 998 (Ct. App. Ark. 1999). In that case, the carrier was held liable when the carrier's driver broke the seal on a reefer shipment of frozen chicken, and the consignee rejected the entire load because of possible contamination.

Obviously the possibility of contamination of food products, drugs, medicines or other items intended for human consumption is a serious matter and I would think that bottle caps for beverages would fall into the same category.

The possibility of contamination may, in and of itself, be sufficient. However, there a number of factual issues that should be investigated in the event the carrier refuses to pay the claim and argues that the rejection of the shipment was unreasonable or that the claimant failed to mitigate its damages by destroying the bottle caps.

For example, you have not indicated whether the other cargo in the truck was actually considered hazardous or poisonous, and I think that it would be important to verify this. Also, there is no indication as to how the bottle caps were packaged or whether the packaging was sufficient to protect them against contamination. There is also no reference to any laboratory testing to determine whether there was any odor or other contamination affecting the bottle caps.

283) Freight Claims - Cost of Investigation

Question: An airfreight carrier lost a sensitive package going overseas to a company affiliate. After the carrier could not find the package for several weeks, the affiliate hired the services of a private detective. The detective was able to locate the package. Would the cost of the detective's services to our company be a claimable expense?

Answer: This is a novel question.

I suppose you could file a claim for the cost of the detective's services on the theory that this was necessary to mitigate the loss, i.e., if the package had not been found, you would have filed a claim for its full value (see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.1.4).

This, of course, assumes that the expense was reasonable under the circumstances and did not exceed the value of the "lost" package.

Note that if this was an international air shipment the carrier will probably assert the $9.07 per pound limitation of liability provided in the Warsaw Convention.

284) Freight Claims - Cost of Mitigating Damage

Question: I have read through section 7.4.9 of *Freight Claims in Plain English* which pertains to freight charges and I am unclear on whether or not we are responsible for certain freight charges.

Here is a summary of what transpired. Our plant in NC used a contract TL carrier to tender a FOB Origin Prepaid TL (2) stop shipment to IN which was to final in AR. Shipment consisted of stretched wrapped and palletized cases of paper plates. At origin, load was secured with load locks and shipment arrived completely intact at the first stop-off in IN.

Customer in IN offloaded their order (approx. 1/2 TL) and carrier then headed to AR. Carrier driver was negligent in that he did not re-secure load with load locks after leaving IN delivery. When carrier arrived at AR delivery, load had shifted substantially with visible damage and customer in AR refused the entire shipment. Carrier than transported entire shipment back to origin in NC.

Damaged product was unloaded and repacked using new corrugated cases. There was no product loss; we only incurred labor and material costs to repackage the damage goods.

Repackaged goods were then sent to AR customer with a different carrier.

Here are the freight recovery issues I am unclear on. I have freight invoices for the following:

1. Original shipment: NC to IN to AR = $1,804
2. Damaged freight return: AR to NC = $1,155
3. Replacement shipment: NC to AR = $1,030

I am fairly certain we are not responsible for a portion of freight invoice no.1 - from IN to AR as the product was never delivered to customer in AR. Am I correct and are we responsible for the other freight charges?

Any assistance you may offer would be greatly appreciated.

Answer: This is not the usual situation where the measure of damages would be based on the invoice price of the goods or the "destination market value". Assuming that the goods were substantially worthless or unsaleable when delivered to the consignee in AR, I would think that you could claim any reasonable expenses related to mitigation of the loss.

The costs of mitigating the loss would include freight charges to return the goods to NC, labor and material for repackaging, and freight charges to re-deliver the goods to the customer in AR. This would put you in the same position as if the carrier had delivered the shipment in good condition in the first place.

285) Freight Claims - Damage Notations

Question: Are there any court cases that ruled that a proof of delivery on which damage was noted was sufficient notification to the carrier; meaning that the carrier could take the initiative to protect the damage from being discarded. With almost no exception our carrier will know about the damage well before I do, up to 2-3 months sometimes. It is my understanding that carriers reserve potential liabilities, therefore I would believe the carrier would instruct their drivers to advise them when damage occurs.

Answer: 1. A damage notation on a delivery receipt, by itself, does not constitute a "claim in writing", see the Claim Regulations at 49 C.F.R. Part 370.3 (formerly Part 1005.2), reproduced as Appendix 65 in *Freight Claims in Plain English* (3rd Ed. 1995).

2. The same regulations (Part 370.11) require the carrier to give notice to "the owner and other parties that may have an interest therein" when goods are not delivered, rejected or refused due to damage, and to sell or dispose of the goods "in a manner that will fairly and equally protect the best interests of all persons having an interest therein."

286) Freight Claims - Damage to Packaging

Question: My company is a 3PL company. One of our clients is a Retail chain that sells electronics, tvs, dvds, etc. This company has the following policy regarding the disposition of damaged freight: 1)they define damaged product as any damaged box, and will not test the actual item to determine if it is still operational. 2)they will allow 0% salvage value. 3)a claim presented to us is sufficient notification of "concealed damages". 4) no product will be released to the carrier until our client has received payment in full and a letter with disposition instructions. 5)"we don't have time nor resources to repackage any damaged freight". My question is this, are these policies legal? I understand that our client has a legal obligation to mitigate their losses through the deduction of salvage and that the carrier is entitled to mitigate their losses.

Answer: You are correct in observing that there is a general obligation of the parties (shipper, carrier, consignee) to take reasonable efforts to mitigate the damage when there is a loss, damage or delay in transit.

The consignee's policies are not "illegal", although they could be the basis of a defense by the carrier that they have failed to mitigate the loss. Since this is a defense, the carrier would have the burden of proof - which could be difficult.

The problem is that consumer products often have packaging that displays the the item and contains advertising or other information for prospective purchasers. When the packaging has visible damage, it may be difficult or impossible to sell the item, even as distressed merchandise. This is especially true with electrical and electronic devices if there is a question about internal damage or possible malfunction and/or a concern about warranty or product liability exposure. Furthermore, the retail store may not have the facilities to inspect, test and/or repackage damaged goods.

Obviously, you should discuss the matter with your client and ask them not to reject items with minor cosmetic damage to the packaging. It may also be possible to return the items back to the manufacturer for refurbishing or repackaging, and thereby mitigate the loss.

287) Freight Claims - Damaged Cartons - Cost of Repackaging

Question: A carrier delivered an entire shipment (27 cartons) to the custom with visible damage to each carton. The consignee signed the freight bill "most boxes damaged-interior condition of damage unknown-will advise." In fact, the driver for the carrier signed the freight bill a "cartons not in usable condition, some cartons torn." It turned out that there was no damage to the product itself, but all the cartons had to be replaced and there was labor incurred for repackaging and inspecting the items. A claim was filed for the cost of the replacement cartons and for the labor involved. The carrier denied the claim saying, "In the absence of actual product damage, we have no alternative but to decline your claim and close our file." Shouldn't the carrier be responsible for the cost of the damaged cartons and cost of repackaging?

Answer: The answer is "Yes". Whenever there is damage, the parties have an obligation to "mitigate the loss", see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.1.4.

I assume that these are goods that would not be saleable at full price to the consumer or purchaser if the exterior packaging were damaged as you have described. Most customers will not accept merchandise if the package indicates possible damage. If saleable at all, such goods usually have to be sold as distressed merchandise or at a reduced price.

Also, it is apparent that damage to the contents of the package could not be ascertained unless the packaging was opened and the contents inspected.

If my assumptions are correct, these expenses would appear to be reasonable expenses incurred in mitigation of the loss, and are properly claimed. See FCIPE at Section 7.2.4.

288) Freight Claims - Damages For Early Delivery

Question: My company tendered a shipment to a common carrier and it was delivered earlier than the stated appointment on the Bill of Lading (B/L). The shipper hired us and shipped the freight billed to their customer as a 3rd party. The freight was a promotion and the customer who this freight was billed to is claiming significant damage due to the delivery being made early. The carrier ignored the requested delivery appointment that was on the B/L. The delivering terminal called and made their own appointment, which was about 5 days early. Is the carrier responsible for the damages that resulted from the product being delivered early?

The product wasn't damaged and it was delivered in good order. The product was a promotion for a television market and when it was delivered early the customer's competition had time to revise their own promotion and 1-up our customer's customer. The damage according to them is in the form of lost market share and additional costs associated with revising their promotion or running another one. The product was to be delivered on a certain date also because they had a phone bank set up for that date. When the product was received in home early people started calling and their calls wouldn't go through.

Answer: As a general rule, a carrier is only required to deliver with "reasonable dispatch" - meaning the usual and customary time to move the goods from origin to destination. If there is a special contract to deliver by appointment or at a particular time, the carrier could be liable for damage resulting from its failure to do so.

Frankly, I've never heard of anyone complaining because a shipment was delivered too soon, and I don't understand why the consignee would say it was damaged because the shipment was delivered early. Perhaps you could explain.

I would say that this is a case of "special damages" that are not recoverable from the carrier. Unless there was some actual notice at the time of the contract of carriage, there would be no way the carrier could foresee that these specific consequences and damages would occur.

This subject is covered in depth in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.3.

289) Freight Claims - Declared Value, Insufficient Packaging

Question: Enclosed are photographs of a package that I recently shipped via a parcel express carrier, but which was delivered mangled and torn with parts falling out of the package. This package was the original carton used by the manufacturer to ship these products. Needless to say, it was refused by the consignee, but then the carrier erroneously delivered it to a department store! A few weeks later, it was returned to me in the condition shown in these photographs.

This exercise bicycle was valued at close to $400, so I bought $300 in excess insurance, (over and above the carrier's limit of $100) which was written on the UPS receipt. However, the carrier made the mistake of charging me for only $.70, which was for only $200 of excess insurance. ($.35 per $100).

The claim was denied by the carrier claiming that the package was insufficient to protect the goods. When I produced the photos of the condition of the package, the carrier admitted liability. However, the carrier's insurance company paid me only $345, stating that I only paid for $200 in excess insurance and therefore, they were only liable for that amount.

Can the carrier and the insurer get away with destroying packages in this manner and then not paying for the full amount of the loss?

Answer: The carrier was clearly wrong when it billed you for the wrong amount of excess insurance coverage that you requested on the pickup receipt. The insurance company should have

protected you for the full amount of your loss; i.e., the amount of excess insurance requested on the receipt, which was "$300, plus the carrier's limit of liability ($100). Obviously, in view of the small amount of your loss, your options are limited.

It is suggested that you report the insurance company to your State Insurance Commissioner and local Better Business Bureau. You should also file a complaint against the carrier with the Federal Motor Carrier Safety Administration (FMCSA), Office of Public and Consumer Affairs, 400 Virginia Ave., SW, Washington, DC 20024. The FMCSA also has a Complaint Hotline 1-888-368-7238, or you may download your complaint on a form at www.fmcsa.dot.gov, where complaints against individual carriers are now being recorded.

Don't expect any action from the FMCSA right now, but eventually, if enough complaints appear against a particular carrier, the government will probably conduct an investigation into that carrier's practices.

Regarding the damage to your package, it appears that your exercise bicycle was shipped in the original carton designed to protect the product from normal transit handling. The carton was probably ripped open by being caught in a conveyor belt system, for which the carrier would be liable.

When a carrier denies liability based upon "insufficient packaging", or similar excuses, the law requires them to specify what was wrong with the packaging. It is not enough for a carrier to merely allege that the packaging was insufficient or inadequate. In this connection, one of the carriers recently added a statement that the shipper must comply with the packaging requirements published in its tariff, service guide "or elsewhere"! It is highly unlikely that a court would permit a carrier to base its declination on such a nebulous standard.

The law also requires carriers to prove that they were not negligent in the handling of your goods AND that the damage was caused by one of the five bill of lading exceptions, such as an act or omission of the shipper. "Insufficient packaging" would fall into this exclusion from liability, but the carrier must prove it, not merely allege it.

Furthermore, the law provides that "communications received from a carrier's insurer shall not constitute a disallowance of any part of a claim unless the insurer, in writing, informs the claimant that such part of the claim is disallowed, provides reasons for the disallowance, and informs the claimant that the insurer is acting on behalf of the carrier."

You may find that your carriers or insurers are not aware of these laws, or the fact that interstate parcel carriers are currently subject to federal laws and regulations governing their disposition of claims, but they are. This is one area that was not deregulated when the ICC was sunsetted. See *Transportation, Logistics and the Law*, pp.135-138, 367.

Carriers that disregard the loss and damage claim regulations should be reported to the FMCSA, which is charged with responsibility for enforcing the regulations. One of the reasons that Congress singled-out household goods van lines for continued regulation when it deregulated all other types of truckers was because the ICC received thousands of complaints from household goods shippers about problems they experienced with these movers. The DOT continues to receive these complaints against movers and has instituted the Hotline to receive them. Parcel shippers should also utilize this line in an effort to obtain some relief from improper claims handling practices.

290) Freight Claims - Defenses - Insufficient Packaging

Question: A carrier has refused liability on one of my claims by citing insufficient packaging. I plan on rebutting with a "time to refuse because of packaging is at pickup" letter. Will my intended letter be sufficient in light of the fact that the carrier has cited a 3rd party inspector's opinion that

"the crate employed in this movement was of too light weight construction to contain the items in the shipment"? My contention is: the inspector's opinion, by itself, is not sufficient evidence to substantiate the carrier's claim of insufficient packaging. Is this inspector's opinion enough evidence to prove "special damages"? It should be noted: the 3rd party inspector was contracted, by the carrier, to do this inspection.

Answer: First, I don't see any "special damages" issue. The term "special damages" refers to damages which result from, or are a consequence of, loss, damage or delay to the shipment. An example would be shutting down an assembly line because critical parts were delayed in transit.

Insufficient packaging is a defense to a claim for damage to goods. In order to avoid liability, the carrier has the burden of proving that the sole cause of the damage was the improper packaging, and that the carrier itself was not negligent in any way. See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 5.0. In other words, the opinion of an independent inspector as to the adequacy of the packaging is not enough to avoid liability, if there was any negligent handling which could have caused or contributed to the damage.

If the improper packaging is evident and visible at the time the goods are tendered to the carrier, the driver should refuse to accept the shipment. If the driver does accept the shipment, and there is obvious inadequate packaging, the carrier will be deemed to assumed the risk.

291) Freight Claims - Delay - Special Damages

Question: My company recently suffered a considerable loss when a piece of manufacturing equipment was damaged by the carrier called to return the equipment to our factory after repair.

The machine being shipped was part of an integrated manufacturing line. While the machine was under repair we were unable to produce goods for delivery to our customer. The potential penalty for causing a shutdown to our customer would have been approximately $4,000,000 per hour!

After sending the machine to the manufacturer by dedicated truck and having repairs done overnight, we contacted a major airfreight company to return the machine, by air, to our site. At the same time, the manufacturer had dispatched service people to uncrate and install the machine upon arrival.

The expediter picked up the freight by truck and carried it to the airport for loading onto the plane. At the airport, the carrier was unable to load the freight onto the plane due to its weight. The weight had been over-estimated by the shipper, but even after weighing the freight and finding out it was in fact half of the weight on the bill of lading, the carrier still was unable to load the freight on the plane. Upon taking the load back to the expediter's warehouse for repackaging, the truck was involved in a traffic accident and the freight was overturned, causing the damage.

The cost to repair damages to the machine was over $5000.00, which I am confident we will be able to recover. The major loss, however, was due to the delay in return of the machine due to having to send it back to the manufacturer to repair the freight damage.

When after determining that they would be unable to load the machine onto their aircraft, we called another carrier that was able to get a plane that could carry the machine. However, once the machine was damaged the second carrier was asked to wait until it could be determined if the damages could be immediately repaired. At that point, the service people dispatched for installation were at our facility waiting for the machine to arrive. When it was learned that the repair would take twelve to eighteen hours, the plane was released and the service people were told to go check in to a hotel and stay by the phone.

The carrier that caused the damage has since submitted an invoice for $7,000 for a load, which they returned to the original, pick up location. In addition, we were forced to use alternative manufacturing methods that caused us over $20,000 in additional scrap.

My question is, what in addition to the $5,000 damage to the machine can I recover? What about the $10,000 it cost to get the second plane, which we ended up not being able to use? How about the $7,000 in additional labor for having service people waiting for almost twenty-four hours? What about the $20,000 in scrap incurred due to the delay in getting the machine repaired a second time? What about travel expenses for sending someone to inspect the damage and coordinate the second expedited delivery? What about the $7,000 that the damaging carrier wants to charge me for a delivery they never completed?

Answer: You have a classic case of the "special damages" problem, see Section 7.3 in *Freight Claims in Plain English* (3rd Ed. 1995).

The basic issue in determining what monetary damages are recoverable is whether the consequences of the carrier's acts (damage or delay to the shipment) are FORESEEABLE at the time of the contract of carriage. Thus, some consequences may be obvious due to the nature of the shipment, but others would not be known to the carrier unless there was some actual notice. Unless you clearly spelled out the potential impact of damage to your machine, or a delay in returning it to service, the first air freight carrier probably would not be liable for the most of the costs and expenses that you incurred. On the other hand, if the carrier had been fully apprised of the consequences of damage or delay, it could be liable for at least some of the expenses. I would suggest that you read the Marjan case, which is reproduced in Appendix 115 of FCIPE, and which illustrates when special damages can be recovered.

There is no question that you should recover the $5000 cost of repairing the machine that was damaged when the truck was in the accident. And, I don't think you should have to pay the carrier's $7000 invoice for its freight charges, since it clearly never performed its contract. As to any additional costs or expenses, we would have to know exactly what notice was given to the carrier at the time you contracted for their services.

292) Freight Claims - Delay & Reasonable Dispatch

Question: What are the rules/regulations for failure to delivery freight within the quoted time frame? How do I file a grievance/claim with a freight carrier for failure to delivery freight and failure to provide status of shipment?

Answer: I don't know whether you have a written transportation agreement with your carriers, so all I can do is give you a general answer.

A motor common carrier is only required to deliver goods with "reasonable dispatch", unless there is some special contract to deliver at a specified time or by appointment. Carriers are liable for loss, damage or delay to shipments, and you can file a claim for unreasonable delay (or breach of an express agreement to deliver at a specified time, etc.).

You should note that the measure of damages for delay is a difficult subject. Unless the carrier has actual or constructive notice - at the time of shipment - as to the consequences of delay in transportation, your damages may be considered "special" or "consequential" damages and may not be recoverable.

293) Freight Claims - Delay Due to Strike

Question: · Claim filed by a concern in our terminal city

· Claim for entire value of a shipment of printed promotion materials which became valueless due to delay

· Shipment picked up on Thursday and arrived at destination, 900 miles away from origin on "a" Saturday afternoon

· Load near the nose of a trailer load of miscellaneous freight
· Terminal doesn't usually work on Saturdays
· Bills marked to deliver no later than Monday at 5 p.m.
· Dock crew that which ordinarily strips all inbound trailers between midnight Sunday and 6 a.m. Monday
· Anticipated no reason why the shipment should not be delivered on time
· A strike of drivers and dock men began during this weekend and the trailer was not unloaded
· The strike continued about 10 days during which the event for which the promotion material was needed passed.
· When the strike occurred, shipper and consignee were notified of the circumstances but due to threatened violence and dangerous attitude of the strikers the consignee's employees refused to pick up the shipment at our dock and unable to deliver.
· Who is liable?

Answer: A motor carrier normally has a duty to deliver with "reasonable dispatch". From your description, it appears that the carrier accepted the shipment with notice on the bill of lading, knew of the need to deliver by a specific date, and failed to do so. It also appears that the delay resulted in the goods being substantially worthless.

There are only a few reported court decisions on whether the carrier has a defense to liability because of a strike, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 6.8. These decisions turn on the specific facts and circumstances.

From what you have told me, I would say that the carrier is liable for the loss.

294) Freight Claims - Delay on International Air Shipment

Question: In February we arranged a very large air shipment from Istanbul to New York City (763 cartons, 13,000 kg.). The fright forwarder booked the move via Air France. When the cargo arrived in Paris, Air France cancelled a 747 Freighter, which caused a backlog. Our shipment was moved over 4 or five lots and commenced arriving at our warehouse about 9 days after departure. Would Air France be liable for delaying the shipment?

Answer: Without reviewing the full file, I can only give you a general answer.

1. For international air shipments, the Warsaw Convention (as modified by the Montreal Protocol #4) will be applicable. As relevant to your question, Article 19 provides: “The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage or goods.” Article 20 essentially provides that the carrier will not be liable for delay if it proves it has “taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.” Article 21 provides that the carrier will not be liable if the damage is caused by the shipper’s negligence, and Article 20 limits the carrier’s liability to 17 SDR's per kilo, unless the shipper declares a higher value. See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 16 and Appendix 143.

2. To the extent they do not conflict with Warsaw/MP4, the terms and conditions of the air carrier’s air waybill and tariffs will also be applicable. These would have to be reviewed.

3. Clearly, air carriers can be liable for delay. However, the question is what damages would be recoverable. As a general rule, in any delay case, the damages must be “foreseeable” in order to recover. In other words, the carrier must have actual or constructive notice as to the consequences of the delay. Damages that are not foreseeable may be considered “special damages” which would not be recoverable. See *Freight Claims in Plain English* at Section 7.3.

295) Freight Claims - Delay, Replacement Shipment

Question: A freight broker arranges for a prepaid 5000 lb. shipment on behalf of a shipper between the same two points each week. The transit time is historically four days and is so stated on the bill of lading (B/L) (ship Thursday deliver Monday). On the shipment in question, the delivery date is stated on the B/L and the shipment is picked up on Thursday as usual, however the truck does not show up on Monday. On Tuesday, the customer calls but the truck cannot be located. The truck has still not arrived on Wednesday and in the afternoon the freight broker suggested that they pick up an additional 5000 lbs of the same product and expedite delivery for Thursday morning at no charge to shipper. The shipper verbally agreed. Later the same day the salesman for the shipper made arrangements, without notifying the freight broker, to airfreight a 5000 lb. replacement shipment of product to their customer. This air shipment according to salesman was to keep the customer "running." Now the shipper is withholding $10,000 of payables to the freight broker to recover what they claim is the cost of "same day delivery" of product to their customer via charter air carrier (with back up invoice). The freight broker asserts that if given the opportunity it could have made the same "same day" delivery via their air carrier at a cost of $5,800.00.

Does shipper have right to hold back money due for other shipments made by the broker? Is the broker liable for any other charges?

Answer: Your questions raise a number of legal issues. I am assuming that the broker does not have any written transportation agreements with either the shipper or the carrier that would govern the dispute.

1. If the broker is truly acting as a licensed freight broker, and not holding itself out to be a carrier, it should not have any liability for loss, damage or delay to its customer's shipments, UNLESS the cause of the problem is the broker's negligence. In other words, the shipper should address its claims to the carrier, not the broker.

2. If there is liability for the delay you have described, it is the motor carrier that should be liable. Even if there is a failure to deliver with reasonable dispatch, the shipper may have another problem - "special damages". Most of the court decisions say that the cost of shipping a replacement by air freight or other expedited service is not recoverable unless the carrier has actual or constructive notice of the consequences of failing to deliver by a particular date.

3. If the shipper fails to pay the broker for either the shipment in question or for past shipments, the broker has a cause of action and can sue the shipper for its freight charges. The shipper may attempt to assert a counterclaim in the lawsuit, but it would really be against the wrong party and should be dismissed. (As noted above, the shipper's delay claim is properly against the carrier.)

296) Freight Claims - Detective Services to Find Missing Package

Question: An air freight carrier lost a sensitive package going overseas to a company affiliate. After the carrier could not find the package for several weeks, the affiliate hired the services of a private detective. The detective was able to locate the package. Would the cost of the detective's services to our company be a claimable expense?

Answer: This is a novel question.

I suppose you could file a claim for the cost of the detective's services on the theory that this was necessary to mitigate the loss, i.e., if the package had not been found, you would have filed a claim for its full value (see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.1.4). This, of course, assumes that the expense was reasonable under the circumstances and did not exceed the value of the "lost" package.

Note that if this was an international air shipment the carrier will probably assert the $9.07 per pound limitation of liability provided in the Warsaw Convention.

297) Freight Claims - Dropped Trailers

Question: I have had a number of freight claims denied by LTL carrier due to a drop trailer agreement our consignee has entered into with this carrier. This agreement states if an exception (shortage, overage, damage) is not reported in a specific number of days of unloading the trailer it will be invalid. The consignee agrees all claims for delivery exceptions are waived if notification of shortage is returned late. The consignee is not paying the exceptions and deducting from their invoice. Are these carriers still liable for the shortage under the Bill of Lading contract and the shipper had nothing to do with this agreement? We are the only one suffering a loss.

Answer: The contract of carriage (bill of lading) is between the shipper and the carrier, and the rights and obligations of the parties are governed by that contract. If the carrier chooses to drop its trailer at the consignee's facility, it is doing so either for its own convenience or for the convenience of the consignee, and it is essentially waiving its right to have the driver present at the time of unloading. I don't see how any "agreement" with the consignee can be a defense to your claim for loss or damage.

I would note that you indicate that these are LTL shipments. LTL freight generally moves through the carrier's terminal(s) and other freight is picked up or dropped off en route, so there is greater opportunity for shortage, overage or damage. If this was a full truckload "shipper's load and count" situation, or there was a sealed trailer, there could be other factors to consider.

298) Freight Claims - Duty to Mitigate

Question: Our Company filed a freight claim for $5,417.00 against a carrier back on 7-12-01, which it acknowledged on 7-16-01. On 12-18-01 they denied the claim because they felt the material could be fixed for a lesser amount.

We shipped these fence gates to Chicago from Maryland. Since the damage claim was applied for we have terminated our relationship with this customer for various reasons. They never paid the invoice for $5,417.00.

I believe they have trashed the above material because of space requirements on their part. The carrier refuses to give us any credit because the material is now gone. All of my documentation is in good order including several letters I've written since they denied the claim.

On the last communication I was threatened that because of my complaining about the time lines of the claim (past the 120 day period) they would not pay me anything.

Where can I go with this claim now?

Answer: You have two problems: one with the carrier and one with your customer.

My first question is: what were the terms of sale? If these goods were sold "FOB Origin" or equivalent, the risk of loss would be on the buyer under the Uniform Commercial Code. If so, your customer would still be obligated to pay for the goods, even though they were damaged in transit, and the customer should be the one to file the claim with the carrier.

The carrier is partially right here in the sense that there is a duty to "mitigate the loss", i.e., to repair or salvage the damaged goods if it would be reasonable to do so. Again, your customer may have taken action that would prevent this.

Even so, it would seem that the carrier still has liability for the damage, and should be responsible for the invoice value of the goods, less the reasonable cost to repair or a reasonable amount that could be realized in a salvage sale. The carrier cannot completely deny this obligation.

299) Freight Claims - Duty to Mitigate Damage

Question: Please tell me where I can find the rule/regulation that a shipper has the obligation to mitigate a claim to the lowest possible amount.

I have a roll of carpeting that was damaged by an interline carrier we hand off to (we don't deliver to this particular area) the roll was refused due to damage. We called the shipper and they refused to issue authorization to return the roll to them because it was damaged and too small to restock after cutting the damage off. We can't make them take it back. We paid the claim and transmitted the claim to the interline carrier. They declined our claim stating the shipper is obligated to take the roll back and mitigate the claim. They still have possession of the carpet. Please advise or let me know where this is written.

Answer: There is no "rule/regulation" per se that establishes an obligation to mitigate a claim to the lowest possible amount. The principle of mitigation of loss has evolved from court decisions over the years, see *Freight Claims in Plain English* (3rd Ed. 1995) at Sections 7.1.4 and 10.9.

In applying this principle, each case must be evaluated on its own facts to determine whether it is reasonable under the circumstances for the shipper to repair, salvage, repackage, etc.

As a practical matter, your shipper may or may not have any buyers for a short roll of carpet, and it may be essentially "worthless" from a commercial standpoint. If so, your connecting carrier should pay the full value of the claim. As an alternative, either your company or the connecting carrier may want to try to sell the carpet for salvage, in order to reduce the loss.

300) Freight Claims - Excessive Delay

Question: Recently we had a shipment we sent out lost by the carrier. Although the shipment was later found about a month later, I did make an inquiry about filing a claim. According to the carrier, if at any time the lost shipment is found (even up to a year or more later) any claim paid would have to be returned to the carrier. Is this true, or is there some kind of cutoff date? Also, are we still liable for the freight charges for this shipment because it was delivered a month late?

Answer: A common carrier has a duty to deliver with "reasonable dispatch", which is defined as the usual and customary time for delivery. Failure to do so is a breach of the contract of carriage for which the carrier is liable for any actual loss that may be sustained.

When goods are "lost" for a period of time and are later "found" and delivered, there often may be damages resulting from the delay.

Each case has to be evaluated on its facts: the length of the delay, whether there is an increase or decrease in the destination market value, whether the goods are "seasonal goods", whether there is any deterioration or physical damage, whether there is loss of sale, whether the carrier had actual or constructive notice of the consequences of failure to deliver in a timely manner, etc. If there is a significant delay, goods may become unmarketable, unusable for their intended purpose, or substantially worthless.

If the carrier has paid your claim in full, and the goods are later found, delivered and paid for by your customer, you would have an obligation to refund the claim payment. However, you would be entitled to deduct any actual damages you may have sustained because of the unreasonable delay.

And, if the carrier actually did deliver the goods and the consignee accepted them, it would be entitled to its freight charges.

301) Freight Claims - Excusable Delay in Filing

Question: In 1998 we were involved in an acquisition, during which time we had an extremely large backlog of trailers to unload. We now have several claims that have been returned to us as time barred covering shipments delivered short during this time.

These were all LTL trailers delivered on our unloading allowance agreement with one of the carriers in particular. In each case the trailer was dropped at our facility in a totally secured lot and our gate guard logged in the trailer seal (gates and facilities all have 24 hour security). In each case the seal remained intact and we applied an additional seal to each trailer as added verification that the seal had been inspected and to better identify the status of the trailer (empty, full, and trailers with refused freight on them were all sealed with different colored coded seals).

In some cases it took up to 30 days to unload the trailer. It also took an unusually large amount of time due to the fact that our orders were mixed on all of these trailers with the acquisition's orders, and we had to match our receipts to their orders. In all cases the carriers were aware of the difficulties encountered, and some even agreed to extend the claim filing limits set in our contracts during this period of time.

The carrier in question was not one of them, but was under contract. The contract carried the standard 9 month deadline for filing cargo claims.

Answer: The first thing that must be determined is whether the carrier actually issued a bill of lading that incorporated the provisions of the National Motor Freight Classification, or used a "long form" version of the Uniform Straight Bill of Lading, with the terms and conditions printed on the reverse side. This is necessary to bring Section 2(b)(2) into operation as part of the contract of carriage.

If so, the shipment would be governed by the time limits in the Uniform Straight Bill of Lading; the time limit for filing a claim is "nine months after the delivery of the property..."

Normally, "delivery" is completed when there is nothing further for the carrier to do; in your case, the carrier delivered the trailer and departed. Subject to the question I raised above, it would appear your claim is time barred. For a thorough discussion of time limits, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 9.0.

302) Freight Claims - Federal Regulations

Question: I am looking for a concise definition of what a "freight claim" is. The definition can either be for "transportation claim", "freight claim", or just plain "claim" but it has to be backed up in federal law or court decisions. I want the most current definition that is available.

Answer: This is not exactly a "definition" of a freight claim, but it is an excerpt from the FMCSA (formerly ICC) regulations in 49 C.F.R. Part 370, Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage that establishes the requirements for a valid claim:

> 370.3 (b) Minimum filing requirements. A written or electronic communication (when agreed to by the carrier and shipper or receiver involved) from a claimant, filed with a proper carrier within the time limits specified in the bill of lading or contract of carriage or transportation and:
>
> (1) Containing facts sufficient to identify the baggage or shipment (or shipments) of property,
>
> (2) Asserting liability for alleged loss, damage, injury, or delay, and
>
> (3) Making claim for the payment of a specified or determinable amount of money, shall be considered as sufficient compliance with the provisions for filing claims embraced in the bill of lading or other contract of carriage; Provided, however, That where claims are electronically handled, procedures are established to ensure reasonable carrier access to supporting documents.
>
> 370.3 (c) Documents not constituting claims. Bad order reports, appraisal reports of damage, notations of shortage or damage, or both, on freight bills, delivery receipts, or other documents, or inspection reports issued by carriers or their inspection agencies, whether the extent of loss or damage is indicated in dollars and cents or otherwise,

shall, standing alone, not be considered by carriers as sufficient to comply with the minimum claim filing requirements specified in paragraph (b) of this section.

303) Freight Claims - Forms and Procedures

Question: Is there a standard process and/or form for doing freight claims?

We are a manufacturer of modular office furniture, distributing through a dealer network. I would like to train a standard process of claiming freight damage for our dealers, sales reps and associates.

Answer: There are some "standard" forms for filing loss and damage claims. The most commonly used form is the "Standard Form for Presentation of Loss and Damage Claim" that is set forth at the back of the National Motor Freight Classification. A copy of this form is reproduced at Appendix 129 in *Freight Claims in Plain English* (3rd Ed. 1995) ("FCIPE") and the form is also available from many commercial stationery printers.

As far as procedures, most companies have written policies, procedures or employee manuals dealing with the handling of loss or damage to shipments that are tailored for their particular products and their shipping and receiving needs.

I would suggest that you read Section 10.0 "Claims Procedures and Administration" in FCIPE if you want to prepare instructions or procedures for your employees. It is also possible to have someone prepare a procedural manual specifically for your operation.

304) Freight Claims - Freight Charges for Replacement

Question: We have had a fire on an LTL shipment with Roadway that did destroy all of 160 cartons that were tendered to them. We did have to replace the shipment to the customer via 2nd day airfreight the next day after finding out about the fire. We asked the carrier to pay the original freight charges out to California and the airfreight charges for the replacement shipment. Can you tell us what freight charges the carrier should be paying us all, some or none?

Answer: If a shipment is destroyed in transit and not delivered, you can recover the freight charges that you have paid to the carrier for that shipment as part of your claim.

However, as a general rule, expedited freight charges to send a replacement shipment to a customer are not recoverable, see Section 7.4.9 in *Freight Claims in Plain English* (3rd Ed. 1995).

305) Freight Claims - Goods Damaged During Return

Question: The customer received freight from the shipper just fine, but the customer returned the goods to the shipper and there was damage caused by the carrier while the goods were on the way back to the shipper. Should the claim be filed with the carrier at invoice or at cost, and why?

Answer: The usual measure of damages is the "destination market value" of the goods; if goods are lost or damaged on the way to a customer, this is generally the invoice value of the goods. See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.0.

When goods are being returned to the vendor-shipper, I would think that the proper measure of damages is the credit that would be given to the customer for the returned goods. In other words, if the goods had been returned in good order and condition the customer would have been given a credit of $xxx. (Think of it as a separate sale from the customer back to the original vendor-shipper.)

I note that it is likely that the carrier will take the position that there was no sale, and that the vendor's inventory value should govern. However, I would file the claim as suggested above.

306) Freight Claims - Holding Goods Pending Resolution

Question: What is reasonable time to wait for a resolution to a claim? My claims average two to three months and I am expected to warehouse this merchandise for that time. My warehouse is bursting at the seems and all this destroyed merchandise is just in the way. Do I need to be a warehouse for the trucking companies?

Answer: I assume you are holding the damaged goods pending resolution of the claim and would suggest the following procedure:

1. As soon as you have any damage, you should immediately send a WRITTEN request to the carrier and ask them to make an inspection of the damaged goods.
2. Tell the carrier that you will hold the goods and the packaging for some reasonable time (say 2 weeks) after which you will attempt to salvage or dispose of the goods.
3. Make an accurate, factual, record describing the damage to the packaging and the goods and put with your claim file. Take photos if possible.
4. If you salvage the goods, keep a record of the salvage sale information and the net proceeds. If you dispose of the goods, also make a record and keep with your claim file.

Remember that you have a duty to "mitigate the loss", so you should take commercially reasonable measures to salvage, repair, repackage and sell goods if possible.

307) Freight Claims - Improper Packaging

Question: I had a local trucking company who goes to Florida pick-up a quantity of metal lockers there to deliver to my warehouse in Ohio. When the load arrived and the door was opened it was obvious the shipment was pretty well damaged. We had an inspection report made by MTI. We marked the freight bill correctly and submitted our damage claim.

The claim total was $1,700.00. The trucking company wants me to take their offer of $850.00. They say that the damage occurred because of inadequate packaging. They also state that they don't have to give me a dime and if I don't take the $850.00, they wont pay me anything. What are my rights?

The shipper has successfully used the same packaging to ship all over the US and Canada.

Answer: From the facts as you have described them, you should be able to recover your "full actual loss". This is the measure of damages under federal law, the "Carmack Amendment", 49 U.S.C. § 14706. The carrier appears to be asserting a defense which we refer to as "act or default of the shipper", namely, improper packaging. However, the carrier would have to prove that the improper packaging was the sole cause of the damage, and that it was free from any negligence, which I doubt it can do. Even if the packaging was insufficient, it appears that the carrier accepted the lockers for transportation and thus waived any claim that the packaging was inadequate. Note that these subjects are covered in depth in *Freight Claims in Plain English* (3rd Ed. 1995).

If you can't get a satisfactory settlement with the carrier, your only recourse may be to bring a lawsuit. Based on the size of the claim, you could bring the suit in your local small claims court, and you may not even need to hire an attorney.

308) Freight Claims - Improper Packaging

Question: We had a shipment which was damaged in transit. The freight company is refusing to pay the claim, quoting N.M.F.C. classification 100 series and referencing item 23320 - 'such articles will be accepted for transportation in any container or in any other form tendered to carrier which will permit handling into or out of vehicles as units, providing such containers or tendered forms will render the transportation of freight reasonably safe and practicable."

If they accepted the freight for shipment are they responsible for any damages which occur?

Answer: Common carriers are liable for loss or damage unless they can prove that the loss was due to one of the basic defenses such as act of God, act or default of the shipper, etc. AND that they were free from negligence. See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 5.0 for a detailed discussion of carrier liability.

Item 23320 of the Classification refers to "belts or belting, elevator, conveyor or transmission, etc.....", but there is no reference to "containers". I don't see how it could affect your shipment.

I am assuming that this carrier is saying that you did not properly prepare or package your goods for transportation ("act or default of shipper"). If so, the carrier still has to prove that the improper packaging is the sole and proximate cause of the damage and that it was not negligent in handling your goods.

In other words, the answer to your question is "Yes".

309) Freight Claims - Inadequate Packaging Declination

Question: If a carrier declines a claim based upon "inadequate packaging" per the NMFC, is it appropriate to respond that the carrier must fulfill its burden when making this allegation, i.e. (a) that the sole and proximate cause of the loss was the act or default of the shipper, and (b) that the carrier's negligence did not contribute to the damage?

Answer: Obviously, you can quote the law on burdens of proof and cite the *Elmore & Stahl* decision, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 5.0, but it probably won't help too much.

Carriers are required by the federal claim regulations at 49 C.F.R. Part 370 to investigate all claims. Each claim must be determined on the specific facts of the shipment. Even if packaging does not conform to the NMFC packaging rules, the carrier still will be liable if there was negligence in the handling or transportation of the goods.

If you are unable to obtain satisfactory resolution of your claims, you may have to resort to litigation or arbitration.

If there is a question regarding the adequacy of the packaging, perhaps one of the following people can help you:

Chet Guynn
PACCON
7406 North Hawthorne Lane
Indianapolis, IN 46250
Tel. (317) 841-0813
CKGuynn@aol.com

Dr. Diana Twede
MICHIGAN STATE UNIVERSITY
SCHOOL OF PACKAGING
130 Packaging Building
East Lansing, MI 48824-1223
Tel. (517) 355-9580
Fax. (517) 353-8999
twede@msu.edu

Jerry Stone, Packaging Engineer
NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION
2200 Mill Road

Alexandria, VA 22314
Tel. (703) 838-1828
nmfta@erols.com

310) Freight Claims - Inspection Reports

Question: We have frequent concealed damage freight claims. We file a claim with our carrier (faxed and mailed). The cover letter with the claims states that an inspection is requested. We ask that a copy of the inspection report be sent to us. We rarely receive this report. When we asked our carrier about this they stated that a copy of the inspection report is left with the consignee. We are the shipper, the shipping terms are pre-paid and add, we are filing the claims and we feel the inspection report should be sent to us. The NMFC states that the consignee gets the report whether or not they are filing the claims. Can we demand copies of the inspection from the carrier?

Answer: Item 300140 of the NMFC is titled “Inspection by Carrier” and it does say that “The original of the report will be given the consignee for claim support. Any inspection report issued must be incorporated in the claim file.”

Ordinarily, if the shipment is “FOB Origin”, the risk of loss in transit passes to the consignee upon tender of the shipment to the carrier at origin. The consignee, having the risk of loss, would be the one to file the claim, so there is no problem.

It would appear that the NMFC provision fails to contemplate the situation where the shipper has risk of loss (or voluntarily assumes the responsibility to file the claim). Thus, if the shipper wants a copy of the inspection report, he would have to get it either from the consignee or from the carrier.

I would assume, that if you have a business relationship with your consignee, the consignee would provide a copy of the inspection report. Likewise, I can't think of any reason the carrier would not honor such a reasonable request.

Of course, you don't need to have the inspection report to file a claim; you can always file your claim without it. Then ask for a copy of the inspection report, since the carrier is required to keep a copy in its claim file.

311) Freight Claims - Inspection Requirements

Question: Is there a certain amount of time that product is required to be held for the carrier to inspect damaged goods for which a claim is being filed against them.

If we file claim against a carrier, and they do not inspect within "x" amount of days from notification of claim, can we dispose of the product? What is the carrier’s liability? What is our liability? Can the carrier come back later and refuse payment of the claim because they are unable to inspect the damaged goods, even if they were given a reasonable time to conduct the inspection?

Answer: There is no law or regulation governing the time you should hold damaged goods for inspection by the carrier. Some suggestions:

1. You should request an inspection promptly upon delivery or discovery of shortage or damage. This can be done by phone or email, but always follow up IN WRITING, and keep a copy.

2. If the carrier fails to inspect the goods within a reasonable time - say a week or 10 days - send another WRITTEN notice. Tell them: (a) that you will hold the goods until a certain date only; (b) that if they fail to inspect the goods by then they will be deemed to have waived any right of inspection, and (c) that you will dispose of or salvage the goods after that date.

3..If this is a significant claim, you may want to retain an independent inspection agency to inspect the goods and give you a report. In any event, you should always document the damage carefully and accurately - condition of the packaging, a description of the damage, photos, etc.

312) Freight Claims - Inspection Upon Delivery

Question: I had a question from a client who was asked by a vendor who ships prepaid to their warehouse locations to make a notation at the time of all their deliveries. They asked that the person receiving the shipment should make the following notation: “Pending final case/carton count, piece count and product inspection” along with the person's full name receiving it.

My questions are:

1. Does this type of wording hold up in a claim if there is a shortage or damage?
2. Does this place any liability against the receiver?
3. What should they do, should they go ahead and place this notation on the delivery receipt, or should they tell the shipper they can't and the reasons why?

Answer: The best advice is: ALWAYS carefully inspect packages and cartons at the time of receipt and make shortage or damage notations on the bill of lading or delivery receipt. Notations should be factual and reflect what is actually observed, e.g., 5 cartons wet, puncture hole in side of carton, etc.

If there is ANY physical evidence of damage, there should be an immediate inspection, preferably before the truck driver leaves.

Obviously, if the carrier drops a full-truckload sealed trailer that is not opened until a later time, this cannot be done, and the consignee should be especially careful to document any overage, shortage or damage problems that are observed when the trailer is opened.

Notations such as "subject to count" or "subject to inspection" really have no legal value, nor do they help with claims. Any time that shortage or damage is concealed, the claimant will have the burden of proving that it did not occur after delivery.

313) Freight Claims - Insurance Coverage

Question: We had a customer ship a load of brewing tanks valued at $45,000. The driver had an accident enroute, totaling the truck and trailer and damaging the product. The insurance company got authorization from the shipper to sell the product as salvage for $8,000, which would go to the insurance company to cover losses. The shipper filed a claim with the carrier for $45,000. Who is responsible to pay the shipper for their product, the insurance company or the carrier? If the carrier is responsible to pay the claim, what is the time frame they are required to pay within? Can the carrier wait until the insurance company has paid them before paying the shipper?

Answer: I assume that the “insurance company” you refer to is the motor carrier's insurer under a motor carrier legal liability policy or equivalent.

The motor carrier has primary liability for loss or damage to the goods. Its insurance policy is an “indemnity” policy under which the insurer is obligated to reimburse the motor carrier for losses that are covered under the policy, subject to the policy limits, terms, conditions and any applicable exclusions.

The motor carrier may be liable to the shipper for loss or damage that is not covered by its insurance, or it may have a large deductible. That is not the shipper's problem.

314) Freight Claims - Insurance vs. Liability Limitations

Question: We ship 5-gallon pails with UPS. We also declare a value on our UPS shipments and insure them. While there is an issue as to whether the 5-gallon pails are sufficient packaging,

my question is whether UPS can refuse to pay a claim for insufficient packaging even if UPS accepts payment to insure that package?

Answer: You are mixing "apples & oranges".

Insufficient packaging is a defense to a claim; it falls under the "act or default of the shipper..." category. If the sole and proximate cause of the loss is the improper packaging AND the carrier was free from negligence, then the carrier would not be liable for the loss. See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 6.0.

All UPS surface shipments move under a $100 per package liability limitation. Additional coverage may be obtained by declaring a value on the bill of lading and paying a valuation charge. Liability limitations are not "defenses"; they just set the maximum amount the carrier must pay if it found to be responsible for the loss.

315) Freight Claims - Intact Seals

Question: If a driver is present during the loading and has the opportunity to count the cartons, acknowledges the carton count on the B/L, seals the trailer in the presence of the Shipper at origin and the trailer arrives at the consignee with the seal intact, no signs of tampering of the seal and shortage is discovered during the unload in the presence of the driver. Can the claimant rely on the B/L carton count acknowledged by the driver at origin, along with the driver's verification of shortage at delivery to establish its prima facie case, and the responsibility to prove any miscount of cartons on the carrier? Or is the fact that the seal was intact, with no signs of tampering, strong evidence that the loss could not have occurred during transit, and the claimant could not rely solely on the B/L?

Answer: As to your first question, the answer is "yes" - if the driver is present, acknowledges the package count and signs the bill of lading, it is usually sufficient to establish your prima facie case.

The fact that the seal may be intact at the time of delivery is usually fairly strong evidence that a shortage did not occur in transit. But there are a lot of cases where seals have been removed and replaced, or the door hinges and/or locking mechanisms have been tampered with, etc. so it cannot be considered conclusive evidence one way or another.

The bottom line is that each case must be investigated thoroughly, and a determination must be made on the individual facts and circumstances. And if you are having recurring problems, you may want to retain a security expert or consultant.

316) Freight Claims - Interlined Shipments

Question: I filed a missing item claim with the originating carrier and they in turn sent the claim to the carrier they passed the shipment on to (there was also another carrier that delivered the shipment). The shipment consisted of 5 pallets, one of the pallets contained 5 boxes, which was clearly marked on the bill of lading. When the originating carrier sent the shipment to the second carrier they omitted the description of the pallet with the 5 boxes only stating that it was "1 pallet of boxes". The customer informed us one month later that he was missing one of the boxes. (We ship to installers and they frequently wait 1 month or longer to install the equipment we send to them). We filed the claim and 90 days later received a denial letter from the second carrier saying that they delivered what was on the bill of lading (the one from the originating carrier) intact. The originating carrier refuses to accept our claim themselves and I have only received a verbal declination from them. How should this be handled?

Answer: First of all, your "contract of carriage" is with the original ("receiving") carrier, not with the connecting or delivering carriers. Your claim should be filed with first carrier, since they are

legally responsible even if the shipment was interlined or delivered by some other carrier. These principles are explained in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 4.4.

Second, it is your burden of proof to show what was tendered to the carrier at origin and what was actually delivered at destination. Assuming that you can do this with documents, witness statements, etc. you should be able to prevail on your claim.

If the carrier still refuses to pay your claim, your only recourse may be to bring a lawsuit (or, if the carrier agrees, to submit the claim to arbitration using the Transportation Arbitration Board or some other service).

317) Freight Claims - Is UPS a Common Carrier?

Question: Is UPS a common carrier and subject to the terms of the Carmack Amendment for freight claims purposes? How do they get away with dragging their feet settling claims? Any tips for dealing with them on claims settlement matters?

Answer: You are correct: for any shipments which move "surface" (by truck), UPS is considered a motor carrier and is subject to the "Carmack Amendment" (49 U.S.C. 14706) and the FMCSA (formerly ICC and FHWA) claims regulations. They are required by law to investigate claims and to respond in a timely manner - just as any other motor carrier.

I would observe that UPS does have a liability limitation ($100 per package, unless the shipper declares a higher value and pays a valuation charge). This liability limitation is usually enforceable, according to most of the recent court decisions.

The only suggestion I can give you - if you are getting the "brush off" - is to file a suit in your local small claims court. That usually gets their attention.

318) Freight Claims - Late Delivery of Brokered Load

Question: I contacted a broker to arrange the pickup and delivery of dairy products from a facility in Colorado to California. The dairy products were to be delivered by a certain date because the products had an expiration date. The trucking company hired by the broker failed to deliver the dairy products before the expiration date. The broker insists that I pursue a claim against the trucking company for my damages. Aren't the broker and carrier both liable to me? Can I claim the price I paid for the goods as my damages?

Answer: The carrier is primarily liable for loss or damage to goods it transports. If the carrier failed to deliver with "reasonable dispatch" (the usual and customary time to deliver similar goods between the same points), it should be liable for damages resulting from the delay. And if the goods were "substantially worthless", the measure of damages would normally be your invoice price to the customer rather than their cost.

There is one caveat however: if the carrier was not aware of the need for timely delivery and that the product had an expiration date, it might claim that it the invoice price is "special damages", and that a lesser measure of damages is applicable.

Regarding the broker, normally a broker is not liable for loss or damage in transit unless it is negligent. Now, if the broker failed to advise the carrier of the perishable nature of the goods, or that there was a need to deliver in a timely manner, or that there was an expiration date problem, it is quite likely that you could establish negligence on the part of the broker and also hold it liable for the loss.

319) Freight Claims - Liability for Improper Loading

Question: We recently shipped an intermodal load to a customer that was f.o.b. shipper's dock. The load shifted during transit and the carrier billed our customer for damage to their trailers. Our customer then came back to us and wanted us to pay the damages.

We contend that since these loads were live load and the driver signed off on the bill of lading, that the trucker in fact stated that the load was acceptable and should resolve us of any damage to the trailers that took place during transit. Also since the load was f.o.b. shipper's dock, once it was on the truck we no longer owned it and therefore we believe it was no longer our responsibility.

We have since corrected the problem, but want to know who is responsible for the damages incurred in this situation.

Answer: As the shipper, you would have some responsibility to properly load, block and brace any shipment that you have undertaken to load on the carrier's equipment. Thus, if your loading was improperly done, a third party injured as a result thereof could bring an action against you for negligence.

However, the primary responsibility generally lies with the carrier. Federal D.O.T. regulations require the carrier's driver to insure that all cargo is properly and safely loaded, and to check the load from time to time while in transit, see 49 C.F.R. Parts 392.9 and 393.100. This subject is discussed in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 4.8.3.

Unless this was a "Shipper Load & Count", with a sealed trailer, I would take the position that the D.O.T. regulations govern, and that the carrier bears responsibility for the damage.

I would also observe that your terms of sale would not affect liability for damage to the equipment. Under the Uniform Commercial Code, if the terms are "FOB Origin" the risk of loss or damage to the cargo shifts to the purchaser when the goods are given to the carrier at origin. However, liability for damage to the equipment would be based on negligence, and not on the ownership of the goods.

320) Freight Claims - Liability Limitation - Used Machinery

Question: We recently received in a Rockwell Hardness Tester. After the trucking company had left in our inspection of the equipment it was revealed that the piece was damaged rendering it unusable. On contacting the shipper it was discovered that the piece had originally been put on a skid but arrived at our dock not on a skid. We contacted the freight company that same day. The next day they sent out an inspector. The shipment was sent collect freight class 185. We have filed a claim against the freight company, which they denied because we accepted the shipment, and they have claimed that if they were liable it would only be for 10 cents per pound. This is unacceptable to us. The claim is for $2,668.00, which is for the cost of the equipment and the original shipping charges. It would seem to me that we acted in a timely and responsible manner. It would also seem to me that the freight company should step up to the plate and do the right thing. What actions can we take against the freight company to receive a fair settlement?

Answer: First of all, the fact that the damage was discovered after delivery only means that you have an additional burden of proving that the damage did not occur while the tester was in your possession.

As to the 10 cents per pound, it would appear that the carrier has a limitation of liability in its (unfiled) tariff. Many carriers do have such limitations for USED equipment or machinery. The enforceability of such limitations depends on a number of factors including the form and language of the bill of lading, the rate that was charged, whether the carrier actually published and maintained applicable rate and rules tariffs, etc.

At the very least, you should demand full and complete copies of the tariffs (both the rate tariff and the rules tariff) which the carrier claims entitle it to a limited liability.

I should note that your experience is not uncommon: many shippers are surprised by liability limitations lurking somewhere in a carrier's tariff, of which they have no knowledge. One way to protect against this kind of problem is to enter into written transportation contracts with any carriers that you deal with.

321) Freight Claims - Liability Limitations

Question: We sent a package containing two rings COD, using FedEx overnight delivery. The package was refused, even though online tracking initially showed that the COD charge had been picked up. Apparently, the driver let the recipient open the package prior to payment. When we received the package return, it was apparent that the stones in the rings had been changed. The original stones had been laser inscribed. The original COD charge was $5,888.00 and we made a claim against FedEx for that amount, which they have refused to pay. Even though FedEx violated their own policy by allowing a consignee to open a package prior to payment, they claim they are only liable for $100.00. Do we have any recourse?

Answer: FedEx has a clearly stated limitation of liability on its domestic airbill that limits its liability for loss, damage or delay to $100 unless a higher value is declared and an additional valuation charge is paid. Apparently, you did not declare a value or pay the additional charge.

Unfortunately, the courts will usually enforce the FedEx liability limitations, even in cases of misdelivery or gross negligence, such as you have described.

From the facts as described, it would appear that your buyer probably switched the stones. If you have evidence to support this, you should file a complaint with the police. You can also bring a civil action against the buyer for conversion.

FedEx's position in this matter may smack of arrogance, but shippers really should read their shipping contracts and take appropriate measures to protect their interests.

322) Freight Claims - Liability of Successor Company

Question: We have been dealing with a motor carrier who is in the process of selling out to another carrier. There are several claims which are still open against the original carrier, and I was wondering if, in a sell out, the new buyer must purchase all assets and liabilities, or does he only buy the assets?

Answer: There is no "hard and fast rule" in these matters. If the successor company acquires the stock of the first company and it is merged into the successor, then it is likely that the successor will acquire both assets and liabilities, unless there is some agreement to the contrary.

If the successor company is buying only assets (trucks, customer lists, etc.), then it is likely that it will not be assuming the liabilities. However, you have to actually look at the agreement between the parties to know what is assumed and what is not.

323) Freight Claims - Limitation of Liability

Question: We made a shipment of 1 crate weighing 575 lbs. on a carrier (R&L Carriers) that our customer specified. The freight terms were FOB origin, freight collect. We do not have any agreements with this carrier. The shipment was damaged in-transit and refused by the consignee (our customer). Our customer filed a claim for $2,700.00, but put our name on the claim, figuring that the carrier would pay us directly and satisfy the invoice. The carrier sent a letter to me denying

the $2,700.00 claim and stated that their liability if any is only $1,300.25 based on the limitation of liability provision contained in Item 170, Rules Tariff RLCA 100 ($5.00 per pound or 5 times the total freight charges applied to the shipment, whichever is lower). Should I amend the claim to accept the $1,300.25 or hold the carrier liable for shippers' full actual loss ($2,500.00) since we do not have an agreement in writing to a lower liability?

Answer: Since the shipment was FOB Origin, the risk of loss in transit was on the buyer-consignee, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 10.5.1. Accordingly, you can hold the buyer responsible for payment of the invoice price, and let the buyer handle the disputed claim with the carrier.

Whether the liability limitation is enforceable is another question.

If you used a Uniform Straight Bill of Lading that had the usual language incorporating the carrier's tariffs by reference, the tariff rules limiting liability would probably be binding. (There are other requirements such as a choice of rates, etc. - see generally FCIPE Section 8.0 for a full discussion.)

If the bill of lading or receipt that was used does not refer to classifications or tariffs, then the tariff limitation would not be incorporated into your contract of carriage, and would not be binding.

I would note that many shippers are caught by surprise when they file a claim, only to learn of a liability limitation lurking in one of the carrier's unfiled tariffs. This is why we always recommend that shippers enter into written transportation agreements or, if they must ship with common carriers, demand, in advance, copies of all relevant tariffs.

324) Freight Claims - Measure of Damage - Invoice Price vs. Manufacturing Cost

Question: 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?

Answer: Where goods have been sold to a customer, and are lost of destroyed in transit, the proper measure of damages is the invoice price to the customer, and not the "manufacturing cost" or "replacement cost". This subject is discussed in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.2.3.

Think of it this way: Assume that the consignee had risk of loss in transit (FOB origin). If 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. Why would the measure of damages be any different just because the shipper files the claim?

325) Freight Claims - Measure of Damages

Question: We are a manufacturer in the Midwest area and one of our carriers damaged an outbound shipment. The shipment was notated as damaged upon receipt and an inspector was sent to the consignee to provide a written report of his findings.

We filed the claim for the delivery invoice rather than our cost of manufacturing, but the carrier has taken the position that they are only obligated to pay for the manufacturing cost (no overhead or lost sales) with a deduction for the freight charges.

What is the carrier's obligation and must we disclose confidential information regarding the cost of manufacture?

Answer: Where goods have been sold to a customer, and are lost of destroyed in transit, the proper measure of damages is the invoice price to the customer, and not the "manufacturing cost" or "replacement cost". This subject is discussed in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.2.3.

Think of it this way: Assume that the consignee had risk of loss in transit (FOB destination). If 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. Why would the measure of damages be any different just because the shipper files the claim?

326) Freight Claims - Measure of Damages

Question: A company wants to file for their selling price vs. their cost (which is what the carrier is insisting on). I saw in your Q&A section a case that I believe addresses this issue - *Robert Burton Associates, Ltd. v. Preston Trucking Co.*, unreported, Civ. No. 96-745(NHP), (D.NJ Mar. 24, 1997, aff'd on reh., (D. NJ May 22,1997), reversed in part and remanded, 1998 WL 381711 (3rd Cir. Jul.10, 1998). Is it correct that it is up to the carrier to prove the lost skids didn't cause a loss sale for the shipper? The shipper did send a replacement shipment to this consignee but lost a sale on another customer. Does that count or will the carrier say they have proof a replacement order was sent out?

Answer: You are correct. Where the goods have been sold and are lost or damaged in transit to the purchaser/consignee, the proper measure of damages is the destination market value, which normally is the invoice price.

The seller/shipper is entitled to be made whole for the loss, and the test is what would he have received if the contract of carriage had been performed. Obviously, in most cases, the seller/shipper would have been paid his invoice price for the goods.

The *Robert Burton* case recognized this, although the appeals court muddied the water somewhat by remanding the case back to the district court on the question of whether there was a loss of sales. (I would note that the defendant, Preston, filed for bankruptcy while the case was pending in the district court, so there was never any final determination on that issue.)

In my opinion, the fact that the seller/shipper may choose to replace a lost or damaged shipment is irrelevant. It is a separate transaction and involves a separate and different contract of carriage.

327) Freight Claims - Measure of Damages

Question: One of our LTL carriers has suddenly started declining freight damage claims for full invoice value. Their reasoning is that we are only allowed to recover our actual costs and not our profit or freight costs. My interpretation is that we are entitled to recover our loss, which was a result of carrier negligence. Since the damage resulted in lost sales, we feel we should be entitled to a full recovery. We make every attempt to mitigate damages and claim only that portion of the product that is not salvageable. We also give the carrier credit for scrap value, as we do not want defective product in the market place. This particular carrier (recently purchased by a major small parcel, air carrier), is also requiring a breakdown of our manufacturing costs, which is company confidential information that we do not share for obvious reasons.

They are further stating that on a prepaid shipment, we are not entitled to recover freight costs since those costs should be built into the sales price to our customers.

I would appreciate your clarification on these points?

Answer: Where goods have been sold to a customer, and are lost of destroyed in transit, the proper measure of damages is the invoice price to the customer, and not the "manufacturing cost" or "replacement cost". This subject is discussed in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.2.3.

Think of it this way: Assume that the consignee had risk of loss in transit (FOB origin). If 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. Why would the measure of damages be any different just because the shipper files the claim?

As to your second question, where freight charges have been paid to the carrier, and the goods have not been delivered or have been damaged so they are substantially worthless, the claimant may recover the freight charges on the theory that the carrier has not performed the contract.

Where the claim is based on the destination value of the goods, that value presumably includes the delivery charges, and thus the freight charges may not be separately claimed. For example, if freight costs are prepaid and included in the invoice price, the invoice value to the purchaser represents the full value of the goods. This subject is covered in detail in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.4.9.

328) Freight Claims - Measure of Damages - Invoice Price

Question: I received the following response from a motor carrier regarding my claim for $13,679.15 on 1 lost pallet. This is our invoice price to the consignee. They are asking us to reduce the value to our manufacturing cost for the following reasons: "...Please be advised that it is legal and customary for the carrier to request that the Shipper or Manufacturer amend a claim to their cost rather than invoice value. The basis for doing so is that in many instances, the shipper replaces the shipment that has been lost or damaged. Therefore, the sale was not lost. If and when the ultimate customer reorders from another source or chooses not to replace the shipment, the sale is then considered to be lost and the Shipper and or Manufacturer is entitled to recover the invoiced value. The carrier's responsibility is to cover your loss. This does not include profit unless the loss or damage resulted in a lost sale".

We replaced the product after flying the replacements in from overseas which air freight cost we did not include in the claim. What is your opinion? What is a good response to their theory?

Answer: The carrier is wrong. If these goods had been sold to a customer and were lost during transit, the proper measure of damages is the invoice price to the customer. The fact that you may have obtained other goods and shipped them to your customer is irrelevant.

329) Freight Claims - Measure of Damages - Invoice Price

Question: When a trucking company damages freight, they pay the claim filed. If it is noted on the bill of lading, is the trucking company also legally responsible for the replacement cost of the damaged product including the cost to expedite the manufacturing of the replacement product?

We ship to construction sites. We had a shipment that was totally damaged. The consignee was compensated for the cost of the freight that was damaged. But it cost them almost $4,000 more to replace the product. They had to pay a premium to expedite the manufacturing. Also their cost per unit

was higher as their total order was smaller than the original. My question is, how can we hold the trucking company liable for the added cost of replacement?

Answer: There are some situations where "replacement cost" is a proper measure of damages, see generally Section 7.0, Damages, in *Freight Claims in Plain English* (3rd Ed. 1995).

Where a consignee must purchase another item to replace an item that has been damaged or destroyed in transit, the "destination market value" of the replacement item (what it costs to buy another one) may be a proper measure of damages. This could be more than the original invoice price paid for the item that was damaged.

330) Freight Claims - Measure of Damages - Replacement Cost

Question: 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. Can you review and advise me your thoughts.

Answer: The usual measure of damages, as prescribed in the court decisions, is the "destination market value" of the goods, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.2.1 et seq. Other measures of damages are sometimes applied if it is more appropriate under the circumstances.

I am assuming that you are the consignee of the shipment, that you had risk of loss in transit, i.e., that the shipment was "FOB Origin", and that you had to pay more than the original invoice price in order to replace the portion of the shipment which was damaged in transit.

This situation is one of the circumstances where "replacement cost" is a proper measure of damages. See International Barges, Inc. v. Kerr-McGee Corp., 579 F.2d 1204 (10th Cir. 1978)

331) Freight Claims - Measure of Damages on Interplant Movement

Question: 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 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.

Answer: Your question involves the proper measure of damages for loss or damage in transit.

There are a number of cases involving movements from plant to warehouse in which the courts have allowed the manufacturer to recover its selling price (as opposed to its manufacturing cost). These cases turn on whether there was a reasonable certainty that the goods would in fact have been sold to customers within a reasonable time. If this can be established, the selling price (less any expenses of sale that have not actually been incurred, such as commissions) is the correct measure of damages.

This subject that is discussed in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.0, and more specifically at section 7.2.3.

332) Freight Claims - Measure of Damages on Refurbished Goods

Question: We have several shipments where our commercial coolers were damaged in transit. These commercial coolers were being moved from a refurb center (refurb consists of mechanical and cosmetic enhancements to bring cooler back to like new condition) to our distribution center. Due to the fact that these units were not brand new our carrier deemed these units as "used", and advised us that the amount of claim would be limited to $.10 per pound based on their tariff for used items.

In addition, we had other costs related to the loss (i.e. initial freight charges, repair estimate charges, moving the cooler to a repair location & moving the cooler back to our distribution center). The carrier insists that it is only liable for the $.10 per pound, and that covers all expenses associated to the claim.

What cost can we actually collect on a claim for used equipment and how can the carrier determine whether these coolers are new or used if that information is not noted on the bill of lading at the time of pick up?

Answer: You indicate "these commercial coolers were being moved from a refurb center (refurbing consists of mechanical and cosmetic enhancements to bring cooler back to like new condition) to our distribution center."

If this is true, then Item 425 of the National Motor Freight Classification would apply:

> Item 425 CLASSIFICATION OF RECONDITIONED ARTICLES
>
> Unless otherwise provided in this Classification or in other tariffs governed by this Classification, articles which have been rebuilt, refurbished, remanufactured or reconditioned in any way will be subject to the same provisions applicable to such articles when new.

It is my opinion that the liability limitation of 10 cents per pound is not applicable, and the carrier should pay the claim in full.

333) Freight Claims - Mexico Shipments

Question: A shipper gives its carrier a bill of lading (B/L) to deliver a shipment to customs broker selected by shipper at US-Mexico gateway. In the body of the B/L, ultimate destination is shown to be a point in Mexico. The broker signs the B/L upon delivery by carrier, and unloads the shipment. The original shipper issues another B/L to broker showing origin gateway point with destination being same Mexican point.

Is the original carrier still bound by the original B/L or has that B/L contract for services been terminated by the sign-off and receipt by the customs broker and the issuance of the new B/L by the original shipper?

Answer: The fact pattern you describe is somewhat similar to the situation in *Tempel Steel Corp. v. Landstar Inway, Inc*., 2000 WL 528057 (7th Cir. 2000).

The *Tempel Steel* case involved a shipment of a large machine press from Minster, Ohio, to Monterrey, Mexico. Landstar issued a through bill of lading to Monterrey and transported the shipment to the border. The damage was actually caused by drayage company that the customs broker (Parker) hired to move the cargo through U.S. and Mexican customs facilities before delivery to the Mexican interchange carrier. Landstar attempted to assert a tariff provision disclaiming liability for loss or damage in Mexico, and argued it was not liable because the loss was the fault of the drayage company.

The court observed that under the "Carmack Amendment", 49 U.S.C. § 14706(a)(1): "...The liability imposed under this paragraph is for the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading[.]"

The court then went on to say: "Mexico is an adjacent foreign country; Landstar issued a through bill of lading; and Tempel is "the person entitled to recover under the ... bill of lading." That the drayage company is "another carrier over whose line or route the property is transported" does not relieve Landstar of its liability. Having issued a through bill of lading (and touted its "seamless" service), Landstar is responsible for the entire movement. A shipper may look to its chosen carrier, which then bears the responsibility for seeking compensation from another carrier actually responsible for the loss. (Landstar's arrangement with its Mexican counterpart provides expressly for this; the originating carrier handles all loss, damage, and delay claims.) A straightforward application of the Carmack Amendment supports the district court's decision. If Landstar feared that Parker would use a feckless drayage company, it could have issued two bills of lading: one from Minster to U.S. customs, and the other from Mexican customs to Monterrey. But it did not do this and is liable for damage caused by intermediate carriers, no matter who selected them, under sec.14706(a)(1)(C)..."

Under the Landstar case, if a motor carrier that initially received the goods in the U.S. issued a "through bill of lading" - one that showed the origin in the U.S. and the final destination in Mexico - that carrier would be liable even if the loss occurred in Mexico on the lines of a connecting carrier. Furthermore, the issuance of a second bill of lading by the Mexican carrier would not change this result.

I haven't seen the actual bill of lading that you refer to, but your case may be distinguishable - IF the first bill of lading issued by the U.S. carrier clearly shows the shipper's customs broker at the border as the consignee, AND the reference to the final destination in Mexico "in the body of the bill of lading" is merely for information purposes.

334) Freight Claims - Misdelivery

Question: We have two customers supplying material to one worksite. The carrier delivered the last load of the job to the incorrect customer (Bill of Lading showed correct customer name and address). The carrier contacted the wrong customer at the time of delivery (someone on site) for delivery confirmation and instructions, and subsequently delivered to the wrong place. The recipient of the material will not pay for the load, although the signature on the paperwork closely resembles other bills they have signed and paid for, claiming they did not receive it and were not paid for this extra load by the end user. Please advise if we have a valid claim against the carrier.

Answer: From your description of the facts, it appears that there was a failure to deliver to the named consignee on the bill of lading. This is a breach of the contract of carriage, and the carrier should be liable for the value of the goods (subject to any applicable limitation of liability).

The carrier, upon payment of your claim, would appear to have a cause of action against the party that actually received the goods. They should not have accepted the goods, and having done so, may be guilty of conversion.

335) Freight Claims - Missed Deliveries

Question: What is the law concerning passing of fines to the carrier on missed delivery appointments? Different LTL carriers of ours have missed delivery appointments and our customers have assessed the fines to us, and we in turn have passed them onto the carrier in the form of a freight claim. The carriers have declined the freight claim under the heading "special damages". Our B/L clearly states that "All Delivery Fines are Passed to Carrier" Who is in the right in these instances, and what other resources do we have if the carrier is right in declining the freight claims?

Answer: There are two separate contractual relationships: vendor-purchaser and shipper-carrier.

The first question is whether the purchase order or terms of sale provide for a penalty for missed delivery appointments. If they do not, the purchaser has no legal right to charge a penalty.

The second question is whether the contract of carriage provides for delivery at a specific date and time, and for a penalty if the appointment is not met. It could be argued that the notation on your bill of lading is sufficient notice that penalties will be passed on to the carrier. Otherwise, the carrier's only obligation is to deliver with "reasonable dispatch" and your attempt to collect the penalties would be considered "special damages". See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.3.

The best advice is to have a written transportation agreement with each of your carriers in which you spell out the terms and conditions, and clearly define the obligations of the parties. You can include provisions governing delivery by appointment, and the penalties or other consequences if appointments are not met.

336) Freight Claims - Mitigation of Damage

Question: A shipment of tempered glass, special order for a job site was damaged by a carrier. The shipment appears to have just the top layers of glass broken. The job site refused the shipment and reordered another shipment, which they received and used. The shipper refuses to accept the undamaged portion of the glass for credit due to the fact that it is tempered and a special order for that job, which means they can not resale it or melt it down to recycle it. The purchaser of the glass does not need it due to the fact that the job the glass was ordered for is done and they do not need that for another job nor can they recycle tempered glass. A claim was filed for the whole shipment of glass. The carrier involved is declining the claim due to the fact that not all pieces of the shipment appear to be damaged (claim amount not mitigated). The claim amount cannot be mitigated due to the facts above. The material is of no value to either shipper, consignee or the company that purchased the product. Are carriers liable for the entire shipment even though not all the shipment is damaged when there are these special circumstances involved?

Answer: As you point out, there is generally a duty to "mitigate damages", see Section 7.1.4 in *Freight Claims in Plain English* (3rd Ed. 1995).

It is not clear from your description whether it would have been possible for the manufacturer to have replaced only the damaged portion of the shipment, instead of replacing the entire order.

Assuming that this was not practical, my advice would be to have the shipper attempt to find a buyer for the undamaged portion of the shipment. This will establish whether the material has any salvage value or whether it is in fact worthless. If, after a good faith attempt, no buyer can be found, then the carrier should pay for the full value of the shipment. Note: The shipper should carefully document its efforts to find a buyer for the material and the details of any offers or sales!

Alternatively, the undamaged material can be turned over to the carrier, and the carrier can pay the claim and recover what it can from a salvage sale.

337) Freight Claims - Mitigation of Loss

Question: We sent a shipment to our warehouse via LTL common carrier. When the shipment arrived it was noted as damaged. The common carrier covered the cost of repairs to the equipment, however they would not cover the original freight charges that we paid. They advised us that the only freight charges that they are liable for is moving the freight from the destination warehouse to a repair center. They also stated in order for us to collect on the original freight cost we would need to make a replacement shipment and provide them with documentation. Are they

correct that we must make a replacement shipment in order to collect the freight charges from the original shipment?

Answer: As I understand it, the goods were delivered, but were in a damaged condition. In order to mitigate the loss, they were taken to a repair facility and repaired to their original condition.

It is my opinion that, under these circumstances, the carrier would be liable for the cost of transporting the goods to and from the repair facility and the cost of the labor and materials to make the repairs.

If the goods had NOT been delivered and had been lost or destroyed in transit, the situation would be different. Then, if the claimant has paid the freight charges, it is proper to include the freight charges as part of the claim. The legal theory is that there has been a breach of contract and the carrier is not entitled to its charges. This would be true whether or not there was a “replacement” shipment.

338) Freight Claims - Multiple Claims on Same Shipment

Question: Our Terms of Sale are FOB origin with our customers. Though we sometimes file claims on behalf of our customers, we do enforce our terms often and have the customer file with the carrier. We also prepay the freight invoices and for motor carrier movements, we do not pass this cost on to our customer on our invoices. Liability in our contracts with our motor carriers reads invoice value plus prorated freight paid to the carrier(s). When we file, we usually have no problem collecting the freight amount, too. But when our customers file, they do not include freight since they did not pay the freight bill.

Our questions is this: If we file a claim, and the carrier advises us our claim is a duplicate of a paid customer claim, and on that basis our claim is denied, do we have the right to ask the carrier to reimburse the freight amount only to us, though they may have already paid the loss or damage portion of the claim to our customer?

Answer: While it might sound reasonable that you should be able to claim for your prepaid freight charges, I doubt that any carrier will accept two claims for the same shipment.

Furthermore, if the consignee is filing a claim for the invoice value of the goods, it would seem that the cost of delivery is somehow "built in" to that price, even though it may not be separately stated or identified in your invoice. This is, in effect the "destination market value" of the goods, which is generally recognized in the court decisions as a proper measure of damages. Thus, the carrier would argue that it should not have to pay twice for the freight charges.

339) Freight Claims - Notations on Delivery Receipts

Question: On full truckload inbound shipments from our vendors to our DC's (FOB origin freight collect), our present guidelines require the carrier's driver to verify the piece count at origin and seal the trailer. Once the trailer arrives at our DC's, the majority of the time the carriers drop the trailers on our yard. Our guidelines also state that our security guard verifies the seal number, that the seal is intact, and notes on the delivery receipt "piece count subject to verification". My question is, do notations like the above on the delivery receipt have any legal significance?

Answer: From a legal standpoint, your notation on the delivery receipt really doesn't mean much. If, upon opening the sealed trailer, there should be a shortage, you would still have the burden of proving what was actually loaded into the trailer, and what was actually in the trailer at the time it was delivered. If you can't do this, the carrier will inevitably decline the claim.

In essence, when there is a sealed container or trailer, and the seal is intact upon delivery by the carrier, there is a strong presumption that the loss (shortage) could not have occurred in transit. (This would not, of course, apply to damage to the shipment.)

I should note that there are reported situations where seals are intact, but there is still a shortage or pilferage in transit. This can happen if someone tampers with the seal, or enters the trailer without breaking the seal (by removing door hinges or panels on the trailer, etc.)

340) Freight Claims - Offsets and Payment of Freight Charges

Question: Is there any law or regulation regarding payment of freight charges? Can a shipper offset, (unilaterally reduce) reduce its payment to a carrier because of a claim or past over payments?

Additionally:

1. Does a claimant have to pay the freight bill in order to get a claim paid?
2. If a claim processed and denied and the freight charges were not paid can the claimant refuse to pay the charges?
3. If the claim is approved by the carrier and the freight charges were paid, can the claimant include the full freight charges in the claim?

Answer: There is no “law or regulation” governing offsets. It is not “illegal” for a shipper to offset its loss and damage claims against freight charges owed to a carrier. However, the carrier is perfectly within its rights to demand (in writing) that the shipper submit a formal written claim for the alleged loss or damage, with appropriate backup documentation. Additionally, the carrier could take legal action against the shipper to collect the unpaid freight charges (to which the shipper would likely assert a counterclaim for the loss). Note that shippers who take unilateral offsets should be aware that if they fail to pay freight charges within the specified credit period, they expose themselves to the potential for additional penalties or costs that many carriers have in their tariffs.

1. There is no legal requirement for a claimant to pay freight charges before submitting a claim. Some carriers may have tariff provisions to this effect, which could be binding on the claimant if properly incorporated by reference through the contract of carriage (usually a bill of lading).
2. A claimant can always refuse to pay freight charges. Of course, the carrier has a remedy - bring a lawsuit for its freight charges.
3. If the claimant has paid the freight charges and the goods have been lost or destroyed in transit, it is proper to include the freight charges as part of the claim. The legal theory is that there has been a breach of contract and the carrier is not entitled to its charges. I would note that where there is a partial loss, the claim should include a pro-rata portion of the freight charges based on the weight of the lost/damaged items vs. the total weight of the shipment.

341) Freight Claims - Package Express Carriers

Question: We have a few claims against FedEx and they are telling us that if we do not notify then within 10 working days for 3 days saver package shipments and 15 days for everything else otherwise they will not honor the claim. Is this true? Do you know about this?

Answer: Time limits for the various kinds of service are set forth in the FedEx Service Guide Terms and Conditions.

On FedEx Domestic Express Services (AIR shipments) within the U.S., the "notice of claim" time limit for claims for damage, delay or shortage, and failure to collect or deliver a COD payment instrument, is 15 days after delivery of the shipment. The "notice of claim" time limit for all other claims including nondelivery or misdelivery is 90 days after date of shipment.

On FedEx Ground Shipments (TRUCK shipments) both U.S. and International, a claim in writing must be filed within 9 months from the date of delivery [as provided in the "Carmack Amendment", 49 U.S.C. § 14706], or in the event of non-delivery, 9 months after shipment [note that Carmack says 9 months after a reasonable time for delivery].

On International Express Shipments (AIR shipments), the provisions of the Warsaw Convention and/or Montreal Protocol #4 are applicable to most shipments. For damage, delay or shortage a notice of claim must be filed within 21 days after delivery of the shipment. For nondelivery or misdelivery, the time limit is 90 days in the Service Guide.

I did not see any time limit of "10 working days for 3 days saver package shipments" in the Service Guide.

A further comment: in my opinion, unless a shipment actually moves in part by air for some part of the movement, the minimum time limit would be governed by the "Carmack Amendment" - 9 months from the date of delivery.

I would suggest that you ask your FedEx sales rep for a copy of the current Service Guide and become familiar with the terms and conditions. There are many "surprises" buried in the Guide.

NOTE: Same holds true for other package express carriers such as UPS, DHL, Airborne, etc. and shippers should obtain and review the service guides for each and every carrier they use.

342) Freight Claims - Packaging

Question: We are a manufacturer of residential & commercial heating and cooling systems and are experiencing more than usual damage to our product when using the big three LTL long haul carriers. We have had conversations/meetings with a couple of these carriers and have invited them to our R&D lab for inspection of our product and package test system/procedures. We have an extensive lab for testing our product and it's packaging but it is not certified by ISTA or any other organization. We are also contemplating making a test shipment to the west coast with one of these carriers for further inspection and recommendation for package improvement. If we take that step, we'd like your opinion if you think this process will be harmful to our business by causing an increase in rates, discontinuance of transportation services, etc. Further, would there be repercussions if we selectively choose some but not all their recommendations?

Additionally, we are considering having our product and packaging certified by the International Safe Transit Association (ISTA). Does the ISTA certification deter the carriers from denying our damage claims?

Answer: I'm not an expert on packaging, but I certainly do agree that you should work closely with your carriers' loss prevention people if you are having problems. Frankly, I can't see any negative exposure from the procedures you have described. I would think that if they agree to a particular method of packaging, it would be difficult later on to deny a claim based on improper or inadequate packaging. Of course, it would be a good idea to confirm any discussions or agreements with the carriers in writing.

I would suggest that you contact Jerry Stone, who is the packaging engineer at the National Motor Freight Traffic Association - phone # (703) 838-1828. He is familiar with the packaging rules in the NMFC, and the requirements and conditions for test shipment permits (see NMFC Item 689).

343) Freight Claims - Palletized Shipments

Question: I am the Director of Customer Service for a company that manufactures HVAC related items such as registers and grilles and venting products. We ship via common carriers and

are having a problem with shortages. Our customers claim a shortage on a large percentage of our shipments. Unfortunately, I have not been able to dispute many of these claims.

Our terms are F.O.B. Our Plants. In the majority of the cases our customer's orders qualify for us to pay the freight. When I go back to our plants to research shortage claims I'm told that the shipment was "Shippers Load and Count". When we go back to our customer, they claim they've received the shipment intact and they usually claim the shortage after the fact. They sign for and unload X amount of pallets/skids of our product. When questioned about the condition of the product, they respond by saying that the pallets were stretch wrapped and all cartons intact. They claim the shortage after the truck leaves and they break down the pallets. We have not been successful in disputing very many, if any of these claims.

Do have any suggestions as to how we should handle these claims? I know there has to be a better, and fairer way of dealing with this situation.

Answer: Your questions raise a number of issues, and it isn't clear whether your problems are with the carriers, the customers, or both.

1. FOB terms

The Uniform Commercial Code establishes certain presumptions about "risk of loss" based on the terms of sale specified in the sales contract. UCC 2-319 provides that where FOB place of shipment is specified, risk of loss passes to the buyer once goods are put in possession of the carrier at origin; where FOB place of destination is specified, risk of loss is on the seller during transit. These presumptions can be varied by the parties in their contract.

If your terms are "F.O.B. Our Plant", in theory, your customers have risk of loss and should be handling the claims. Unfortunately, many customers just want to have undamaged, conforming goods delivered to them and don't want to be bothered with loss and damage claims or other problems with carriers. Some don't understand the significance of the terms of sale, or they don't care, and simply refuse to accept goods damaged in transit. It is really a business decision as to what terms you insist on in your sales contract and whether you enforce your rights at the risk of losing a customer.

2. Shipper's load & count

The notation "shippers load and count" ("SL&C") on a bill of lading is generally used when, for the shipper's convenience, the carrier "drops" a trailer or container to be loaded and sealed by the shipper, and returns at a later time to pick up the trailer or container without inspecting or counting the contents.

When "SL&C" is inserted on a bill of lading, it is essentially creates a rebuttable presumption that the shipper has loaded and counted the shipment, and that the carrier has no knowledge of the condition of the goods or the number of packages or items in the shipment. It can have significant legal effect upon the carrier's liability, especially in the case of shortages that may be discovered at destination. For a discussion of the shipper's burden of proof in cases involving "SL&C" notations, see Section 5.2 in *Freight Claims in Plain English* (3rd Ed. 1995).

3. Palletized shipments

Palletized, stretch-wrapped, LTL shipments are similar in some ways to "SL&C" shipments in that the carrier's driver usually does not have an opportunity to count the cartons. If the driver cannot count the cartons, many carriers instruct their drivers to sign for pallet count only, and will not allow them to sign for carton count.

Shortages from palletized, stretch-wrapped shipments are troublesome problems and often require some detective work to determine where the loss occurred. It could be that the product was never put on the pallet by the shipper; or someone may have tampered with the stretch wrap during transit; or it could be that there is theft or pilferage in the consignee's facility.

4. Suggestions

Check your shipping procedures for order picking, checkoff against shipping orders, manifests, etc. You may want to have shipments double counted or checked by a supervisor, and get the person's signature, date and time on your shipping documents.

Consider using color-coded or patterned stretch wrap or tape. That way it is easy to determine if a pallet has been broken down and re-wrapped.

Look for any recurring patterns of shortages. If you find any, a thorough investigation is warranted, and you may want to engage a professional security consultant. If you have problems with particular consignees, notify their management that they may have an internal security problem.

344) Freight Claims - Palletized Shipments - Shortage

Question: My vendor shipped the following: “3 pallets, 76 Ctns- Synthetic Fiber blankets 1 envelope”. The driver signed for “3 pallets and 1 envelope”. I received the shipment two cartons short and the claim has been declined. Driver did not indicate STC [“said to contain”]. I would think the carrier failed to protect itself in this case by not indicating STC and should honor the claim. What is your opinion?

Answer: This is essentially a "concealed shortage" problem.

The carrier will probably contend that the driver was prevented from counting the contents of the pallets because of the palletization and stretch wrap. If this is true, you have the additional burden of proving what was actually loaded on the pallet and you will probably need a written statement or affidavit of the shipping person or supervisor who had actual knowledge of what was shipped. See Section 5.0 of *Freight Claims in Plain English* (3rd Ed. 1995) for a discussion of "Burdens of Proof".

You should also investigate whether there was any sign of tampering with the stretch wrap (cuts, tape, etc.) or if it had been removed and replaced during transit.

345) Freight Claims - Parcel Carriers - Limitation of Liability

Question: I brought a claim against UPS for $30,000 due to their losing a shipment of computers. When the boxes arrived at the customer they were torn and pretty much empty. UPS has sent to me their standard forms limiting their liability to $100.00 unless the customer declared a greater value for his goods, which my insured didn't.

Is this limitation of liability valid and enforceable?

Answer: Most all parcel and express carriers (UPS, FedEx, etc.) have limitations of liability in their bills of lading and service guides, and these limitations are usually upheld by the courts. As with any "general rule", there may be exceptions based on the specific facts of the case.

For a discussion of parcel and express carrier liability limitations, I would recommend that you see Section 8 (particularly 8.2.7) of *Freight Claims in Plain English* (3rd Ed. 1995), which discusses the issues and court decisions.

346) Freight Claims - Partial Payment

Question: If a company files a shortage or damage claim against a carrier and the carrier sends a check to pay for part of the claim (they are for some reason not paying it in full thus disputing only a portion) and the check is deposited, can the company still seek the additional amount of the claim? Does it matter if the check went directly to a lock box and is automatically deposited from there or if it went to a person who then had it deposited?

Answer: The following is an excerpt from "TRANSPORTATION, LOGISTICS and the LAW" by William J. Augello:

> Furthermore, parties should keep in mind that when dealing with a claim, if one party accepts a check tendered by the other party for less than the full amount and cashes that check, then the payee of the check may be adjudged by a court to have accepted the partial payment as payment in full. Whether or not the cashing of the check constitutes acceptance of a settlement is fact dependent and governed by state law. Therefore, parties should look for endorsements on the check such as “payment in full” or words to that effect, and consult their attorney before depositing claim checks. See *Khoury v. Bekins Moving & Storage Co.*, 2000 Tex. App. LEXIS 4833, (Ct. App. 5th Dist. Tex. July 24, 2000) (When carrier issued a check for $16,100 based on the declared value, cashed the check and then sued for over $100,000, held plaintiff entered into a valid accord and satisfaction).

By having carriers send freight claim payments to a “lock box” and depositing the check without reviewing the amount, you may well be barred from contesting the amount if it is later found to be only a partial payment of the claim or otherwise unacceptable.

347) Freight Claims - Payments to Lock Box

Question: Are there any legal ramifications to having carriers send freight claims payments to a lock box? Does payment through a lock box and the depositing of the check prior to review acknowledge acceptance of the amount paid?

Answer: By having carriers send freight claim payments to a "lock box" and depositing the check without reviewing the amount, you will probably be barred from contesting the amount if it is later found to be only a partial payment of the claim or otherwise unacceptable. This is known as an "accord and satisfaction".

348) Freight Claims - Proof of Delivery

Question: The consignee states that he never received a load that was shipped. The carrier cannot provide a proof of delivery (POD). The carrier says its satellite tracking system shows the trailer was in the right neighborhood on the right day.

The carrier is requesting access to the consignee's inventory records from the date of possible delivery plus seven additional days in order to make sure shipment has not been received. Please help with the following questions:

1. Is information provided by a satellite tracking system valid as a proof of delivery?
2. Can a carrier deny claim if consignee does not give access to its documentation?
3. Can a consignee assert a claim based on the fact that carrier cannot provide POD?

Answer: Let me try to answer your three questions.

1. Is information provided by a satellite tracking system valid as a proof of delivery?

Answer 1: Not really. You have a disputed question of fact. If this matter were litigated in court, the satellite information might have some evidentiary value, but it doesn't prove actual delivery.

2. Can a carrier deny claim if consignee does not give access to its documentation?

Answer 2: Yes. Remember that the claimant has a burden of proving that the carrier received the shipment in good condition at origin and that it was either not delivered, or delivered in a damaged condition at the destination. It is not unreasonable for the carrier to request proof in a disputed situation.

3. Can a consignee assert a claim based on the fact that carrier cannot provide POD?

Answer 3: Yes. But, again, the absence of a POD is not, in itself, prima facie evidence that the shipment was not delivered. You should have independent evidence (statement or affidavit from a person having actual knowledge of the facts) that the consignee did not receive the shipment.

The "bottom line" is that there should always be a prompt and thorough investigation of the facts, and that the ultimate outcome may well turn on the credibility of the witnesses.

349) Freight Claims - Proper Party to File

Question: I have been trying to collect on a claim but the carrier refuses to deal with us. The carrier maintains that the warehouse we use hired them, not us, so the warehouse should be the one to make the claim, not us. Maybe I am wrong but from reading *Freight Claims in Plain English* I was under the impression that if you maintain an interest in the shipped product (like ownership), you could bypass the warehouse and make the claim directly to the carrier. How should we resolve this claim?

Answer: Apparently the carrier is taking the position that your company is not shown on the bill of lading as the shipper or consignee, so that it has no contract with you. However, the court decisions are clear that you may still file a claim if you have an interest (ownership) in the goods. If the carrier is giving you a hard time, I would suggest that you get a letter from the warehouse stating that you are the owner of the goods and submit it with your claim.

350) Freight Claims - Protective Service

Question: We hired a broker to ship candles back in August. The candles were suppose to be picked up by a refrigerated ("reefer") truck and handed off to another carrier (not reefer) to deliver the candle shipments. On most cases the carrier picked up and delivered the next day. However, we still had a high volume of candles melting. The broker is saying they are not responsible because it is not the carrier's fault the candles melted. I say it is impossible for the reefer trucks to have been working properly for the candles to melt in one day. The broker was to hire the reefer trucks and insure the reefer trucks were operating properly. The reefer trucks obviously were not working properly and therefore the broker still owes us the claim. Is that correct?

Answer: First of all, it is usually not the broker that is liable for the loss or damage to your goods; it is the motor carrier, and that is the party that you should file your claim against.

If the carrier was told that the shipment involved candles, and that protective service was required, it should be responsible for the melting. Even if protective service was not requested, but the carrier was familiar with the characteristics of the product, it should have taken proper steps to protect against damage.

351) Freight Claims - Recovery of Freight Charges

Question: Are freight charges added to a freight claim for a damage claim also payable besides the amount of the damage to goods shipped?

Answer: Where freight charges have been paid to the carrier, and the goods have not been delivered or have been damaged so they are substantially worthless, the claimant may recover them on the theory that the carrier has not performed the contract.

Where the claim is based on the destination value of the goods, that value presumably includes the delivery charges, and thus the freight charges may not be separately claimed. For example, if freight costs are prepaid and included in the invoice price, the invoice value to the purchaser represents the full value of the goods. This subject is covered in detail in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.4.9.

352) Freight Claims - Refrigerated Load

Question: We send what we call load tenders to our carriers. On the load tender we have the delivery locations, quantities ordered in cases, weight of the orders and the order in which stops need to be delivered. In addition, we have verbiage stating that the load needs to be maintained at 35 degrees, the trailers sent in to load need to be clean and sanitary and that our products cannot be commingled with those of other shippers without our knowledge. We did not have a statement on the bill of lading stating the load needed to be maintained at 35 degrees. The carrier signed our load tender and returned it to us as notification of his acceptance of the load. The carrier has pulled the same refrigerated freight from the same warehouse for us for several years, every load a refrigerated load to be maintained at 35 degrees. There was some sort of confusion between the carrier's dispatch and the carrier's driver and the driver was instructed to put the refrigerated trailer at zero degrees. This resulted in freezing the product on the trailer and rendering the product unsaleable. We are filing a claim against the carrier for the lost product. We required the product to be transported back to our warehouse. We had the product properly destroyed and documented this. The carrier subsequently went out of business (filed chapter 11) before the claim was filed officially.

Did the fact that the bill of lading did not state temperature requirements for the load nullify our grounds for the claim?

Did the fact that we required that the product be returned so that we could assure proper disposal in any way nullify our grounds for the claim?

Is the liability for freight expense to return the product to us the carrier's or ours?

Based upon the carrier filing for chapter 11 will our claim still be paid in full? If not what other recourse do I have to seek recovery for the goods they destroyed?

Answer: Let me try to answer your questions in sequence:

1. Did the fact that the bill of lading did not state temperature requirements for the load nullify our grounds for the claim?

No. The explicit instructions in your "load tender", together with the course of dealing with this carrier, should be sufficient to establish the temperature requirement. At one time (under the "filed rate doctrine", when all tariffs were required to be filed with the ICC), some carriers had tariff provisions requiring specific temperature and protective service notations to be entered on the face of the bill of lading, but I doubt that this would be applicable.

2. Did the fact that we required that the product be returned so that we could assure proper disposal in any way nullify our grounds for the claim?

No. It would appear that you took reasonable steps to mitigate the damages, but determined that the product could not be salvaged. If this was a perishable food product, it is quite likely that federal regulations would mandate that the product be destroyed if it was unsuitable for consumption.

3. Is the liability for freight expense to return the product to us the carrier's or ours?

Again, this would appear to be a reasonable expense incurred in mitigating the loss.

4. Based upon the carrier filing for chapter 11 will our claim still be paid in full? If not what other recourse do I have to seek recovery for the goods they destroyed?

Obviously, you can and should submit a claim in the bankruptcy proceeding. However, as an unsecured creditor, you probably will only receive a few cents on the dollar, if anything.

If the carrier had cargo legal liability insurance, you may be able to claim directly against the cargo insurance policy, with permission of the bankruptcy court. Most of these policies have various exclusions and a large deductible, so you probably will not be able to collect in full. You can also proceed against the carrier's BMC-32, the federally mandated minimum cargo insurance endorsement, which provides up to $5,000 per shipment, with no exclusions or deductibles, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 12.1.1. To find the name of the insurer and policy number, access the FMCSA website and go to the "Licensing & Insurance System" - www.fmcsa.dot.gov.

353) Freight Claims - Refused Shipment

Question: When a shipment is refused by a consignee because of damages, and the material is disposed of by the carrier, whose responsibility is it to notify the shipper?

Our company shipped some material to a vendor and we then debited the vendor. Unbeknownst to us, the shipment was refused due to visible damage, and the carrier disposed of the material. It was only when the vendor disputed our deduction, stating they never received the material that we were made aware of the material being refused and disposed of.

Unfortunately, by we found out, the 9 months in which to file a claim had passed. The carrier is denying the claim on the basis that it is not timely, and they are also taking the position that it was the consignee's responsibility to notify us about refusing the shipment.

I am under the assumption that if the material was still in the carrier's possession at the time of disposal, it is the carrier's responsibility to return the refused material to the shipper, or notify the shipper upon disposal of that material. Is this correct?

Answer: The answer depends on your contract of carriage with the motor carrier. Normally this will be some form of the "uniform straight bill of lading", which contains the following language as part of the terms and conditions on the reverse side of the current version of the long-form bill of lading as set forth in the National Motor Freight Classification:

Sec. 4. (a) 1. If 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.....

Since this apparently was a "return to vendor" shipment, the carrier was obligated to notify your company as the shipper shown on the bill of lading.

If they failed to do so, it could be argued that their disposal or sale of the damaged goods was illegal and constituted "conversion" of your property. This would not be subject to the nine-month time limit for filing a claim.

354) Freight Claims - Replacement Cost

Question: When a trucking company damages freight, they pay the claim filed. If it is noted on the bill of lading, is the trucking company also legally responsible for the replacement cost of the damaged product including the cost to expedite the manufacturing of the replacement product?

We ship to construction sites. We had a shipment that was totally damaged. The consignee was compensated for the cost of the freight that was damaged. But it cost them almost $4,000 more

to replace the product. They had to pay a premium to expedite the manufacturing. Also their cost per unit was higher as their total order was smaller than the original. My question is, how can we hold the trucking company liable for the added cost of replacement?

Answer: There are some situations where "replacement cost" is a proper measure of damages, see generally Section 7.0, Damages, in *Freight Claims in Plain English* (3rd Ed. 1995).

Where a consignee must purchase another item to replace an item which has been damaged or destroyed in transit, the "destination market value" of the replacement item (what it costs to buy another one) may be a proper measure of damages. This could be more than the original invoice price paid for the item which was damaged.

355) Freight Claims - Requirement to Pay Freight Charges First

Question: We are 3rd party & logistics management company.(and a member of T&LC) One of our clients had a damaged and refused shipment on American Freightways. (our client is the consignee) The shipper, for whatever reason, is not planning on filing a claim but American is still expecting us to pay the freight charges on what we see as a shipment that really didn't happen. I do understand that you have to pay freight charges in order to have a claim processed, but there is no claim being submitted here! Now, we can submit a claim but in this instance it's really not our place. AF recognizes this but says the only way for us to handle the freight charges is to file a claim and include the freight charges and wait for reimbursement. Isn't this silly? They are willing to accept the liability on a claim they would not otherwise have to honor just to have paper to reimburse us for these freight charges??

Do you have anything we can use to further our argument? The money is not a big deal but the issue matters to us.

Answer: As I understand your question, the carrier wants you to pay the freight charges first, and then file a loss and damage claim where the only amount claimed is the freight charges for the shipment which was damaged and refused by the consignee (no claim is being made for the damage to the goods).

At one time carriers were prohibited from offsetting claims against freight charges, due to possible discrimination among customers. Many carriers still require payment of freight charges even if the shipper is entitled to recover some or all of the freight charges as part of its loss or damage claim.

The problem may have something to do with the carrier's accounting system or its internal procedures, but you would think they could just cancel or issue a credit memo against the freight bill. Maybe you should just talk to them again and point out that their procedure will cost both parties unnecessary administrative expense. You might also suggest that if they do require you to file a loss and damage claim, you will make claim for the value of the goods as well as the freight charges.

356) Freight Claims - Return Freight Charges as Mitigation

Question: We shipped a truckload that was in an accident. The carriers insurance company offered to pay our cost plus freight. Our company requires that the shipment be returned due to the liability involved with having damaged good with our name on it in the field. The question is, since we require this material to be returned, is the carrier liable for the return freight back to us?

Answer: I would assume that the reason why you are requiring this material to be returned is that you need to inspect, sort, segregate, repair, salvage, etc., and that the nature of the goods is

such that they cannot safely be sold or allowed to enter the stream of commerce without legitimate concerns about product liability.

Essentially, your question involves "mitigation of loss", and the rule is that reasonable expenses incurred in mitigating damages are compensable as part of your loss & damage claim.

357) Freight Claims - Risk of Loss

Question: Can you help us to determine whom the filing of a claim would fall to, the shipper or consignee, in the following situation? The shipper using the EDI (Electronic Data Interchange) System transmitted an incorrect delivery address to the carrier. This inaccurate information resulted in the freight being misdirected to a different state and lost in the process.

There is a valid Bill of Lading showing where the carrier's driver signed for the cartons in question. This was a FOB Origin, Freight Collect shipment.

Answer: Risk of loss in transit is governed by the terms of sale and the Uniform Commercial Code. As a general rule, if the shipment is "FOB Origin", the risk of loss passes to the buyer when the goods are tendered to the carrier at the point of shipment. Thus, in your case, the proper party to file the claim would be the buyer (consignee). See Section 10.5.1, *Freight Claims in Plain English* (3rd Ed. 1995) for a detailed explanation.

I would point out that, if the claim cannot be collected from the carrier for some reason, the buyer may have a remedy against the seller based on its negligence in providing an incorrect delivery address.

358) Freight Claims - Risk of Loss in Transit

Question: My company sells spare parts to support semiconductor production equipment to the major SPC's here in the US. Our standard terms of sale are "FOB Origin". The predicament we find ourselves in more and more often is that our customer's purchase terms are "FOB Destination" or have some variation of an “acceptance of goods” clause stating they won't accept title and risk of loss of the goods until the goods have passed their incoming inspection process.

This has placed us in an awkward position on more than one occasion where we have tried to force the customer to comply with our rights as a seller under FOB Origin terms.

Our business is based on serving the customer so this tactic is not necessarily the best for developing long-term relations with our customers.

My question is when the seller's and buyer's terms are at opposite ends of the FOB terms, whose term takes precedent? It seems the UCC usually takes the side of the buyer.

Answer: The Uniform Commercial Code establishes certain presumptions about "risk of loss" based on the terms of sale specified in the sales contract. UCC 2-319 provides that where FOB place of shipment is specified, risk of loss passes to the buyer once goods are put in possession of the carrier at origin; where FOB place of destination is specified, risk of loss is on the seller during transit. These presumptions can be varied by the parties in their contract. The UCC doesn't take "sides" with either the buyer or the seller; it merely establishes uniform commercial rules for buyers and sellers.

Your problem appears to be more with your customers. Many customers just want to have undamaged, conforming goods delivered to them and don't want to be bothered with loss and damage claims or other problems with carriers. Some don't understand the significance of the terms of sale, or they don't care, and simply refuse to accept goods damaged in transit. It is really a business decision as to what terms you insist on in your sales contract and whether you enforce your rights at the risk of losing a customer.

359) Freight Claims - Salvage - "Safety item"

Question: Freight is refused due to possible damage. It was then returned to shipper for credit and inspection. The shipper is filing claim for full value, but refuses to relinquish freight because it is considered a "safety item" as it is used in the manufacture of new automobiles.

What are the carrier's rights in this situation? Is the carrier required to pay full value and relinquish any salvage from this shipment?

Answer: Salvage of damaged goods is one of those "gray" areas that depends on the facts, see generally Section10.10 of *Freight Claims in Plain English* (3rd Ed. 1995).

Where there is damage or possible contamination to food or drug items the answer is fairly clear that there can be no salvage because of the strict government regulations. In your case, the concern of the shipper is that the damaged items should not be salvaged or allowed to enter the stream of commerce because of product liability exposure. In other words, if the damaged item were installed or used, it could result in injury to a third party. If this is a legitimate concern, the item may in fact be considered "worthless", and the shipper may be able to recover the full value.

360) Freight Claims - Salvage - Damaged Roll of Carpet

Question: We picked up a roll of carpet to go to a consignee in MI. Our company contracts interline carriers to go to this particular city. When the roll of carpet arrived at the consignee, they signed for it damaged. The consignee contacted our office regarding the damage and informed me that he would need approximately 17 feet to complete his job. He reordered the 17 feet and we assured him it would be put on a "HOT" rush. This did not get done. Therefore, the replacement roll was delayed and the other interline carrier we contracted to deliver this roll did not go to that particular area for another week. This delayed the delivery even more. The consignee does not want the entire shipment now because it has taken too long to deliver and this was to be installed for a grand opening. The shipper will not take the rolls back.

I have spoken with the carrier who damaged the original roll and I am told they will only be responsible for the damaged area and the customer is basically stuck with the damaged roll that he cannot use.

My question is: should the interline carrier be responsible for the entire roll due to the fact that the consignee has decided not to install the carpet due to all the delays? Or is the consignee responsible to keep the damaged roll and file claim for the damaged 17 feet only.

Answer: I assume that your company is the receiving carrier and that you issued a bill of lading to the shipper; you picked up the goods and then interlined them to another carrier for delivery.

1. The shipper or consignee has a claim against either the receiving or delivering carrier under the "Carmack Amendment", 49 U.S.C. 14706.

2. Whether the claimant can collect the value of the entire roll or only the damaged portion depends on the facts. Essentially this falls into the category of "special damages", see Section 7.0 of *Freight Claims in Plain English* (3rd Ed. 1995), particularly Section 7.3.1 et. seq. The court decisions usually turn on the issue of whether the damages (full roll vs. only the damaged portion) are "foreseeable". I would say, that under the circumstances you have described, it would be foreseeable that damage to a portion of a roll of carpet would make it unusable for the intended purpose. Thus, the carrier(s) would be liable for the value of the full roll of carpet.

3. There is one additional consideration: the roll of carpet may have some salvage value. If a buyer can be found, the carpet should be sold and the proceeds applied against the claim.

4. If the shipper or consignee files a claim against your company (the receiving carrier), and you pay the claim, you have a right of indemnification over against the carrier that actually caused the damage.

361) Freight Claims - Salvage on Drugs

Question: I would like to know why a carrier is not entitled salvage on controlled drugs or substances. I have informed them due to strict FDA regulations the drugs must be destroyed.

Answer: You are correct. There are strict federal regulations that cover food and drug items, and essentially state that a product is deemed "adulterated" if it is damaged and may have been contaminated. See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 11.5.

There are also legitimate product liability considerations. A recent case involving a reefer failure on a shipment of meat is *Swift-Eckrich, Inc. v. Advantage Systems, Inc*., 55 F.Supp.2d 1280 (D. Kansas 1999). The court agreed that there could be no salvage because "selling the meat products for human consumption would not have been prudent or appropriate under the circumstances".

362) Freight Claims - Sealed Trailer

Question: As the motor carrier, our driver picked up a load of boxed furniture. The driver was required to count the freight and as each piece was loaded on the trailer, the shipper scanned the bar code. When the loading was completed, the shipper printed out a tally containing each piece loaded by serial number, product code, description and exact time loaded. The shipper then applied a seal to the trailer. The load was delivered to the consignee with seal intact under a drop load situation where the consignee would unload at a later time.

The consignee (prepaid shipment) filed a claim for a 4 piece shortage. We denied the claim based on a copy of the shipper's loading tally that was verified by the driver, that was submitted with the denial. The consignee refused to accept our denial, yet would not provide us proof of that they did not receive the 4 pieces, yet they signed that the seal was intact. We have asked the consignee for their intake records, ie., computer records of product unloaded and recorded by swiping the bar code. Is our denial valid?

Answer: From the facts as you have described them, it sounds as though you have proof that the goods were actually loaded into the trailer, that it was sealed and that you delivered the trailer with the seals intact. This would indicate that the loss occurred after delivery, for which you would not be liable.

There are a few caveats:

(1) You have not indicated who applied the seal at origin. There have been cases where the shipper gave the driver a seal, and the driver pretended to apply the seal but did not in fact do so (in order to later steal the goods).

(2) You have not indicated whether there was any evidence of tampering with the seal or with the door locks and/or hinges. Again, there are cases where contents of a trailer have been removed in this manner.

If you have investigate the situation and ruled out these possibilities, I certainly think you are within your rights to demand additional proof and documentation from the consignee.

363) Freight Claims - Sealed Trailer

Question: A truckload driver signs our (the shipper's) bill of lading (B/L) for the actual piece count, which was180 cartons in this case. Our standard procedure once a trailer is loaded is to place a plastic seal on the trailer. We did not record the seal, and due to the time frame involved we did not maintain our security log. The purpose of the seal is to ensure that the driver or others do not access the product while the trailer is in the yard moving to the guard shack. We have a very large facility. In any event the shipment delivers to the consignee, and the consignee notes on

the delivery receipt that the shipment is 10 cartons short. The consignee claims that since the trailer was “sealed” that the carrier is not liable for the shortage. The consignee chose the carrier, and this shipment moved collect. Can the carrier be held liable for the 10 carton shortage based on the original B/L? Who is liable in this case?

Answer: Obviously, there is a question of fact as to where the shortage occurred.

If the driver was present and had an opportunity to count the packages during the loading, this would not be a “SL&C” (shipper load and count) situation.

Thus the number of packages on the bill of lading, signed for by the driver, would normally be prima facie evidence of what the carrier actually received at the point of origin.

Assuming that it can be established that there was in fact a shortage at the time of delivery, it would appear that the carrier is liable.

The presence or absence of seals is not conclusive evidence that a loss could not have occurred in transit. There are many cases where seals, doors, locks, etc. have been tampered with, and shortages are found upon delivery even though the seals appear to be intact.

364) Freight Claims - Sealed Trailers

Question: On full truckload inbound shipments from our vendors to our DC's (FOB origin freight collect), our present guidelines require the carrier's driver to verify the piece count at origin and seal the trailer. Once the trailer arrives at our DC's, the majority of the time the carriers drop the trailers in our yard. Our guidelines also state that our security guard verifies the seal number, that the seal is intact, and notes on the delivery receipt "piece count subject to verification". My question is, by placing notations like the above on the delivery receipt have any legal significance?

Answer: From a legal standpoint, your notation on the delivery receipt really doesn't mean much. If, upon opening the sealed trailer, there should be a shortage, you would still have the burden of proving what was actually loaded into the trailer, and what was actually in the trailer at the time it was delivered. If you can't do this, the carrier will inevitably decline the claim.

In essence, when there is a sealed container or trailer, and the seal is intact upon delivery by the carrier, there is a strong presumption that the loss (shortage) could not have occurred in transit. (This would not, of course, apply to damage to the shipment.)

I should note that there are reported situations where seals are intact, but there is still a shortage or pilferage in transit. This can happen if someone tampers with the seal, or enters the trailer without breaking the seal (by removing door hinges or panels on the trailer, etc.)

365) Freight Claims - Setoff of Claims vs. Detention Charges

Question: Have a bonafide and sizeable rail claim for a warm load due to railroad equipment failure. We also have unpaid destination detention (demurrage) bills for an even larger amount. We paid the origin detention, but have refused to pay the detention at destination stating it was the warehouse fault, and not ours. The carrier tariff stipulates the carrier can charge destination detention against the shipper, which we were. These bills cover shipments that go back to a period between 3/99 and 4/00. We are not shown as the consignee on the bills of lading (although it was our product going into the outside warehouse). Also, it looks like Section 7 was signed (haven't reviewed them yet, but that was the practice).

Assuming we are not legally responsible (or some statute of limitations apply), can the rail carrier still legally not pay our claim because we refuse to pay their detention, which we may or may not be responsible for (again we were not shown as consignee plus Sec. 7 signed)? This covers interstate movements.

Answer: 1. Did you have a contract with the rail carrier? If so, what does it say?

2. If no contract, is this a tariff move or an exempt move (boxcar, TOFC, COFC, etc.) subject to an exempt circular? What does the applicable tariff or circular say?

As a general rule, failure to pay freight or detention charges would not be a defense to paying a legitimate loss/damage claim, but there might be some rule in the tariff or exempt circular. I would have to review the relevant documents to give you a more definitive answer.

As to statutes of limitation, 49 U.S.C. § 11705 is the section applicable to rail carriers and provides for a 3 year statute of limitations for recovery of charges for transportation or service provided by a rail carrier.

366) Freight Claims - Shipment Lost for 3 Months - Mitigation of Loss

Question: We shipped 6 pallets of go-karts to a major customer on September 9th from our outside warehouse in Las Vegas, NV. This was shipped "FOB Origin Collect" via an LTL carrier who signed the "DLDC" bill of lading as SLC. The shipment was never delivered to the consignee so they refused payment on the invoice.

We made several attempts to obtain a proof of delivery from the carrier, but never received it. A claim was filed with the carrier on October 29th. The carrier responded on December 20th stating that the shipment was loaded on a trailer destined for the delivering terminal. It remained there until the trailer was returned to their terminal on December 22nd. They indicated the merchandise was in good condition and is being held in a "Refused On Hand" status awaiting dispostion.

In my reply to them I stated that, due to their negligence, we had lost the sale of the five pallets of go-karts and asked that they pay the claim in full. There was no replacement order shipped to this store. Not only did we lose the sale, but we forfeited any profit we would have made from the sale of these units.

Their Claims Dept. states that "We wish to apologize for our portion of this problem. However, this merchandise remains "On-Hand-Refused" awaiting your disposition. If disposition is not received within 15 days, we will have no choice but to dispose of this merchandise in accordance with the bill of lading contract."

It wasn't until after we filed a claim that the carrier even attempted to locate this shipment. We have lost the sale due to their negligence and I don't see how they can get by without paying the claim in full. Do you have any suggestions?

Answer: I appreciate the situation, but you do have to realize one thing. There is an obligation to "mitigate the loss", see *Freight Claims in Plain English* (3rd Ed. 1995) at 7.1.4.

Even though the go-karts were missing for over 3 months, they have now been found and have some value. If you just abandon the shipment to the carrier, then the carrier will auction it off, deduct its freight charges, storage, expenses, etc. and you may get little or nothing. Since this is a product that you manufacture, it would be better to have them return the shipment (at their expense) and try to find another buyer.

Then, I think you would be entitled to collect the difference between your original invoice price to the customer, and the amount realized from the sale.

367) Freight Claims - Shipment Missing for Two Months

Question: We tendered a shipment to an interline carrier on December 6th and they lost the freight. It was never located until February 9th when they advised that the piece had been found. In

the meantime, the shipper had filed claim as a replacement had to be shipped and delivered to their customer. Neither the shipper nor the manufacturer wanted the piece back as it was a custom made item.

We pursued with the interline for settlement of the claim based on the fact that they did not fulfill their contractual duty to transport this freight with "reasonable dispatch" as the freight remained "lost" for two months. They have totally denied our claim based on the fact that the missing item was found.

Wouldn't two months be considered to be well beyond the time for "reasonable dispatch", making them responsible for settlement of this claim?

Answer: Where a shipment has been missing and has not been delivered for such a long time - in your case, over two months - it is totally reasonable to assume it has been lost in transit, and for the shipper to file a claim for the full invoice value.

The only caveat is that there may be some duty to "mitigate the loss". If the item can be salvaged, or a buyer can be found (even though it is a custom-made item), the net proceeds should be applied to reduce the claim.

368) Freight Claims - Shipper Load & Count

Question: We had 12 truckloads of computers going to Texas to NC. They were in storage at our agents dock until the customer notified us that they wanted them shipped to NC. Our agents loaded the computers on each truck with the driver present. When three of the trucks arrived in NC, the computers were scattered all over the truck. The consignee signed for them with "load shifted in truck, shipment damaged etc, improperly loaded". We claimed the carrier and they denied the claim stating that our agent loaded the truck and we should claim them. Each truckload was signed for with no exception like "shippers load and count" or "improperly loaded" it was only after the trucks arrived at the destination that the notation "improper loaded" was put on the POD. I believe the driver put the notation "improper loaded" on the POD. Can we go back to the carrier with the argument that the driver was present during the loading and didn't secure the load properly?

Answer: Regardless of who actually loads the truck, unless the loading is actually a "shipper's load & count", where the driver is not present and has no opportunity to observe the loading, the carrier is responsible to ensure that cargo is properly secured, blocked, braced, etc.

I would note that DOT regulations specifically place this responsibility on the motor carrier and the driver, see, e.g., 49 C.F.R. § 392.9 "Safe loading", and "General rules for protection against shifting or falling cargo", reproduced as Appendix 81A in *Freight Claims in Plain English* (3rd Ed. 1995).

369) Freight Claims - Shipper Load & Count

Question: I am the claims supervisor for a national footwear retailer. We use contract carriers to pick up product from our vendors for delivery to our distribution centers, usually as full truckloads. The Terms and Conditions on our purchase orders state that the shipper (vendor) is required to load and seal the trailer, and that, "...shipments will be considered Shipper Load and Count unless otherwise noted on the bill of lading."

Recently, many vendors have been insisting that the contract carrier drivers count the freight as it is loaded and sign the bill of lading as "shipper load, driver count." Most of our contract carriers are unwilling to accept this stipulation. One way we have been dealing with this is to have the driver and shipper count the freight simultaneously as it is loaded, and if their counts agree sign the BOL as "Shipper load, driver assist count".

In *Freight Claims in Plain English*, page 4.21, you state "...where a driver or other carrier agent has the opportunity to count and inspect during loading, he may not insert "SL&C" on a bill of lading." Does this mean that if the driver or carrier agent has the opportunity to count and refuses,

and no special notations are made on the BOL, the liability for damage/loss is assumed by the carrier, even though our Terms and Conditions state our presumption of Shipper Load and Count? If the driver refuses to count, can the shipper (vendor) refuse to load the freight? Also, what is the effect on shipper/carrier liability burdens of "Shipper load, driver assist count"?

Answer: I assume you must be having shortage problems on your "SL&C" (Shipper load & count) shipments. The reason your vendors want the carrier to count the cartons while the shipment is being loaded is for their own protection when a shortage is reported upon delivery. Frankly, I don't blame them for ignoring your purchase order conditions. Theft and pilferage can occur in transit, but it sometimes occurs at the receiver's dock if security is lax.

Notations such as "SL&C", "Shipper load, driver count" or "Shipper load, driver assist count", essentially shift burdens of proof when there is a shortage. It is usually in the shipper's best interests to have the driver count and sign for the number of cartons or packages that are loaded. If the driver is present, and has the opportunity to count the packages or cartons, he should do so, and he should not be allowed to sign the bill of lading as "SL&C".

370) Freight Claims - Shipper Load & Count

Question: I have claims where our insured ships an item under what is called a “shipper load”. It is my understanding the insured loads the truck and the consignee picks it up. The problem I find is when the shipment arrives damaged, the transport company blames the insured for improper loading, and denies liability. They even refuse to pay the basic liability payment that is usually offered when the insured does not declare a value. Is the carrier correct that since they never touch the items, just transport, they are no longer responsible for any damage?

Answer: NO, motor carriers are liable for loss or damage to goods in transit unless the sole cause of the loss is the improper loading of the goods by the shipper, AND they can prove freedom from negligence, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 5.0.

If a shipment is actually a “shipper load & count”, without the driver being present or having an opportunity to witness the loading, and words to that effect are placed on the bill of lading at the time of shipment, the claimant will have a greater evidentiary burden to establish what was loaded and how it was loaded, blocked, braced, etc. - but this does not change the basic rules of carrier liability.

371) Freight Claims - Shipper Load and Count (SL&C)

Question: I am strictly an inbound account and pay the freight charges. My vendor has a “shipper load and count” agreement with the trucking company. On many occasions a shortage arises, I file a claim with the trucking company. The claim is denied based on the SL&C agreement with my vendor. Is the trucking company legally responsible to pay the claim? I thought the contract of carriage is between the trucking company and the payer of the freight charges. How do they manage to wiggle out of paying these type of claims? Generally, all vendors adjust the invoice after we forward them a copy of the declination letter.

Answer: I hate to answer a question with more questions, but:

1. What are your terms of sale with the vendor? If they are "FOB Origin" the consignee (you) will normally have risk of loss in transit, but if they are "FOB Destination", the shipper/seller has risk of loss and should be the one filing the claim. Note that freight payment terms (prepaid, collect) have nothing to do with the terms of sale.

2. Are these shipments really "SL&C"? Are they full truckload shipments which have been loaded by the shipper, without the driver being present or having an opportunity to count the cartons as they are being loaded? If not, the shipment is not properly described as SL&C.

3. What kind of contract does your vendor have with the trucking company? What does it say about loss & damage, claims liabiilty, etc.?

4. Are the trailers sealed at origin? Are the seals intact at destination? Who breaks the seal at destination - the driver or your receiving department employee?

4. If these really are SL&C shipments, and there is a shortage at destination, the burden is on the vendor/shipper to establish what was actually loaded into the trailer. Uusally such proof requires shipping documents and witness testimony or affidavits from someone who has actual knowledge of what was loaded and shipped.

I realize that this is not an "answer" to your question, but I think you can see that there are a number of issues and considerations in determining carrier liability.

372) Freight Claims - Shipper's Load and Count

Question: We recently tendered a shipment of 168 cartons to a carrier and the driver signed for 168 cartons. We utilize a four-part bill of lading and the original copy appears to clearly state 168 cartons. The carrier's copy appears to them as 155 cartons, since there is pre-printed line that cuts through the middle of the numbers.

They billed it as 155 cartons, and their delivery receipt shows delivering clear for 155 cartons. The consignee has since deducted from their invoice the value of the 13 cartons. We filed a claim for the 13 cartons, and the carrier has rejected our claim, but offered 50% claiming that bill of lading was questionable.

I have argued that the driver clearly signed for 168 cartons, since the bill of lading states "driver count/pieces."

I do not feel that we are liable, but what can I do resolve this claim without having to accept 50%.

Answer: From your description of the facts, I'm not sure whether there really was any shortage at the time of delivery. If you actually did ship 168 pieces and only 155 were delivered, then the carrier should pay the claim in full.

On the other hand, it is possible that the consignee may have signed for 155 pieces based on the misprint on the bill of lading or delivery receipt, and did not actually count the pieces that were received (or was less than honest).

If you are not really sure about the facts, the 50% offer doesn't sound too bad.

373) Freight Claims - Shortage - Pallets v. Carton Count

Question: We have filed a claim for a noted shortage against a motor carrier. The carrier is denying the claim based on the BOL, which states 9 pallets in the number of pieces. In the body of the BOL this statement appears: "434 boxes 9 p". The consignee signed the delivery receipt "4 ctn. Short". The carrier is denying the claim claiming that the shipment was tendered to them as 9 skids and the driver is not responsible for carton count.

I have twice rebutted this declination with the reasoning that the driver signed the BOL with the number of cartons stated on it and the delivering driver signed for the shortage. The carrier says that the carton count in the body of the BOL is merely a description of the freight and that drivers are not expect to verify the container count just as they are not expect to verify the commodity (if shipped in an

enclosed container). Please help me to find some back up documentation that will back my position. Thanks.

Answer: I am assuming that the boxes were placed on the pallet and stretch-wrapped before the driver arrived and that the driver did not have the opportunity to count what was actually on the pallet. If so, your problem is similar to a "shipper's load & count" situation, and you have the burden of establishing that the pallet actually did contain the specified number of boxes when it was tendered to the carrier. You may be able to do this through your records, together with a statement or affidavit from someone in shipping that has actual personal knowledge of the preparation of the shipment. If so, the carrier should reconsider its declination of your claim.

A Question: was there any evidence of tampering with the stretch-wrap, re-coopering, etc. at the time of delivery? You should check this out.

To avoid this problem in the future, you may want to have the driver present when you stack the boxes on the pallet so he can verify the count, and sign for the number of boxes instead of pallets.

374) Freight Claims - Shortage on Palletized Shipment

Question: On each Bill of Lading, we fill out the total number of cartons and weight for each shipment (in this case 49 cartons, 1372 lbs). The carrier's driver signed and dated the Bill and noted "2 pallets". The party receiving the shipment signed the Bill of Lading as "2 pallets" and noted "1 carton short". I filed a claim for the missing carton and was denied by the carrier. The carrier said that they signed for 2 pallets and they delivered 2 pallets, end of story. Is their any justification to their denial of the claim?

Answer: Unfortunately, this is becoming a very common problem. When cartons have been counted and loaded by the shipper on a pallet, and then shrink-wrapped, it is often impossible for the driver to verify the count. Carriers understandably do not want to take responsibility for a specified number of cartons unless the driver has actually had an opportunity to count what is on the pallet. Many carriers now direct their drivers to sign only for a pallet count when goods are tendered on shrink-wrapped pallets.

The uniform straight bill of lading contains the language: "Received... the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown)...."

I am not aware of any court decisions that expressly deal with the carton vs. pallet issue. However, in my opinion, it is not improper for a driver to make a notation to the effect that the shipment is palletized and shrink-wrapped, and that he does not acknowledge the piece count if it can not be readily determined. In a way, the shrink-wrapped pallet is similar to a "SL&C" shipment where the shipper loads a trailer or container and seals it; it that case the carrier will usually insert "SL&C" on the bill of lading.

Basically, the issue comes down to your burden of proof. In a shortage situation, the claimant has the burden of proving what was actually tendered (number of pieces) to the carrier at origin, and what was actually delivered.

If you do have a dispute over shortages, you should provide documentation (tallies, picking sheets, etc.) and a statement from the loading supervisor to establish the actual carton count on the pallet in question. Likewise, you should get documentation and a statement from the receiver of the goods. Re-submit your claim with the additional proof of the shortage to the carrier, and request it to reconsider the claim.

I would note that many shippers are now using a distinctive shrink-wrap or a coded tape on their shipment. This is useful in determining if the pallet has been broken down and re-stacked in transit, or if there has been any tampering with the shrink-wrap.

375) Freight Claims - Shortage on Shrink-Wrapped Pallet

Question: I shipped a pallet containing 13 pieces via a less-than-truckload carrier. The pallet was shrink-wrapped and “Do Not Break Down” labels were placed on the pallet. The driver signed my bill of lading for 13 pieces on one pallet. The consignee informed us they only received 11 pieces. The proof-of-delivery from the carrier states “one pallet delivered”. There is no piece count. The carrier refuses to pay our claim stating they delivered one pallet. Is the carrier liable for the shortage?

Answer: Shortages from shrink-wrapped pallets are a frequent problem area. Ordinarily the bill of lading description is prima facie evidence of the quantity shipped, and this would certainly be true if the driver was present when the packages were put on the pallet or if he had an opportunity to count the packages before signing the bill of lading. However, if the pallet is shrink-wrapped before the driver arrives, and it is not possible to count the cartons on the pallet, the carrier may argue that it is not bound by the count shown on the bill of lading.

Since the carrier has challenged the count, I would suggest that you provide additional proof of what was actually put on the pallet before it was shrink-wrapped. This can be a written statement or affidavit from the shipping supervisor or employee that had actual knowledge of the facts, together with any other relevant records such as a picking list, stroke tally, etc.

If there is also a question as to the actual quantity received, you should also get a similar statement from the receiving supervisor or employee that discovered the shortage.

Submit the information and ask the carrier to reconsider the claim.

376) Freight Claims - Shortage v. Overage

Question: We are a broker that hires outside carriers to haul loads for us. We hired a carrier to pick up 1594 cases in one city and deliver them in another. At the delivery place the consignee made a notation that there was 33 cases short on the proof of delivery. It was marked precisely 33 short of #32122. The numbers we have listed for all the different products are UPC numbers; this number was not listed there. But the exact description of the product short was listed on the claim we received. The carrier is denying the claim saying they did not haul that UPC number. The fact is they picked up 1594 cases and delivered 1561 cases, and the delivery receipt was marked 33 cases short. We feel this is a straightforward claim stating he delivered short. No arguments about it. The carrier still denies the claim. What do you suggest we can do to further our stand?

Answer: From what you say, the carrier admits that there were 33 cases (of something) that were short on delivery.

Were the missing items of particularly high value - as compared to other items in the shipment? Maybe the carrier is suspicious that there was some "hanky panky" - either on the shipping end or the receiving end.

Obviously, the carrier is liable for the shortage, but there may be some legitimate question as to the value of the short delivery items. I would suggest retracing your steps and trying to determine exactly what items were shipped but not received.

377) Freight Claims - Shortage vs. Overage

Question: A carrier picked up a trailer loaded with shipments to the "same name" consignee but with different addresses. One order going to Florida delivered 39 cartons short while another order

going to Texas delivered 40 cartons over. Is the carrier correct in declining the shortage because of the overage?

Answer: I assume that the misdelivery was the fault of the carrier and not due to improper marking of the shipment or erroneous paperwork by the shipper.

There is no question that the carrier is liable for the shortage. The "overage" to another consignee does not relieve the carrier of its liability for failing to deliver in accordance with the bill of lading contract.

A little common sense is in order here, and the carrier should make an effort to "mitigate the damage" if possible. If the goods that were in the "short" shipment are the same as the goods in the "over" shipment, it seems to me the carrier has a duty to retrieve them and deliver them to the proper consignee.

378) Freight Claims - Shortage vs. Overage

Question: An LTL carrier declined payment of our freight claim. Our bill of lading stated “6 cases, 114 pounds” with a description of GM GFC UL KB and was signed by the driver. The carrier delivery receipt shows “6 pieces 114 pounds”, with a note “6 pcs product code 2498 over, 6 pcs of product code 2541 short” and signed by the driver. We filed a claim for the six cases short ($2,977). It is my understanding that our contract holds the carrier liable for the items the driver signed for.The carrier declined the claim based on the following: "Per the original bill of lading, the shipment was tendered as six pieces. Per the original delivery receipt six pieces delivered." Is the carrier liable?

Answer: Sure, as a general rule, the carrier is liable if it doesn't deliver what it picked up and signed for on the bill of lading. And delivering the wrong shipment to the consignee doesn't "cancel" a failure to deliver the right shipment.

However, it seems there is a basic question of fact: what product was actually shipped - product code 2948 or product code 2541. Were there other similar shipments made at the same time? Perhaps the shipments were mis-labeled or improperly marked. It seems unlikely that a driver would substitute one kind of product in place of another. Maybe the mix-up occurred in your shipping department.

I would suggest further investigation.

379) Freight Claims - Shortages

Question: Often times we find our selves in a position with major retailers where they claim OS&D (mainly S) as it relates to freight we delivered. In many cases the use their own fleet to provide for the transportation to their DC's.

When we receive notice of an alleged shortage it appears as though we have no recourse, they deduct it from their payment for the goods.

My question is 2 fold,

a. If they signed for "cartons" and later claim shortage who should we go after, the customer or their carrier?

b. What is considered an appropriate amount of time to file a claim? In my opinion 60 days after delivery makes for an extremly cold trail to attempt an investigation.

Answer: First, you should always try to have the carrier's driver sign for the carton count (not pallets), and you should require the carrier to provide a signed delivery receipt in order to verify the loss or damage at the time of delivery. Also try to get your customer to provide you with an OS&D report or a signed statement from the receiving department if it is deducting from your invoices.

Legally, you have up to 9 months to file a claim under the Uniform Straight Bill of Lading. However, it is always best to investigate and file claims as quickly as possible.

380) Freight Claims - Shortages - SL&C Shipments with Stop-Offs

Question: A truckload carrier that we use picks up sealed loads at our distribution center and makes three stopoffs along the way. This carrier has taken the position that as the loads are sealed at origin, they have no liability for shortages at any of the stops. However, the issue I have with this position is the fact that their drivers do not participate in the verification of freight being unloaded. They simply open the trailer and advise the consignee to take whatever freight is theirs. Consequently, we have experienced numerous shortages for which I am holding this carrier responsible for in the absence of a delivery receipt that indicates the number of pieces delivered at each stop. I would appreciate your thoughts on this matter.

Answer: I can understand the carrier's position, but I think the carrier still has a duty to make proper delivery in accordance with the bill(s) of lading or delivery instructions. In other words, if 150 cartons of a certain description are to be delivered at the first stop-off, the driver has a duty to verify what is actually delivered and to make sure the consignee only receives what he is supposed to under the shipping documents. If he fails to do this and/or does not get a signed delivery receipt, he is inviting a claim. I would point out that with an "SL&C" shipment, the shipper has a greater burden of proof as to the quantity and condition of the goods actually loaded into the trailer, since the driver is not present and does not have opportunity to count or view the goods during loading. This normally requires appropriate testimony, picking records, stroke tallies or other documentation as evidence what was actually shipped.

381) Freight Claims - Shortages - Stretch Wrapped Shipments

Question: Our company tendered 2 stretch wrapped pallets (STC 106 pcs) to one of our carriers in accordance with our shipper load and count agreement. Per our contract, the carrier has 24 hours to submit an exception notice if there is a discrepancy with the shipment at its first break point. No exception was reported. The shipment arrived at destination showing 2 shrink-wrapped pallets intact but the consignee noted that the piece count received was 54 (1 pallet) and short 52 pieces (the second pallet). We filed a claim with the carrier assuming that the specific notation of a case shortage would take precedence over the notation that two intact pallets were delivered. But, alas, our claim has been declined. We have no way of determining if the carrier broke our pallets, lost one, and then recoopered by building two pallets at the destination terminal before delivery.

Our questions are: Is there an order of precedence when the notations on a delivery receipt are in conflict with each other? What recourse to do you suggest? What "tips" can you offer for avoiding this situation in the future?

Answer: I don't have a copy of your "shipper load and count agreement", but tendering stretch wrapped pallets is not normally the same as tending an "SL&C" shipment. The term "SL&C" is generally applicable only where the shipper loads (and often, seals) a full trailer or container, without the carrier's driver being present.

In any event, as with all shortage claims, the claimant has the burden of proving what quantity was shipped and what quantity was received. The description on the bill of lading (e.g., "2 pallets") has evidentiary value, but such presumptions are rebuttable with proper proof.

What you need is statements or affidavits from the persons who had actual knowledge of the carton count that was shipped at origin, and the carton count that was received at destination.

You may also have picking lists, stroke tallies or other documents kept in the ordinary course of business. Get these and re-submit your claim to the carrier.

One inexpensive suggestion for stretch or shrink wrapped shipments is to use a distinctive wrap or tape with color-coded markings. This makes it easier to determine if the pallet has been broken down and re-wrapped by the carrier.

382) Freight Claims - Shortages on Dropped Trailers

Question: On inbound shipments UPS scans the packages as they are loaded in the semi at our local UPS terminal. The semi is then dropped off and a scan of our Receiving Supervisor's signature is entered on the delivery receipt. No verification is occurring that what we are signing for is actually on the truck.

Recently we've had some substantial shortages and our vendor is stating they have a signature on a Proof of Delivery so they are not liable. UPS states we signed for the shipment. We do not have any type of agreement on claims currently in place with UPS.

Would we be within our rights to request UPS do the final scan when the truck is unloaded at our facility? We receive 3-5 semi-loads per day so this seems very labor intensive on both parts.

Answer: First, you should investigate thoroughly and try to determine whether the shortages are occurring before or after UPS loads the semi at its terminal for delivery to your facility. It would appear that UPS can easily tell you what went into the trailer at its terminal; does your receiving record agree with UPS? If so, the shortage must have occurred before that point in the movement.

It sounds as though your Receiving Supervisor is essentially signing a delivery receipt for the trailer - and not for the actual packages in the trailer. If so, it should be clearly noted on the delivery receipt that the contents are subject to count and verification.

I don't know whether UPS would provide manpower to scan the packages as they are unloaded from the trailer; you would have to ask them. If UPS won't scan the packages, perhaps your company should invest in scanners so you can accurately track what is coming in.

In any event, you should definitely discuss this problem with the loss prevention people at UPS and get them involved.

383) Freight Claims - Signing “Subject to Count”

Question: What is the legal obligation of the consignee and the carrier when a delivery receipt is signed "Subject To Count". Please address the answer for movement of goods under the NMFC and International Ocean and Air Shipments.

Answer: Signing a delivery receipt "subject to count" has little probative or evidentiary value, and the legal consequences will depend on the facts of each individual situation. If loss or damage is discovered after delivery (after the driver has departed), the carrier will most likely take the position that is the equivalent of a "concealed" loss or damage claim.

As a general rule, the best practice is for the consignee to count the freight at the time of delivery, when the delivery driver is still present to witness any loss or damage. This avoids a myriad of problems and arguments later on.

384) Freight Claims - Special Damages

Question: My company manufacturers portable generators. We shipped a generator from WI to MO on December 3rd, freight prepaid, FOB destination. The carrier lost the shipment. We filed a freight claim in January and were paid in March. The consignee lost the sale because the generator needed to be installed before Y2K. The consignee filed a claim with the carrier for his lost mark up and labor. The carrier has denied based on special damages were not noted on the bill of lading. Does the consignee have an arguement?

Answer: Since the shipment was "FOB destination", the presumption is that you (the seller) had risk of loss in transit and should be the proper party to file the claim. Apparently, you did this and the carrier paid the claim, and can properly consider the matter concluded.

Even if the buyer/consignee had risk of loss and had filed the claim, it is unlikely that it could have recovered any more than the invoice amount it actually paid for the goods. The only exception which comes to mind is if the consignee had gone out and purchased a replacement unit (in order to meet its customer's requirement) and the replacement cost more than the original unit which was lost.

The carrier is correct in stating that "special damages" are not usually recoverable unless there is notice at the time of shipment, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.3. In other words, unless the consignee's potential loss of sale was clearly communicated to the carrier at the time of shipment, it would not be liable.

385) Freight Claims - Special Damages

Question: We shipped a LTL shipment from New Jersey to Los Angeles, CA consisting of 24 cartons and weighing 3400 lbs. We allowed the normal 10 days transit time to the West Coast. Once received, the shipment was to be shipped via ocean freight to Taiwan.

The shipment was lost in transit and was not delivered for 5 weeks. When delivered it was one carton short. Since the shipment was lost in transit for almost 4 weeks we did not have time to ship it surface and we had to ship it air freight to meet the customer's needs. We filed a claim for the air freight charges ($7,000.00). The one carton short was delivered another 4 weeks later. We did not claim any amount for the one carton, only the air freight charges. The carrier has refused our claim stating that everything has been delivered and the decision to make the shipment via air freight was not their responsibility.

Answer: Your claim involves what is known as "special damages". The question is whether the need to ship a replacement shipment by air in the event of a delay was "forseeable" at the time the contract of carriage was made, or that the carrier had some actual or constructive notice that you would have to do this if the shipment was unduly delayed.

The court decisions split on this issue, see discussion in *Freight Claims in Plain English* (3rd Ed. 1995) at Sections 7.3.4 and 7.4.9. I would not be able to predict the outcome of a court case on this one without more detailed information as to what the carrier actually knew or what kind of communications took place between the parties.

386) Freight Claims - Special Orders

Question: The carrier damaged a shipment of tempered glass, which was a special order for a job site. It appears that just the top layers of glass were broken in the shipment. The job site refused the shipment and reordered another shipment, which was received and used. The shipper refuses to accept the undamaged portion of the glass for credit due to the fact that it is tempered and a special order for that job, which means they can not resell it or melt it down to recycle it. The

purchaser of the glass does not need it due to the fact that the job the glass was ordered for is finished and they do not need it for another job, nor can they recycle tempered glass. A claim was filed for the whole shipment of glass. The carrier involved is declining the claim due to the fact that not all pieces of the shipment appear to be damaged (the damages were not mitigated). However, for the reasons stated above, the damages cannot be mitigated. The material is of no value to either shipper, consignee or the company which purchased the product. Are carriers liable for the entire shipment even though not all the shipment is damaged when there are these special circumstances involved?

Answer: As you point out, there is generally a duty to "mitigate damages", see Section 7.1.4 in *Freight Claims in Plain English* (3rd Ed. 1995).

It is not clear from your description whether it would have been possible for the manufacturer to have replaced only the damaged portion of the shipment, instead of replacing the entire order.

Assuming that this was not practical, my advice would be to have the shipper attempt to find a buyer for the undamaged portion of the shipment. This will establish whether the material has any salvage value or whether it is in fact worthless. If, after a good faith attempt, no buyer can be found, then the carrier should pay for the full value of the shipment. Note: The shipper should carefully document its efforts to find a buyer for the material and the details of any offers or sales!

Alternatively, the undamaged material can be turned over to the carrier, and the carrier can pay the claim and recover what it can from a salvage sale.

387) Freight Claims - Standard Salvage Amount

Question: What is the standard salvage amount to deduct for damage on claims?

Answer: There is no "standard salvage amount" to deduct for damage claims. Each claim should be evaluated on its own merits to determine if salvage is possible, and the actual amount that may be realized from the salvage process.

I would suggest that you read Section 10.10, Salvage Procedures in *Freight Claims in Plain English* (3rd Ed. 1995) for a full discussion of the rules, regulations and proper procedures to follow.

388) Freight Claims - Statistics

Question: Do you have any information as to the percentage of claims that are filed, either by number of claims, or percentage of claims paid. We are interested in the industry average of claims filed in order to compare it to our claim history.

Answer: At one time the I.C.C. collected and published freight claim statistics, but that function was discontinued a number of years ago. To my knowledge there is no agency that now maintains this kind of information.

Many of the major carriers do have detailed statistics on their own claim processing. You might contact the director of cargo claims at one of your carriers and see if he would share some info with you.

389) Freight Claims - Tanker Contamination

Question: We haul bulk product in tanker trailers over the road. After each load we are required to take the trailers to be washed out, which we do at tanker wash out locations. The shipper loads our tankers after they have been cleaned.

We have received a claim due to contamination. We have proof that the trailer was in fact washed out prior to loading. There is nothing in our contract that pertains to liability due to contamination. Who would be liable for contamination? We have not had any luck finding claims laws for tankers.

Answer: Cases involving contamination are very fact-specific, and there aren't many reported decisions to establish "black-letter" rules.

For starters, you need to have a good lab test in order to determine the nature and quantity of the contaminants so it can be determined where the contaminant may have come from, and how serious the contamination really is.

If the source of the contamination was from one of your tank trucks (or a pump, hose or other loading device), you would probably be liable to the shipper or consignee for the damage. Of course, it may be possible to filter or reprocess the material, or to sell it as off-grade product, and if so this should be done as soon as possible in order to maximize the salvage and mitigate the loss.

If there is evidence that the cleaning service did not properly clean the tank truck, you may have an indemnity claim against them for any amounts that you have to pay the claimant.

390) Freight Claims - Terms of Sale

Question: What controls who files a claim against the carrier in a situation where the consignee contracts with the carrier to haul freight COLLECT and the terms of sale are FOB origin? There were damages and now the consignee is issuing a claim against the vendor when it should be issuing the claim against the carrier.

Answer: First, you should know that "FOB" terms identify who bears risk of loss and "Prepaid/Collect" terms identify who is primarily responsible for freight charges. A common misconception is that the party who pays the freight is the one who as risk of loss in transit. This is not true.

In your situation, where you have FOB Origin, you are correct - although the seller bears the risk and expense of putting the goods in possession of the carrier, the consignee bears risk of loss for the freight while it is in transit. As authority for this rule, you can cite section 2-319 of the Uniform Commercial Code.

"In practice, claims are often not filed by the party who has risk of loss. For example, a large shipper which has an experienced traffic department may file claims for its customers as a courtesy or service. However, if the shipper does not bear risk of loss for the shipment, it has no legal obligation to do so", see "*Freight Claims in Plain English* (3rd Ed. 1995), at p. 10.19

For a more extensive treatment on claims issues we recommend that you consult *Freight Claims in Plain English*, which you can obtain from the Transportation & Logistics Council, Inc.

391) Freight Claims - Terms of Sale & Risk of Loss

Question: Most of our company's purchase orders specify FOB Destination, Freight prepay-3rd party bill. We choose the carriers and pay their freight invoices directly, however we do not take possession of the goods until we receive them.

Our distribution center occasionally receives a load of freight with partial damage. The receiving personnel will accept the entire load, noting the damage on the delivery receipt. When this occurs, do we take legal possession of the damaged goods simply by signing the delivery receipt? Or, do we only take legal possession of those goods received "free and clear"? We are

trying to determine whether the liability for the goods belongs to us or our supplier. To my knowledge, the contracts with our suppliers do not specifically address this issue.

Answer: The Uniform Commercial Code establishes certain presumptions about "risk of loss" based on the terms of sale specified in the sales contract. UCC 2-319 provides that where FOB place of shipment is specified, risk of loss passes to the buyer once goods are put in possession of the carrier at origin; where FOB place of destination is specified, risk of loss is on the seller during transit. These presumptions can be varied by the parties in their contract.

If the goods are damaged in transit, and the terms are "FOB destination" or equivalent, the risk of loss generally falls on the shipper/seller, and that party should be the one to file a claim with the carrier for the loss or damage.

The fact that the consignee accepts the goods, including the damaged goods, does not change this. In fact, the consignee should generally accept partially damaged shipments, notify the seller of the damage, and request disposition instructions (e.g., return, salvage, scrap, etc.)

392) Freight Claims - Terms of Sale & Risk of Loss

Question: I am trying to find out from the U.S. Department of Transportation the rules and policy regarding damaged goods delivered by a trucking company. If goods are damaged, can we refuse the delivery, are we still obligated to pay for the goods, and who is liable for the damage?

Answer: First of all, the U.S. Department of Transportation won't be of any help. Second, you are mixing "apples & oranges" in your question.

The Uniform Commercial Code establishes certain presumptions about "risk of loss" based on the terms of sale specified in the sales contract. UCC 2-319 provides that where FOB place of shipment is specified, risk of loss passes to the buyer once goods are put in possession of the carrier at origin; where FOB place of destination is specified, risk of loss is on the seller during transit. These presumptions can be varied by the parties in their contract. What this means is that if you, as the consignee-purchaser have risk of loss (i.e., "FOB Origin" shipment), and goods are lost or destroyed in transit, you will still have to pay for them (and attempt to recover from the carrier).

If there is transit damage to a shipment (caused by the carrier), you should normally accept the shipment, unless the merchandise is "practically worthless", and immediately notify the carrier of the damage and request an inspection.

If the risk of loss is on the shipper-seller, you should promptly notify the seller of the damage and request instructions for disposition of the damaged goods.

If you as the consignee-purchaser have risk of loss, you have a duty to attempt to mitigate the loss. This could involve inspecting, sorting & segregating damaged goods, repackaging or repair, etc. You should also promptly file a written claim with the carrier.

These subjects are covered in detail in *Freight Claims in Plain English* (3rd Ed. 1995), which is available from the Council.

393) Freight Claims - Time Limit to File

Question: We filed a claim after 9 months for damages to an intrastate shipment in Texas. The carrier denied the claim on the basis that "any payment by the carrier is legally prohibited by the Bill of Lading Contract (section 2b), and court action, which has interpreted that section of the contract."

If I have a contract with the carrier that specifically considers the B/L as a title document only and since this was a Texas intrastate shipment do I have any recourse? If you say, "depends on Texas State Law", would you happen to know, or know where to find, the statute of limitations on freight claims under Texas Law?

Answer: The first question, of course, is what does your contract actually say. Most contracts have provisions governing the time limits for filing a claim, and most contracts say that the contract provisions govern if there is a conflict between the contract and any bill of lading that may have been used. If you want us to review your contract, please furnish a copy.

If the answer cannot be found in your contract, the next question is what kind of bill of lading was used and what language is on the bill of lading. If a short form bill of lading was used, it probably has language incorporating the classification (NMFC) or the terms of the Uniform Straight Bill of Lading. If not, or if the carrier is not a participant in the NMFC, the time limit may not be binding. Again, we would need to see the bill of lading.

Since the 9-month time limit is a contractual time limit, it probably makes no difference whether this was an intrastate or interstate movement.

394) Freight Claims - Time Limits for Concealed Damage

Question: What are the time limits for making a freight claim if you sign for a bill of lading clear, and find concealed damage later?

Answer: The time limit for filing a claim, as set forth in the terms and conditions of the Uniform Straight Bill of Lading, is 9 months from the date of delivery (regardless of whether the damage is visible or concealed). Time limits can vary depending on the form of the bill of lading that is used, but can not be less than 9 months for motor carriers, see 49 U.S.C. § 14706 (the "Carmack Amendment").

When you have concealed damage, it is ALWAYS a good idea to notify the carrier immediately, request an inspection, and to preserve all the packaging. The longer you wait, the more likely it is that the carrier will decline the claim, and that it will be more difficult to prove that the damage did not occur after delivery.

395) Freight Claims - Time Limits to Process

Question: I was under the impression that a contract carrier must resolve a claim for damages within a 120 day period of receiving a claim and/or notify me within the 120 day period if additional information is required from me to resolve or further investigate the claim.

I filed a claim for $10,048 for damaged goods on April 14th and as of today (October 21st, well after the 120 period) I have received no response from the carrier other than their initial response that they had received my claim.

I cannot locate specific information in Title 49 that indicates my course of remedy.

How should I proceed to collect the $10,048 that we are owed from the carrier?

Answer: My first question is: “What does your contract say?” If you have a properly drafted transportation agreement, it should spell out the procedures for filing, acknowledging and processing claims. You should look there first.

If your contract is silent on these issues, the former ICC (now FMCSA) claim regulations are applicable. These are “Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage”, at 49 C.F.R. Part 370. The regulations are set out in full at Appendix 65 of *Freight Claims in Plain English* (3rd Ed. 1995).

If you are not getting a response, you may try reminding the carrier about the claim regulations and demand that they comply. Of course, your ultimate remedy, if the carrier refuses to pay a legitimate claim, is to bring a lawsuit.

396) Freight Claims - UPS

Question: Is UPS a common carrier and subject to the terms of the Carmack Amendment for freight claims purposes? How do they get away with dragging their feet settling claims? Any tips for dealing with them on claims settlement matters?

Answer: You are correct: for any shipments which move "surface" (by truck), UPS is considered a motor carrier and is subject to the "Carmack Amendment" (49 U.S.C. § 14706) and the FMCSA (formerly ICC and FHWA) claims regulations. They are required by law to investigate claims and to respond in a timely manner - just as any other motor carrier.

I would observe that UPS does have a liability limitation ($100 per package, unless the shipper declares a higher value and pays a valuation charge). This liability limitation is usually enforceable, according to most of the recent court decisions.

The only suggestion I can give you - if you are getting the "brush off" – is to file a suit in your local small claims court. That usually gets their attention.

397) Freight Claims - UPS - Delivery Receipts

Question: As of late, when requesting signed proof of delivery from UPS, we've been receiving what they consider clear, but consignees will not accept:

Left @: Dock
Received by: Dock
Receiver's signature: Dock

They are refusing to issue us an LDI# in order for us to file a claim. When we file a claim without the LDI#, they automatically reject it. They contend that the signature "Dock" is perfectly legal and they will not pursue the issue any further. Aren't they responsible for obtaining either a legitimate receiver's name or signature?

Answer: From what you describe, these delivery receipts are probably completed by the driver and not the consignee. As such, they are worthless and would not constitute proof that the consignee received the goods.

If you are actually experiencing problems with non-deliveries, you should pursue this matter further with the carrier and, if necessary, take legal action.

398) Freight Claims - Who Can File?

Question: Can a party not listed on the original Bill of Lading (B/L) or Purchase Order (PO) file a claim on behalf of the owner of the material listed on the original B/L or PO?

Answer: Anyone having an interest in the goods (shipper, consignee, owner, etc.) can file a claim for loss or damage. If you are an intermediary (3PL, broker, etc.) you should be able to file a claim on behalf of your customer, if the customer has authorized you to do so. If there is any question, you should get a written authorization or an assignment of the claim.

399) Freight Claims - Who Should File

Question: The terms of our sales are FOB Origin, freight prepaid. As a service to our customers, our Traffic department files freight claims with the carriers. We have always required the consignees to sign two forms, Proof of Loss and Assignment of Claim. Lately, our customers have been refusing to

sign either document stating that the automatic deductions that they take from their invoice(s)are proof of loss Should we discontinue our futile attempts at trying to "require" that these forms be signed? There are two schools of thought on the matter here and we anxiously await your reply.

Answer: As you apparently recognize, the term "FOB Origin" creates a presumption under the Uniform Commercial Code that the risk of loss in transit shifts to the buyer when the goods are tendered to the carrier at origin. In theory, a carrier might raise the argument that you, as the shipper, are not the proper party in interest to file the claim. However, there is ample case law that permits either the shipper or the consignee to file claims. See discussion at Section 10.5 of *Freight Claims in Plain English* (3rd Ed. 1995).

I would note that this issue (risk of loss) could be important if you were attempting to collect from an insurance company, since the policy would only indemnify you if you were the party sustaining the loss.

400) Freight Claims - Who Should File?

Question:

1. Is it legal for a shipper to file claims for shortages or damages if the terms are FOB Origin Freight Collect?
2. The claim is declined, 9 months have past since the incident and the owner of the goods, the consignee elects to open up new issues with the carrier. Is the new filing considered part of the 1st claim?
3. Is it a norm or an exception for the shipper to file short and damage claims for shipments that have terms FOB Origin Freight Collect?
4. Whats the feeling of the carriers when a 2nd claim is filed for the same shipment?
5. We would be deducting the cost of the short or damage from the vendors invoice as a matter of information.

Answer:

1. Either the shipper or the consignee may file a claim (regardless of the terms of sale).
2. As a general rule, once a claim has been timely filed, it may be amended or supplemented. However a new claim may not be filed after the expiration of the 9-month time period in the Uniform Bill of Lading.
3. When the terms of sale are "FOB Origin" or equivalent, the presumption under the Uniform Commercial Code is that the risk of loss passes to the buyer at the time the goods are tendered to the carrier at the point of shipment. However, in many situations, the seller still files claims for loss or damage.
4. Carriers generally will reject a "second claim" on the same shipment. If this situation should arise, the carrier may require an indemnity agreement or a letter assigning the claim.
5. Since you are apparently the consignee on the subject shipments, if they are in fact sold "FOB Origin", you would have risk of loss in transit and should be the party to file the claims.

I would note that these subjects are covered in greater depth in *Freight Claims in Plain English* (3rd Ed. 1995), which is available from T&LC.

401) Freight Forwarders - Legal Requirements

Question:

I am starting a freight forwarding business and was wondering what laws apply to international and domestic freight forwarding?

Answer:

There are laws, but it depends on what you are planning to do.

Domestic surface freight forwarders are required to register with the FMCSA and must file evidence of insurance and registered agents for service of process.

Ocean freight forwarders are regulated by the FMC and must be licensed and bonded.

Air freight forwarders are not regulated by any government agency.

If you need further assistance, T&LC Headquarters can refer you to experienced professionals.

402) Freight Forwarders - Requirements

Question: I am trying to collect an old invoice from a freight forwarder (FF). Does a FF have to carry a surety bond? What are my remedies?

Answer: Domestic surface freight forwarders are required to carry the same insurance as a motor carrier: public liability (if they operate trucks) and cargo insurance, see 49 C.F.R. Part 387.

Unless the freight forwarder is also a broker, it would not be required to have a surety bond for the payment of freight charges.

You can check for insurance and surety bond information on the FMCSA website: www.fmcsa.dot.gov; by clicking on the “Licensing and Insurance” menu.

403) Freight Payment - Credit Period

Question: I have a question for you related to the terms concerning freight payment to carriers. Currently, we are paying our carriers anywhere from 11-19 days from day of shipping. Are there legal guidelines concerning the terms of payments?

I am under the assumption that with contract carriage these terms would be defined within the contact. but we are an exempt commodity (turkey products) and utilize only common carriage, no contracts. We are looking to re-define our payment process by setting up new standards but are reluctant to do so until we check out the legal limitations.

Answer: Under the Interstate Commerce Act the authority to issue regulations for the extension of credit by motor carriers is delegated to the Secretary of Transportation (actually the FMCSA), 49 U.S.C. Section 13707. Regulations governing payment of transportation charges and the extension of credit to shippers by motor common carriers are found at 49 C.F.R. Part 377.

49 C.F.R. 377.203(c) & (d) provide as follows:

(c) Length of credit period. Unless a different credit period has been established by tariff publication pursuant to paragraph (d) of this section, the credit period is 15 days. It includes Saturdays, Sundays, and legal holidays.

(d) Carriers may establish different credit periods in tariff rules. Carriers may publish tariff rules establishing credit periods different from those in paragraph (c) of this section. Such credit periods shall not be longer than 30 calendar days.

I am not aware of any court decisions as to whether these regulations apply to "exempt" transportation. My opinion is that the regulations would not be applicable.

However, in any event, you should be careful to pay freight bills within the carrier's credit period. Always ask your carriers what their credit rules are, and demand a copy of their Rules Tariff so that you have the rules in writing.

Most all carriers provide for substantial penalties or service charges for late payments. For example, many carriers have tariff rules which provide for a loss of discount for payment after 30 days. Think about this: if you have a 60% discount off the class rates, the penalty for late payment is 150% of the original freight bill! This kind of penalty is what is involved in the Humboldt lawsuits

which are presently pending in the Bankruptcy Court in North Carolina, where hundreds of unsuspecting shippers were sued after the carrier went out of business.

404) Freight Rates - Disputes

Question: I am a contract carrier. The bulk of my business is obtained from brokers via the Internet. I haul mostly pipe, steel, and lumber. Question. Many times I will accept a load that has a stated destination of a town, but when I call the receiver I am told that the load delivers to a different place sometimes as much as 40 miles away. I attempt to bill the brokers for the extra miles but they always say it was a flat rate load. Also misstated weight is a problem. The broker will say the load is 42,000 but when you go to load the shipper wants to load 48,000 or more. Is there any way to collect for extra miles and weight?

Answer: It appears to me that you must be making verbal arrangements with the shippers or brokers. You should use a written agreement that spells out the arrangement clearly, together with your terms and conditions. This would avoid most of the problems that you have described.

405) Freight Solutions - Unpaid Bills

Question: We have received dunning notices from carriers who were not paid by Freight Solutions, a broker that went out of business. We have several unpaid bills. Can we pay the carrier direct for his portion and the balance to the attorneys for Freight Solutions, or must we pay all to the attorneys.

Answer: My advice is that you should not pay either the carrier or the attorneys representing Freight Solutions, unless you receive a written authorization and release from both parties. If you pay either one without a release you are exposing your company to a double payment liability.

406) Fuel Surcharges

Question: We have contracts and rate agreements with all our carriers and they do not provide for fuel surcharges. Are shippers obligated to accept fuel surcharges from carriers without prior notice?

Answer: Many carriers have instituted fuel surcharges as a result of the recent increase in diesel prices, and shippers are being billed for these surcharges.

If you have a properly drafted, written transportation contract, and it does not provide for escalation or fuel surcharges, you should be able to enforce the rates and charges specified in the contract. Of course, there may also be a cancellation provision in the contract, which allows the carrier to cancel on specified notice, such as 30 or 60 days, so beware.

407) Hazardous Materials - Federal Regulations

Question: We have received conflicting information on whether or not packaged shotgun shells require and identifying placard.

Can you clarify what the STB/ICC requirements are?

Answer: Requirements for HazMat shipping papers, labeling, placarding, etc. are set forth in the federal DOT regulations, 49 C.F.R. Part 171, et. seq.

You can get the text of the regulations as well as a lot of information on HazMat shipping from the Federal Motor Carrier Safety Administration web site: http://fmcsa.dot.gov (select "HM Safety"). There are also staff personnel available to answer questions.

There are a number of publications available: J.J. Keller is a good source - www.jjkeller.com or 1 800 327-6868; also Chilton's "The Complete Shipping Papers Rules" - from HazMat Shipping, PO Box 2286, Radnor PA 19089-2938 or fax (610) 964-2938.

408) HazMat - Liability for Clean-up Costs

Question: A recent truckload shipment of Nicad batteries was damaged when the trailer caught fire. The driver ran over a mattress, which got caught on the axle and started burning. He didn't stop to check. Half of the shipment was brought back to us and the other half is now a melted mess stuck to the trailer which is now considered hazardous material and under HAZMAT regulations in Ark.

We will be filing a claim with the carrier for the entire shipment value since due to heat and water exposure none of the batteries can be used. The law requires that unusable batteries be disposed of per HAZMAT regulations (40 CFR Part 273) in our case. My question is: The 12 melted pallets left behind will have to be disposed per regulation in Ark. The cost to do so is whose responsibility? Can we file the claim now? What if the carrier attempts to bill us for the cleanup? Also, the returned pallets, which we will recycle, can we charge the carrier for the cost?

Answer: Since the carrier was responsible for melting the batteries I would say it is responsible for the clean-up costs. I am not too familiar with the Hazmat regs, but a cursory review of 40 CFR Part 273 indicates that responsibility would be on the "Generator" of the hazardous materials. In this case, the carrier was responsible for "generating" the hazardous materials, in that the batteries became hazardous materials as a result of its actions.

With respect to the returned pallets, which you plan to recycle, you should know that shippers and consignees have a duty to mitigate damages. In other words, the shipper or consignee is required to do what they can to reduce the total amount of damages; typically this is done through salvage. In your case, the recycling of the returned batteries may be construed as salvaging the batteries to the extent that the use of the returned batteries reduces the cost of raw materials to produce new batteries. Therefore, you may need to place a salvage value on the returned batteries and deduct this amount from your claim.

409) HazMat Shipments - Packaging/Labeling Requiremens

Question: Our company ships hazardous good to Europe. The European Union has new requirements for packaging/labeling of hazardous goods. Our problem is that we can not find "hazard designation requirements" in English. Can you please help me find a source to these requirements.

Answer: From your question it is not clear whether you are shipping principally by air or by ocean (or multimodal), and there are differences in the packaging, marking and labeling requirements for the different modes.

I would recommend that you visit the DOT's "HazMat" web pages on the Internet. The home page is: http://hazmat.dot.gov/hazhome.htm

The DOT site has a lot of information including a listing of publications that can help you comply with international requirements. The page listing the publications is: http://hazmat.dot.gov/interpub.htm

A commercial company that specializes in this area is UNZ and Company in Jersey City, NJ; their phone number is 1-800-631-3098.

410) Hijacking - Federal Crime - Hobbs Act

Question: Can you tell me what is the "Hobbs Act" and how would it apply to hijacking of a truckload of high value garments?

Answer: The "Hobbs Act" is a federal statute, 18 U.S.C. Section 1951, entitled "Interference with commerce by threats or violence". It provides that:

> "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both."

Under this statute, a hijacking of a shipment moving in interstate commerce would be considered a federal crime.

411) Holding Freight for "Ransom"

Question: We are a freight forwarder that periodically has had a vendor or supplier hold our freight as ransom in order to have past due debts paid, or to collect COD shipments.

Is this legal, and can we recover our freight from off their dock, even if we prepaid for the shipment?

Answer: From the information in your memo, it is not clear what the problem is, particularly what you mean by "our freight". As a freight forwarder, you normally have no ownership interest in the goods.

Assuming you are talking about your line-haul carriers holding freight or refusing to deliver because you owe them freight charges, carriers have a lien for freight charges on shipments they are transporting, and can lawfully refuse to deliver until the freight charges are paid. It should be noted that in most states, the lien only applies to the current shipment being transported, and not to freight charges on past shipments. In California, however, the law permits carriers to hold freight for all past freight charges.

412) Household Goods - Claims - Time Limits

Question: We used a moving company last summer for a move from Philadelphia, PA, to Princeton, NJ. There was much damage to our property, our new residence, as well as some missing valuable property. We paid for insurance, and we filed the claim in November, but the carrier has yet to resolve the claim. I have called and sent certified letters. Is there a statute of limitations on filing a lawsuit? Is that our next step?

Answer: With regard to time limits, assuming that the shipment was "interstate", federal law governs and provides for two relevant time limits. The carrier cannot provide for less than 9 months for

the filing of a claim in writing, and the time to bring suit cannot be less than 2 years from the date the claim is declined.

At one time the ICC had an active enforcement group that would respond to complaints such as yours. Unfortunately, while this responsibility has been transferred to the Federal Motor Carrier Safety Administration, it appears that there is neither the interest nor the budget to assist consumers. You may have to contact legal counsel or bring an action yourself in your local small claims court.

413) Household Goods - Claims Assistance

Question: I moved to Illinois in June and my mover dropped my household goods off here on July 2, one day after we our contract called for. The contract was for a fixed price and he threatened to not deliver everything unless I gave him more money. I gave him $400 more. That is not my problem now.

Many things were damaged during the move. I had purchased full replacement cost coverage. I filled out a claim form and it was received by the mover on July 23. I have called him at least 20 times since then. Once I got him - almost a month ago and he said I would get soemthing from him in the mail soon - as required by Virginia law (we moved from Virginia).

We are getting tired of calling and not getting a response and living with broken things. How can we expedite matters?

Answer: If you are unsuccessful in getting the carrier to respond to your loss and damage claim, about the only recourse is to file a lawsuit in small claims court. You can sue the carrier at the place of origin, or the place of destination, or where the carrier operates. This is governed by federal law, by the way, not state law. If the carrier does not maintain an office where you now live, you can still serve their "registered agent" with the summons and complaint. The name and address of the registered agent can be obtained from the Federal Motor Carrier Safety Administration via their web site: www.fmcsa.dot.gov

414) Household Goods - Estimates

Question: Is there any remedy when a HHG "estimate" is exceeded by 50% when the actual weight is calculated and used to calculate the freight charges?

Answer: Your only remedy is to pay the estimated freight charge plus 10% to obtain delivery of your belongings and then to contest the balance. If the shipper did not receive a "binding estimate", or competitive bids, you are at the mercy of the carrier.

One of the recurring problems with estimates is "low balling" the estimate to get the contract, and then charging for the actual weight. Another problem has been "ballooning" the weight when the truck is placed on the scale. Therefore, if other bids are obtained, at least they may be used to contest the actual weight and freight bill. Another suggestion is to complain to the FMCSA at www.fmcsa.dot.gov, as they still have jurisdiction over household goods.

415) Household Goods - Liability Limitations

Question: Last August, I had some furniture moved from MS to TX. Prior to the move, I met with the representative of the company for an estimate of the move. He did the estimate, but failed to provide me with written, detailed information regarding the different types of insurance coverage avialable to the consumer, as per his company policy.

As the furniture was being loaded, the movers dropped a grand piano, causing significant damage. While they should have loaded it onto a grand board, they did not. They did not properly pack a marble top - they boxed it versus crating it - and it was broken upon arrival into several, irreparable, unusable pieces.

Thw damage to both items was directly due to gross incompetency and negligence on the part of the actual movers. When I placed a claim for the full amount needed to repair/replace these items in September, I was informed that it was I who owed the moving company - for full value protection coverage.

After my objection to the extra charge - I did not know at the outset that they would not pay for damages that they incurred - they cited several cases brought against the industry which the consumer lost even though (1) the company was negligent; and, (2) the consumer was not adequately informed about insurance options available.

My questions is this. Are there any cases/rulings that might resemble my problem that have been recently found in favor of the consumer?

I DID sign a bill of lading upon delivery but was not aware nor did I understand what it all entailed when I was asked by the head moving guy what the value of my shipment was. Granted, I did not read all of the small print in the area I was asked to sign- but was only told by the mover that they had to put something down and would I sign here and here, etc. It doesn't seem fair that a moving company can come into your house break things/pack improperly and not be responsible for the damage.

Answer: I appreciate your problem, and agree that most household goods shippers probably don't read or understand the fine print on the Uniform Household Goods Bill of Lading. Even after many years of being an "expert" in transportation law, I still think the language is rather arcane and difficult to understand.

Unfortunately, the courts are not usually very sympathetic. Most of the reported court decisions say that the shipper is presumed to know the law, should be able to read and understand the bill of lading, etc., etc.

Since this is an interstate movement, there are certain federal regulations which are applicable and it is possible that the moving company did not comply. For example, there is a small booklet (originally put out by the ICC, then the FHWA, and currently the FMCSA) which they are required to furnish which explains the rules and the carrier's liabilty. If they did NOT provide this, you might have a good chance to prevail in court, particularly a local small claims court.

In any event, if you should decide to file suit in small claims court, be careful to check the local rules. You should be prepared to have an itemized claim, with receipts for items purchased or paid bills for repaired items, and you may be required to bring in an "expert" if there are any antiques or high value items involved.

416) Household Goods - Liability Limitations

Question: I paid a moving company in NJ to move my household goods from Hawaii to my home in Virginia. They deceived me concerning the insurance and liability issues. I asked them for standard liability (declared value $1.25 per pound x total weight) on my household goods valued at $15,000 and

full value insurance on my motorcycle valued at $12,000. I did not sign a release allowing them to cover it at $60 per pound. The total weight of the shipment was 3600 lbs.

$4462 dollars worth of my goods were missing when they arrived at my home. I believe they were left out in Hawaii when the movers tried to make three containers of goods fit into two containers.

The salesperson with whom I dealt did not explain the insurance procedures to me. He purchased a policy to cover the motorcycle for $12,000. He then claimed that I told him the remainder of the shipment had no value and that I refused to insure it. In reality, I specifically told him twice that the total value of the shipment was in excess of $25,000.

My question is, are they liable for declared value ($1.25 per pound x total weight of shipment) since I did not sign a release of value or are they allowed to release the value themselves to the other carriers?

Answer: Household goods movers are subject to strict federal regulations that may be found in the Code of Federal Regulations (49 CFR Part 375). There is also an informational booklet that is available from the Federal Motor Carrier Safety Administration (or any interstate household goods carrier). Whether the carrier's limitation of liability is enforceable will depend on whether the carrier complied with the regulations, and how the bill of lading was filled out.

I would suggest that you review the regulations to see if the carrier complied, and you may wish to contact an attorney in your area, or commence a lawsuit yourself in the local small claims court.

417) Household Goods - Tariff Rates

Question: Where can I find posted household goods tariff rates? What is the status of tariffs-what role do they play in today's market?

Answer: There are no "posted" tariffs for household goods carriers, and tariffs are no longer required to be filed with any government agency such as the FMCSA (formerly the ICC).

Most major HHG carriers are participants in the Household Goods Carriers Tariff Bureau No. 400-M tariff, from which they usually give discounts off the full tariff rates.

418) Household Goods Complaints

Question: I've had a problem with a household goods move. Do you have any suggestions?

Answer: Since the demise of the Interstate Commerce Commission at the end of 1995, there has been little federal oversight of household goods carriers (See TRANSDIGESTS ## 42 & 46 discussing GAO Report GAO-01-318 regarding issue and Congressional hearings). However, here are some tips and suggestions if you have a problem:

Keep copies of all paperwork - estimate, bill of lading, inventory, information brochures, etc.;

Get accurate name, address and phone number for everyone you deal with;

Make a detailed chronology of all events and communications; and

Send a written summary of your problems, with copies of all relevant paperwork to the Federal Motor Carrier Safety Administration (FMCSA) and also send a copy to your congressman

Following are some contacts to call:

Household Goods Hot line - 1 888 368 7238

Warren Hawthorne

Phone 609 538 4902

Fax 609 538 4913

New York Department of Transportation

Johnathan Nicastro
Phone 718 782 4817

419) Household Goods Damages

Question: We recently moved from Michigan to Colorado vie North American Van Lines. Their rep. assured me of a "professional move" – that things would be handled with care. It wasn't so.

Furniture was damaged from their gross mishandling. They dropped a large china cabinet 2 times moving out and once moving into my new residence. My dining room table was set upside down on the driveway, damaging a corner of the top surface. Items labeled for the garage ended up on the second floor and so on. Light boxes were packed under heavy boxes in the truck. Most of these were PBO cartons. Although nothing was damaged it appeared to be a clear message as if to say "we will teach you a lesson for not having us pack these boxes" In some cases boxes weighing over 75 lb. were packed on top of boxes weighing 3 lb. Even one of the local NAVL people who assisted in unloading said he had never seen a mover pack so irresponsibly.

We carried upgraded insurance on our goods. When we did file a claim, they had an estimator come out and he "allowed" $90 for repair of the china cabinet. The china cabinet is a $3,500 unit and needs a new back and a new glass panel. I checked the price of the glass itself, and it is over $90 not including installation. The total of their "allowance" conveniently came to $225, just under my deductible. I requested a partial refund due to their failure to meet the contractual requirements and they have stated that it is "illegal for them to do so".

How can I proceed with this matter?

Answer: Unfortunately, you are not alone in having "nightmare" experiences with a household goods mover.

At this stage, the only suggestions I can give you are as follows:

1. For damaged items, get an independent written repair estimate. Check with a good antiques dealer or store, or look in the Yellow Pages. If appropriate, take photos of the damage.

2. For missing items, try to find a purchase receipt or other proof of the original cost of the item; if this is not possible, determine the replacement cost - either refer to a catalog or identify a store or vendor which has the item for sale together with the address, item description and price.

3. Submit your claim in writing with the supporting documentation to the carrier. There are standard forms for presentation of loss and damage claims. Usually the carrier will provide these, or you may be able to get them from a stationer. As a general rule, claims must be submitted in writing within 9 months of the date of the loss (delivery).

4. Be persistent; don't take "no" for an answer. Make sure all communications are in writing.

5. You can try filing a complaint with the Federal Highway Administration - they do have limited jurisdiction over interstate household goods movers, but don't really have the resources to provide much help to shippers. Also, in many states the state D.O.T. or Public Service Commission has a department which will investigate complaints.

6. If you cannot reach a satisfactory settlement of your claim, you may have to commence a law suit. If the claim is small (check the jurisdictional limits in your state) you can file a complaint in your local small claims court. If the claim exceeds the limits of the small claims court, you will probably have to hire a lawyer and file suit in a higher court.

7. As to the last part of your question, household goods movers are required to have a tariff containing their rates and charges; technically, they are not allowed to charge either more or less that the tariff rates and charges. On the other hand, if you have lost or damaged items, you should be able to include a pro-rata portion of the freight charges (attributable to the lost/damaged portion of the shipment) as part of your claim.

If you want to read up on the law of freight loss and damage, I would recommend *Freight Claims in Plain English* (3rd Ed. 1995). If this is not available in your library, it can be obtained from the Transportation & Logistics Council at (631) 549-8984 or their web page: www.tlcouncil.org.

420) ICC Operating Authority

Question: We are currently obtaining copies of the old Interstate Commerce Commission permits for carriers to operate as a contract carrier in interstate or foreign commerce to satisfy our transportation agreement requirements. Would you update us as to any other permits, registrations or operating authorities required by the DOT/STB or state regulatory agencies that we should be obtaining from our carriers with whom we sign transportation agreements?

Answer: As you are aware, since the "ICC Termination Act of 1995," there is no longer an ICC. However, the remaining functions of the former ICC have been transferred to the Department of Transportation. Registration of motor carriers, brokers and freight forwarders is now handled by the Federal Highway Administration. Carriers previously holding authority from the ICC may continue to use their old "MC" numbers for certificates and permits, and new carriers must still "register" with the FMCSA and obtain a certificate and/or permit. It should be noted that the DOT is considering a new registration system and is supposed to come out with a report shortly.

Regarding intrastate operations, many states still require carriers to have authority and have adopted a registration system similar to the federal approach.

When entering into a contract carriage agreement, you should still ask all carriers for a copy of their operating authority, both federal and state (if applicable). You should also ask them for certificates of insurance covering both general liability and cargo liability, and you may also want the carrier to provide you with a copy of its current safety rating from the FMCSA. Note that you can access this information on the FMCSA website: www.fmcsa.dot.gov.

421) ICC Termination Act

Question: Your firm recently prepared a motor carrier contract for my company. I have had a few carriers want to change the wording in regards to "waiving any and all rights and remedies under the Interstate Commerce Act for transportation provided". The carriers want to substitute the wording "ICC Termination Act" in place of the Interstate Commerce Act. What is the difference?

Answer: The "ICC Termination Act" was a specific piece of legislation - Pub. L. 104-88, effective January 1, 1996. It amended Title 49, Subtitle IV of the U.S. Code (the Interstate Commerce Act), and many of the sections were reorganized and renumbered. Accordingly, the "ICC Termination Act" no longer exists, as such.

We refer to Subtitle IV as the "Interstate Commerce Act". I suppose you could also refer to it as "Title 49, United States Code, Transportation; Subtitle IV, Interstate Transportation".

But, not the "ICC Termination Act".

422) ICC Termination Act of 1995

Question: We have been using a transportation contract prepared by your firm. I recently have had a few carriers want to change the wording in regards to "waiving any and all rights and remedies under the Interstate Commerce Act for transportation provided". The carriers want to substitute the wording "ICC Termination Act" in place of the Interstate Commerce Act. What is the difference?

Answer: The "ICC Termination Act" was a specific piece of legislation - Pub. L. 104-88, effective January 1, 1996. It amended Title 49, Subtitle IV of the U.S. Code (the Interstate Commerce Act), and many of the sections were reorganized and renumbered. Accordingly, the "ICC Termination Act" no longer exists, as such.

We refer to Subtitle IV as the "Interstate Commerce Act". I suppose you could also refer to it as "Title 49, United States Code, Transportation; Subtitle IV, Interstate Transportation". But, not the "ICC Termination Act".

423) ICCTA - Clarification

Question: Could you provide some clarification on the acronym ICCTA. What does it stands for? Of what relevance is it to the average citizen consumer?

Answer: "ICCTA" stands for the ICC Termination Act of 1995, which was effective on January 1, 1996. This was the most recent legislation intended to deregulate the trucking industry which started with the Motor Carrier Act of 1980, followed by the Negotiated Rates Act of 1993, the Trucking Industry Regulatory Reform Act of 1994, and the Federal Aviation Administration Act of 1994 (which deregulated intrastate trucking).

ICCTA abolished the ICC and transferred the remaining functions to the Department of Transportation (FMCSA or Surface Transportation Board). It also re-codified the Interstate Commerce Act, and incorporated or modified provisions or the earlier legislation.

For an in-depth explanation of these laws, I would recommend the following texts which are available from T&LC:

* Doing Business Under the New Transportation Law: The Negotiated Rates Act of 1993 (Jan. 1994)
* Supplement No. 2 to "Doing Business..." (Feb. 1995)
* A Guide to Transportation After the Sunsetting of the ICC (2nd Ed., Feb. 1997)
* Protecting Shippers' Interests (Sept. 1997)

You can order these through the T&LC web page or by calling (631) 548-8984.

424) Improper Loading - Act of Shipper

Question: We recently shipped a machine from Portland to Memphis. The machine was professionally loaded into the trailer by licensed machinery movers. The driver slept thru the process, and then left to get a meal. The dock area is on the side of our building and open to the public. The load was additionally insured. The driver closed up the trailer.

The machine was damaged extensively. The trucking company is denying any liability saying that the driver was denied access to the trailer during the loading and therefore implies that all damage was ours due to inappropriate loading. We strongly disagree.

What should we do?

Answer: The legal principles are fairly straight-forward: the claimant has the burden of proving that the machine was tendered to the carrier in good order and condition, and arrived in damaged condition. The carrier has the burden of proving that the sole and proximate cause of the damage was one of the "excepted causes" - in this case an "act of the shipper" - improper loading, blocking or bracing. These principles are explained in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 5.2 and 6.5.

Whether the driver participated in the loading or not, it appears he did have the opportunity to witness the loading. In addition, Federal Highway Administration regulations place a duty on the driver to make sure cargo is properly secured, see 49 C.F.R. Section 392.9, discussed in FCIPE at Section 4.8.3. Last, but not least, If the machine was not properly loaded or secured, the driver should have refused to accept it.

Since you apparently hired a rigging company to load the machine, I would suggest that you get a detailed written statement from the people who did the actual loading, together with any loading diagrams, photos, etc. that may exist, and submit these with the claim.

425) INCOTERMS - Bills of Lading and Terms of Sale

Question: I understand that Incoterms do NOT address the transfer of title between the buyer and seller. But I am not sure what addresses the transfer of title, a bill of lading or the sales contract. When we handle an ocean shipment, the consignee needs to surrender the original bill of lading ("B/L") to claim the goods. Thus in an ocean shipment, I think the B/L addresses the transfer of title of the shipment. But in an air shipment, consignee needs not surrender the airway bill. Then what addresses the transfer of title in an air shipment? The sales contract?

Answer: Incoterms are similar to the UCC terms of sale in that they address matters such as delivery, risk of loss in transit, insurance, etc. Neither specifically uses the old terminology of "title" - the UCC for example speaks in terms of the right to possession, which is essentially equivalent to title".

The difference between ocean and air shipments is that ocean B/Ls are usually "negotiable" B/Ls, while air waybills are "non-negotiable" B/Ls. This distinction - and the applicable law in the U.S. - is found in the Bills of Lading Act, codified at 49 U.S.C. § 80101, et seq.

With a "negotiable" B/L, surrender of the B/L is usually necessary to obtain possession of the goods from the carrier.

When a "non-negotiable" B/L is used, the carrier is free to deliver the goods to the consignee without surrender of the B/L. Thus, with a "non-negotiable" B/L, matters such as the right of possession, insurance, risk of loss, etc. are controlled by the contract of sale and purchase, and the interpretation of the contract terms is governed by the UCC or Incoterms.

426) INCOTERMS and Terms of Sale

Question: We are having an internal discussion regarding proper contracting procedure in regards to FOB and INCOTERMS 2000. We have international operations as well as exclusive domestic operations. The question has come up as to whether we can use the INCOTERMS 2000 for domestic (US) only transactions or if INCOTERMS 2000 is applicable in international sales and transactions only. Should we be using the UCC FOB terms for US only transactions and INCOTERMS 2000 for the international transactions? I was under the understanding that the UCC was the governing convention for the US, but my counterparts in the UK have been advised that INCOTERMS 2000 is a universal convention and can be used for all our transactions, even those exclusive to the US.

Answer: Incoterms are the official rules for international trade terms, developed under the International Chamber of Commerce, and adopted by the U.N. Commission on International Trade Law. They are generally required for all international (export/import) transactions.

The Uniform Commercial Code, on the other hand, has been adopted and is the law in all 50 states in the U.S. Domestic trade is governed by the U.C.C. and in the event of disputes, courts will apply the provisions of the U.C.C. and established court decisions interpreting the U.C.C.

While there are many similarities between Incoterms and the U.C.C., there are also substantive differences. Thus, it is still the best practice to use the U.C.C. terms of sale for domestic transactions.

427) Inspection upon Delivery

Question: A common receiving practice at our distribution centers is for our receiving personnel to open each carton a motor carrier delivers, verify the contents inside the carton to the packing list, and then sign the delivery receipt and release the carrier (this is done whether damage/loss is expected or not). Are you aware of any court rulings in regards to consignees not being allowed to open cartons to examine merchandise before giving a receipt to the carrier?

Answer: While we don't think there are any "court rulings" dealing with your question, there are some practical considerations: many carriers would not want their drivers to wait around while a receiving clerk opens up all the packages and verifies the contents. If you can get the carriers to do this, then fine... it does help to avoid concealed damage and shortage problems.

428) Insurance - Sale by Motor Carrier or Broker

Question: Can a motor carrier or a transportation broker offer to provide transportation (inland marine) insurance to its shipper customers?

Answer: In New York, it is illegal to act as an insurance broker without a license (NY Ins L. 2102).

The term "insurance broker" is defined (NY Ins L. 2101) as any person who "for any compensation, commission or other thing of value acts or aids in soliciting, negotiating or procuring the making of any insurance ... contract or in placing risks or taking out insurance, on behalf of an insured..."

There is an exception in section 2101(c)(3) for a "foreign freight forwarder" or a "custom house broker":

> (3) any foreign freight forwarder registered with the federal maritime commission or any custom house broker licensed by the United States treasury department, when such forwarder or broker negotiates, procures, issues or delivers a certificate or other evidence of a contract of insurance under an open marine policy naming the forwarder or broker as the insured and covering exports or imports serviced by such forwarder or broker on behalf of others, provided that such forwarder or broker takes or receives no money or other thing of value when acting as hereinafter specified, from any insurer or representative thereof, unless the receipt of money or thing of value is authorized under this chapter...

This exception would not apply to a trucking company or to a transportation broker. Thus, it would be illegal (at least in New York) to sell insurance to a shipper. It should be noted that state law governs the insurance industry and while other states may have laws similar to those of New York, the New York law referenced does not apply elsewhere.

429) Insurance Requirements - Courier & Messenger Services

Question: What insurance requirement do couriers and messenger service carriers have today?

Answer: Most local courier and messenger services only operate within an exempt commercial zone and, as such are not subject to federal requirements governing interstate for-hire motor carriers. If they do operate trucks in interstate commerce they would be required to register with the FMCSA, and would be subject to regulations requiring public liability and cargo insurance, including the BMC 32 cargo endorsement.

430) Insurance vs. Carrier Liability

Question: I filed a claim with the carrier's insurer for a ruined pallet of material, which apparently resulted from the trailer leaking water. The insurance carrier has denied the claim asserting that the carrier does not have insurance to cover this type of damage. What is the liability and responsibility of the carrier as far as paying the claim?

Answer: The liability of a common carrier has nothing to do with whether a loss is covered by its insurance. The carrier is liable for loss or damage to goods in its possession because of the contract of carriage (usually an express written contract in the form of a bill of lading) between the shipper and the carrier.

Whether a particular risk is covered under the carrier's cargo legal liability policy is determined by the contract of insurance between the carrier and the insurer. Most motor carrier insurance policies have all sorts of deductibles, exceptions and exclusions so that it is common to find that the insurance does not cover a specific type of loss.

431) International Air Freight - Montreal Protocol #4

Question: Most of our shipments are international air freight. We hear that recently the Montreal Protocol IV is now followed by many countries including the US which increases the former $20 per kilo liability limit to 17 SDR's (approx. $23.50 per kilo currently).

Are all countries and carriers (forwarders) within those countries now liable for the 17SDR's? Is there a list of participating countries and dates when others might follow?

Answer: The United States adopted Montreal Protocol #4 effective March 4, 1999. Most other major trading nations have also adopted it, and it would be applicable on any international air shipment originating in a participating country. A current list of the nations that have adopted the Montreal Protocol #4 is available from the Council on request.

432) Internet Logistics Companies

Question: "Transplace.com" is a new Internet-based "global transportation logistics company" which was set up by six large truckload carriers. What are your thoughts on this 'on-line' entity in the transportation world? I'm the Contract Manager of a truckload carrier, which has been approached about doing business "contractually" with this organization.

Answer: I checked out the "Transplace.com" web site. Without actually submitting an application to join as a "partner carrier" I was not able to get any information as to how the program works.

Just because "everybody's doing it" doesn't mean something will actually work to your benefit. I would be cautious - make sure you have a written agreement (get a hard copy) and have a good transportation attorney go over it before signing up. (We would be glad to do this.)

I also checked the FMCSA Licensing & Insurance database and cold not find any registration for "Transplace" as a motor carrier, freight forwarder or broker. Transplace also does not give any address, telephone number or name(s) of any people on its web pages. Makes you wonder who (what) you are dealing with.

433) Interstate Commerce Act

Question: Our transportation contract refers to "49 U.S.C. Section 11707" [the "Carmack Amendment"] I have a copy of the Title 49 of the USCA; and when I looked up section 11707 and it speaks of railroads and nothing about motor common carrier liability. Has this law been changed?

Answer: The reference to "49 U.S.C. § 11707" is obviously from a contract that was drafted prior to December 1995, when the I.C.C. Termination Act of 1995 ("ICCTA") was enacted. We have made a number of revisions since then and I would strongly suggest that you obtain a more current version of the contract.

In addition to eliminating the I.C.C., ICCTA recodified and renumbered the provisions of the Interstate Commerce Act. Former Section 11707 (which applied to both rail and motor carriers) was split into two sections: Section 11706 for railroads and Section 14706 for motor carriers.

You should be able to find the United States Code in any good library, and you can also access it on the Internet.

434) Interstate vs. Intrastate

Question: As the office manager of a small interstate contract for-hire carrier, I have the following question. We have received a citation from the Pennsylvania PUC., for picking up and delivering within the state of PA. The problem is that this was not an INTRASTATE movement. The load was loaded thru a freight forwarding company at Atglen, PA and the load had 7 stops in PA, 1 stop in NY and a final with 2 stops in OH (our home state). What law or regulation covers this type of movement (picking up in one state with intermediate deliveries in the same state but with a final delivery in another state, all from the same shipper).

Answer: There are no "regulations", but there is a section of the Interstate Commerce Act which essentially defines Interstate Commerce as it applies to the regulation of motor carriers: 49 U.S.C. Section 13501. Under that definition and the relevant court decisions, the movement you described would be considered "interstate" in character.

There is a lengthy discussion of Intrastate vs. Interstate Commerce in *Freight Claims in Plain English* (3rd Ed. 1995), at Section 1.2 which should be helpful.

435) Invoices - Billing Customers for Freight Charges

Question: Our company is in the process of developing a corporate-wide policy on how we're going to charge PP&ADD ["pre-pay and add"] freight back to our customers. Because we have a

number of plants across the U.S. that we've brought on through acquisitions, the current methods that each plant uses to calculate PP&ADD freight are as varied as the impact that each method produces in upcharge percentage on the freight bill. My original understanding of this issue was that we were covered legally to do this as long as we had a statement on our Standard Terms and Conditions with the customer that stated our position on this issue.

The statement on our Standard Terms and Conditions reads as follows: "Freight costs prepaid by (our Company) shall be subject to an additional administration and handling charge." However, I'm wondering if this is enough.

1. Have you run across any particular PP&ADD method out there among shippers that you would recommend as one that is legal and defendable but also helps in covering all of the additional miscellaneous "hidden" costs involved with prepaid freight (i.e. financial float, administrative costs, carrier negotiation costs, late added lumper fees, dock appt. charges etc.)?
2. And if so, how did the Shipper specifically calculate the upcharge?
3. Was it a flat rate upcharge to each bill, a certain % of discount off a particular rate discount, or a markup %? Whatever method we use it has to be very quick and easy to calculate.
4. In your opinion, based on your knowledge of the industry and any recent rulings from the courts on this issue, at what upcharge percentage to a freight bill would it become difficult to make a defense on a shipper's behalf as it relates to this issue?
5. What additional steps should our company take at this point (beyond adding this statement to our ST&C) to operate within the law on this issue and still cover our costs associated with prepaid freight?

Answer: Section 7 of the Negotiated Rates Act of 1993, and former regulations of the ICC in 49 C.F.R. 1051.2 were addressed to "off bill discounting". Essentially, this prohibited carriers from paying a discount or allowance to anyone other than the payor of the freight bill and required carriers to disclose all discounts or allowances on their freight bills. The statutory provisions, following the ICC Termination Act of 1995 ("ICCTA"), are now found at 49 U.S.C. § 13708, "Billing and collecting practices":

> Sec. 13708. Billing and collecting practices
>
> (a) DISCLOSURE- A motor carrier subject to jurisdiction under subchapter I of chapter 135 shall disclose, when a document is presented or electronically transmitted for payment to the person responsible directly to the motor carrier for payment or agent of such responsible person, the actual rates, charges, or allowances for any transportation service and shall also disclose, at such time, whether and to whom any allowance or reduction in charges is made.
>
> (b) FALSE OR MISLEADING INFORMATION- No person may cause a motor carrier to present false or misleading information on a document about the actual rate, charge, or allowance to any party to the transaction.
>
> (c) ALLOWANCES FOR SERVICES- When the actual rate, charge, or allowance is dependent upon the performance of a service by a party to the transportation arrangement, such as tendering a volume of freight over a stated period of time, the motor carrier shall indicate in any document presented for payment to the person responsible directly to the motor carrier that a reduction, allowance, or other adjustment may apply.

These provisions apply to the carrier's billing, not to the invoicing for goods by a seller to its customer. As far as the relationship between a seller and a purchaser, the real question is whether a purchaser could reasonably claim commercial fraud or misrepresentation if the seller adds an amount higher than the actual freight charge to its invoices.

Some companies place a notice, either in their terms of sale or on their invoices to disclose that the freight charges being invoiced do not reflect volume discounts or incentives received from the carrier. Others use wording such as "shipping and handling charge". You indicate that your company uses the language "Freight costs prepaid by (our Company) shall be subject to an additional administration and handling charge." I would think that this should be a sufficient disclosure to your customer to avoid such claims.

I don't believe that there is any industry standard or practice as how much to "mark up" the actual freight cost. Many catalog merchants establish a delivery charge based on the invoice value of the order; others use a table of delivery charges based on the shipping weight and/or delivery zone. Some companies add a flat amount per shipment or add a percentage of the actual freight charge. So long as the delivery charge does not result in an unreasonable price discrimination among different classes of customers, it should not run afoul of laws such as the Robinson-Patman Act.

Remember that your selling price already includes overhead and profit, and that processing and shipping orders are a normal expense of doing business. Also, many of your customers may be sophisticated enough to know what the prevailing rates and charges are for delivering goods. The best guidance I can give is that your "mark up" be "reasonable" under the circumstances.

436) Late Payment Charges

Question: We have recently been contacted by a trucking company on a small number of invoices that we paid on an over 60 days basis. They are trying to eliminate our discount on these old and paid invoices because they were paid late.

Are these claims valid?

Answer: First, I am not surprised that other carriers are starting to press to collect their late payment penalties in view of the recent decision in *Humboldt Express v. The Wise Co*. (which is on appeal to the 4th Circuit Court of Appeals, by the way).

Whether late payment penalties are enforceable depends on a number of factors including whether the carrier complied with the ICC's credit regulations, whether there was a proper notice on the original freight bills, etc. There is also the question of whether the late payment charges are an unreasonable penalty of forfeiture. Usually, each case must be evaluated on its own particular set of facts. I would advise you to consult an experienced transportation attorney.

437) Legal Research on the WWW

Question: Can you suggest where I may look on the World Wide Web for the legal cases involving he Exxon oil spill in Alaska?

Answer: The Exxon Valdez oil spill in Prince Albert Sound is not something I usually expect to address in this forum. I will, though, give it a shot.

As an attorney, I usually retrieve cases from either Westlaw or Lexis/Nexis. These are, of course, pay services which can be accessed either via the web or a direct dial connection. I will presume that you do not want to pay for the case so let me offer some direction.

One of the most comprehensive legal sites on the web is the "Legal Information Institute" hosted by Cornell University in NY (http://www.law.cornell.edu/). from there you can go to a variety of free legal sources. Each of the Circuit Courts of Appeal maintains a web listing of all of the cases ruled upon in recent years. As they are all maintained independently of one another, they tend to be of varying degrees of utility. The Ninth Circuit covers Alaska and their web presence is hosted by Villanova University at http://www.law.vill.edu/Fed-Ct/ca09.html.

From there you can search by date, party or keyword.

Perhaps the most comprehensive site on the web regarding the Valdez and its effects can be found at http://www.oilspill.state.ak.us/. While it is not a "legal" site, it is a good place to start. Most of the information regarding the Exxon Valdez incident is accessible from that site.

You might try also http://www.arlis.org/ The Alaska Resources Library and Information Services (ARLIS) is an excellent resource for all things Alaskan. The problem with this site is that, for many of the resources, you will need to become a member.

Finally, you should try corresponding via email with the people at the "Anchorage Daily News" http://www.adn.com/ They are the largest Alaskan Newspaper and would, most likely, be able and willing to help you out.

438) Liability - as a Rate Factor

Question: We have witnessed carriers setting liability limits on our freight, which they could not previously publish. Can we now force the National Classification Committee to drop liability as a factor in classifying our freight?

Answer: Good thought, as the carriers are not offering a reduction in rates as a quid pro quo for the reduction in liability. Shippers should use this argument to oppose new liability limitations proposed by their carriers. It would be a waste of time and effort to suggest that liability be dropped as a classification factor as shippers have no real or effective vote on the Classification Committee, which may be going out of existence soon.

439) Liability - Brokered Shipments

Question: I have a contract with Carrier A. Carrier A accepted a shipment and then brokered it to another carrier (Carrier B) without our permission (which is required in our contract). The load was damaged and a claim was filed with Carrier A.

When Carrier B refused to pay the entire claim amount, Carrier A said that it's our responsibility to sue Carrier B if we want to recover the full amount of the claim.

Isn't it the responsibility of Carrier A to pay the claim and then take steps themselves to settle with Carrier B?

Answer: First of all, the liability of "carrier A" should be governed by the terms and conditions of your transportation contract. Most properly drawn contracts contain provisions by which the carrier remains responsible for loss or damage even if it subcontracts, interlines or uses substituted services of any kind. Since you have not furnished a copy of the contract, I cannot comment on its provisions.

If your contract does not adequately cover this situation, "carrier A" could be right. You state that "carrier A" accepted the shipment and brokered to "carrier B". If "carrier B" was in fact the origin carrier and a bill of lading was issued showing "carrier B" as the carrier, it could be argued that your remedies are against "carrier B" and are governed by the bill of lading and the tariffs of "carrier B", including any valid limitation of liability. In other words, if "carrier A" acted solely as a broker, and was not a party to the bill of lading, it would not ordinarily be liable for loss or damage in transit.

440) Liability - Carrier v. Warehouse

Question: We have a situation where a carrier came into a contracted public warehouse, picked up food grade chemicals and transported them to the consignee. The consignee rejected the

load due to intense odor of perfume on trailer and that the product on trailer has a natural tendency to absorb odors. The driver admits carrying a damaged shipment of perfume prior to this. The carrier loaded the shipment on a different trailer and attempted redelivery the following day, but the odor was still extremely obvious, and the shipment was rejected again. The carrier and warehouse are both denying any liability in the matter. We had similar scenerio two weeks ago (with same warehouse) where a reefer trailer with a patch of blood on the floor and a falling ceiling panel was was loaded with food grade material. The consignee for this shipment rejected also. Who carries the liability? "

Answer: Under the Interstate Commerce Act (49 U.S.C. 14101) a carrier is required to provide "safe and adequate service, equipment, and facilities..." This requirement has been construed by the courts from time to time to mean that the carrier is responsible to ensure that its equipment is clean and free from noxious substances which would contaminate other cargo.

It is not clear from your description whether the goods were actually contaminated so as to make them unusable or unsuitable for their intended use. If so, the carrier would be liable.

On the other hand, if the goods were not actually damaged or could be salvaged in whole or in part, the consignee should not have rejected them, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.1.4, Duty to Mitigate Loss.

Regarding the warehouse, since they are acting as your (the shipper's) agent, there is a duty to exercise reasonable care in handling and shipping your products. If the condition of the trailer was clearly obvious ("patent") at the time of loading, the warehouse personnel should have refused to load the trailer.

441) Liability - Carrier's Liability on Refused Shipments

Question: This question applies primarily to LTL transportation. Regarding storage on refused shipments, I have been unable to find anything in the NMFC rules that sets time limits on when a carrier can begin charging storage on refused shipments. Depending on the carrier and the business volume associated with a specific carrier, the rules change. Since I handle multiple shipping locations, I a trying to get some consistency in our OS&D program and would like to know if there are any rules governing storage and the carrier's obligation to notify the shipper (mode of notification) on refused shipments.

Answer: Assuming that you are shipping by common carrier under a Uniform Straight Bill of Lading, the relevant provisions are found in Section 4 of the terms and conditions on the reverse side of the bill of lading. This section provides:

> If the consignee refuses the shipment... the carrier's liability shall then become that of a warehouseman. Carrier shall promptly attempt to provide notice...to the shipper of party, if any, designated to receive notice on this bill of lading.... Storage charges, based on the carrier's tariff, shall start no sooner than the next business day following the attempted notification...

In other words, the Uniform Straight Bill of Lading essentially defers to the individual carrier's tariff for details as to storage rates and rules.

This is one of the reasons why shippers must always be careful to demand a copy of the carrier's rules tariff before doing business, since these tariffs contain the rules governing storage charges (as well as other rules governing accessorial charges, credit terms, liability limitations, etc.).

I would point out that the problems you discuss can be obviated by a properly drafted Transportation Contract, and we always recommend that our clients use such contracts with their motor carriers.

442) Liability - Custom Order Goods

Question: A custom order that we shipped was partially damaged and the consignee refused delivery because the product could not be used. Because this was a custom order, there is no salvage value so we filed a claim for the full amount, which was declined by the carrier on the basis that it was not on notice of the nature of the goods. What is our recourse?

Answer: By basing its declination on lack of notice of the nature of the goods, it appears the carrier is declining this claim on the basis that you are seeking "special damages". However, this is incorrect and damage to a shipment which consists of something specially made for a consignee would be characterized as general damage making the carrier liable for its full invoice value less any salvage value. The fact that the shipment was specially designed does not transform the damages into special damages. See Section 7.4.4 of *Freight Claims in Plain English* (3rd Ed. 1995) for a discussion of this issue and Section 7.3 *et seq.* for a detailed discussion of "special" versus "general" damages.

443) Liability - Damage to Equipment

Question: We recently shipped a load intermodally to a customer that was f.o.b. shipper's dock. The load shifted during transit and the carrier billed our customer for damage to their trailers. Our customer then came back to us and wanted us to pay the damages.

We contest that since these loads were live load and the driver signed off on the bill of lading, that the trucker in fact stated that the load was acceptable and should resolve us of any damage to the trailers that took place during transit. Also since the load was f.o.b. shipper's dock, once it was on the truck it was no longer owned by us and was thus not our responsibility.

By the way once we were notified of the problem we corrected it immediately.

Answer: As the shipper, you would have some responsibility to properly load, block and brace any shipment that you have undertaken to load on the carrier's equipment. Thus, if your loading was improperly done, a third party injured as a result thereof could bring an action against you for negligence.

However, the primary responsibility generally lies with the carrier. Federal D.O.T. regulations require the carrier's driver to insure that all cargo is properly and safely loaded, and to check the load from time to time while in transit, see 49 C.F.R. §§ 392.9 and 393.100. This subject is discussed in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 4.8.3.

Unless this was a "Shipper Load & Count", with a sealed trailer, I would take the position that the D.O.T. regulations govern, and that the carrier bears responsibility for the damage.

I would also observe that your terms of sale would not affect liability for damage to the equipment. Under the Uniform Commercial Code, if the terms are "FOB Origin" the risk of loss or damage to the cargo shifts to the purchaser when the goods are given to the carrier at origin. However, liability for damage to the equipment would be based on negligence, and not on the ownership of the goods.

444) Liability - for Stolen Freight - Carrier's Terminal

Question: Is a carrier liable for goods stolen from it while they were being held after rejection by the consignee? They were stolen from the carrier's terminal which had no alarm, no security, but the pin lock was broken and the trailer stolen.

Answer: With goods being held after rejection, the carrier's liability is that of a warehouseman. It is then liable only for negligence, as it must exercise reasonable care such as that of a reasonably prudent person caring for his own goods.

Therefore, the question is whether a prudent person would have had an alarm and security guards in that particular location to protect his own goods. See Sections 14.4-14.8 in *Freight Claims in Plain English* (3rd Ed. 1995) for cases.

445) Liability - Import Shipments

Question: We are purchasing merchandise from an overseas vendor on a "FOB overseas port" basis. As our vendor does not have sufficient storage space to hold merchandise, awaiting a "do not ship before date", the vendor has established an arrangement with our forwarder whereby the forwarder is storing the merchandise (at no cost) pending the ship date. We are not a part to this arrangement. We are trying to determine:

1. Who owns the merchandise while it is in the forwarder's possession awaiting the authorized ship date- the vendor or us?
2. If we own the merchandise, what is the forwarder's liability?

Answer: You indicate that "our forwarder" is receiving and storing the goods. I would assume that this foreign forwarder is the equivalent of an NVOCC, although you do not indicate whether an ocean or multimodal bill of lading is being issued when the forwarder receives the goods from the vendor. If so, this could trigger a transfer of the property interest in the goods and shift risk of loss to the purchaser.

The forwarder's liability could be either as "warehouseman" or as an ocean carrier, again, depending on whether a bill of lading has been issued. If a warehouseman, the liability would be governed by the local law of the country where it is located, and most forwarders have very limited liability. If a carrier, it would be governed by COGSA and the terms and conditions of the bill of lading, and tariffs. There may be specific provisions in the bill of lading or tariffs relating to goods stored for the convenience of the shipper or consignee.

In any event, you would be well advised to check this out very carefully, and make sure your marine insurance coverage is adequate.

446) Liability - Inside Delivery

Question: We run a furniture delivery service. What is my liability for damages incurred while delivering furniture inside a residence or business?

We damaged a $4500 desk while delivering to an upstairs address. The customer was advised of possible damage and decided to proceed with the delivery even though the staircase was narrow and had a concrete surface and, the furniture has a weight of over 500 pounds. The desk top received damages totaling an estimated amount of $450. The client is requesting a new desk top at a cost of $1100. The customer has a business at this address.

My company was delivering this furniture on a 3rd party basis under contract with the customer. We are not a furniture dealer only a delivery service.

Answer: I assume this is a local truck delivery within the state. As such, it is "intrastate" commerce and governed by state law. In most states, you would probably be considered a motor common carrier and you would have strict liability for any loss or damage to goods which are in your possession during transit. The only exceptions to liability are things like an "act of God" or an "act or default of the shipper".

You probably should not have agreed to carry the furniture up the stairs under the circumstances you have described but, once you did, you accepted responsibility for the damage.

As far as the amount of damage, there is a legal principle to the effect that the claimant has a duty to "mitigate the loss". In other words, if the desktop can be repaired properly and restored to its original condition, you should only have to pay for the cost of the repairs.

447) Liability - International Air Freight Shipments

Question: When shipping freight overseas, when, specifically does the liability for the goods become the responsibility of either the freight forwarder or the recipient (customer)?

Answer: You seem to be mixing apples and oranges, but I will try to answer.

1. A carrier (air freight forwarder or direct air carrier) assumes liability for loss or damage to goods when it receives the goods and issues its air waybill. It remains liable until proper delivery is made to the consignee named in the air waybill. On international shipments air carrier liability is governed by the Warsaw Convention (or the Montreal Protocol No. 4, which was recently adopted by a number of nations). This subject is covered in detail in *Freight Claims in Plain English* (3rd Ed. 1995), at Section 16.4.

2. As between a seller and a buyer of goods, the parties may specify who has "risk of loss" in transit. The usual way is through the terms of sale; a sale which is "FOB origin" or equivalent transfers risk of loss to the buyer when the goods are given to the carrier at origin. If the terms of sale are "FOB destination" the seller retains risk of loss in transit.

448) Liability - Limitation When Broker Involved

Question: We used a broker to move an interstate shipment in January 99. The item was damaged beyond repair by the carrier. We filed our written claim February 23rd. Finally today we were advised the carrier will issue a check based on their coverage terms on their Bill of Lading which is $0.50 per lb. or $50.00, whichever is greater.

We were not made aware of these terms by the broker we used. The reimbursement comes to 20% of the product value.

I read 49 USC 10730 and 11707 but still am confused. Are we bound by the carrier's clause on their Bill of Lading as noted above or is the carrier responsible to pay in full the invoice value of the item they broke? What are our options/recourses? Can you please reprise our options?

Answer: Your experience illustrates one of the dangers of using brokers to arrange transportation on your behalf. It would appear that your broker may have used a carrier which had a limitation of liability either in its bill of lading or a tariff which was incorporated by reference through the bill of lading.

If you have a written contract with your broker or have otherwise made it clear that the broker is only to ship at full liability, and may not agree to released rates or limited liability, you may have a claim against the broker. If this requirement was not made clear to the broker, it could be argued that he had the authority to agree to limited liability in return for a cheap freight rate.

Whether the motor carrier can enforce a limitation of liability is another question. This depends on the bill of lading that was used, whether there was adequate notice of the limitation of liability, whether there was a choice of full vs. limited liability, and whether the carrier maintained a proper tariff containing the liability limitation. The subject of limitations of liability is discussed in detail in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 8.0. If the amount in dispute is significant, I

would certainly recommend that you have a qualified transportation attorney review the file to determine if the carrier can lawfully enforce its limitation of liability. In other words, don't take "no" for an answer.

449) Liability - on Sealed Container Shortage

Question: I have a situation where I am not sure who is at fault. I have a vendor that had the driver, when picking up a rail container, sign it "Shipper Load, Driver Count." The container was sealed at the pickup point with the driver in attendance and the above notation then placed on the Original Bill of Lading. When delivered we cut the seal (same number) and unloaded the trailer without assist. Our dock man came up 40 cartons short. Against whom do we, as the consignee, have a claim?

I am not sure if we file against the vendor or the carrier that picked up the container.

Answer: Obviously, you have a mystery on your hands.

Ordinarily, "shipper load, driver count" would shift responsibility to the carrier for any shortage discovered upon delivery at destination.

However, when the container is sealed, and if the original seal is intact at destination, it is strong evidence that the shortage could not have occurred in transit. There are cases where seals have been tampered with - opened up and re-attached, or glued back with "crazy glue", etc., and where door hinges have been removed without breaking the seals, but I assume you made a thorough inspection of the container and ruled out such possibilities.

My suggestion would be to talk to the shipper and ask for independent verification that the goods were actually loaded. Ask for their loading records or a stroke tally, and have them check their inventory to see if the goods may still be in the warehouse. If you are satisfied that the goods were loaded into the container, and feel that you can prove this to the carrier, then file your claim with the carrier.

Lastly, check your terms of sale. If the shipment was "FOB Origin", the risk of loss would be on the buyer (consignee); if the shipment was "FOB Destination", the risk of loss would be on the seller (shipper).

450) Liability - Over Height Loads

Question: Whose responsibility is it to insure a load is within the height regulations for each state it travels through? What are the standard/recognized methods for measuring the height of a load? Who is responsible for permits on an over height load - the shipper or the carrier? If the shipper does not put the carrier on notice of a load being over height, does the shipper have the responsibility for it? Are there FMCSA or other agency regulations regarding the above?

Answer: As a general rule, it is the carrier that is responsible for observing height and width restrictions. Such restrictions are route-specific and are governed by state and local laws and regulations. Carriers ordinarily obtain permits for over-height or over-width movements from the state or city department of transportation; most use a permit service company to handle their permit requirements. Carriers usually charge the shipper for the cost of such permits in addition to the agreed line-haul charges.

Normally a shipper will advise a carrier if the cargo is oversized, but I do not believe there is any legal requirement to do so, nor any liability on the part of the shipper one way or the other. The carrier, after all, is the one with the transportation expertise.

I am not aware of any specific FMCSA regulations dealing with oversize loads, but there are some relevant provisions such as 49 C.F.R. § 392.9, Safe loading, 49 C.F.R. § 393.100, General

rules for protection against shifting or falling cargo, etc. These clearly place responsibility on the carrier and the driver.

I would note that there are situations where a shipper may have liability if its negligent loading caused an accident, Cf. Reed v. Ace Doran Hauling & Rigging, 1997 WL 177840 (ND Ill. 1997).

451) Liability for Accidents - Improper Equipment

Question: I had a shipment of 2 oversize skids. The customer arranged for the pickup of the shipment. In discussions with the customer he was advised that stretch flatbeds should be used due to the size of the skids. The customer decided to ignore our advice and standard flatbeds were used to pick up the load. As far as I know all of the correct state permits were issued for the oversized loads. Would our company incur any liability if an accident were to occur?

Answer: The ultimate responsibility for safety, regardless of whether a shipment is loaded by the shipper or the carrier, generally lies with the carrier. Federal regulations require the carrier (driver) to be responsible for blocking, bracing and securement of loads. See 49 C.F.R. §§ 392.9 and 393.100, also discussion in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 4.8.3. For a carrier, the proper course of action is to refuse a shipment if it would be unsafe to transport.

452) Liability of Shipper - Third Party Claims

Question: In light of huge insurance premium increases that our carriers are being charged to obtain coverage that is required in our contract, some of our carriers, particularly the smaller ones, have suggested that we should consider common carriage rather than contract as a way to limit our (the shipper) potential liability from third party lawsuits filed as a result of personal injuries suffered in an accident.

It has always been my belief that, since there is nothing we can do to stop an injured party from filing a suit against us, the only way a shipper can protect itself against third party claims is to require the carriers by contract to carry substantial insurance and to indemnify the shipper against any such claims.

Are there any protections or limitations on third party liability that benefit shippers under common carriage that we should take advantage of?

Answer: First, I would point out that the ICC Termination Act of 1995 eliminated the statutory distinction between “common” and “contract” carriers. Essentially all for-hire carriers are now common carriers with the right to enter into contracts, see 49 U.S.C. § 14101. (Note that the FMCSA hasn't yet gotten around to correcting its regulations and is still letting carriers register as “common” or “contract” carriers!)

Second, I don't think that there would be any difference, as far as potential liability of a shipper, whether the carrier is characterized as a common carrier or a contract carrier.

The carrier is an independent contractor and has primary liability to the public for any typical situations arising out of highway accidents, loading and unloading accidents, spills, etc. For a shipper to have liability there would ordinarily need to be some actual negligence such as improper loading, blocking or bracing that causes or contributes to the accident. (Note that there are some additional requirements imposed on HazMat shippers.)

The best way for a shipper to protect itself is by an appropriate indemnity provision in its transportation agreement and/or by requiring the carrier’s insurer to add the shipper as an additional insured on the carrier's public liability policy.

453) Licensing - Air Freight Forwarders

Question: I know that one must have a license from the FMCSA to work as a broker. I have however seen more and more air freight forwarders consigning freight to ground carriers than ever before. Many of these companies do not have broker authority/surety bond etc. How can they get by with this?

Answer: You are correct in observing that all-surface truck movements are subject to the provisions of the Interstate Commerce Act, regardless of whether the carrier calls itself or holds itself out to be an "air freight forwarder".

The exemption in 49 U.S.C. § 13506(8) applies to the transportation of property by motor vehicle "as part of a continuous movement which, prior or subsequent to such part of the continuous movement, has been or will be transported by an air carrier..." Thus, the activities of an "air freight forwarder" are only exempt if some portion of the transportation actually moves by air. A lot of the so-called expedited services, 2nd-day air, etc. involve movements that never see an airport.

Unfortunately, the Federal Motor Carrier Safety Administration is quite lax in enforcing the laws and regulations, and there are quite a few of these "air freight forwarders" operating illegally as brokers or surface freight forwarders, without proper registration, insurance or surety bonds.

Obviously, this creates a number of traps and pitfalls for unsuspecting shippers, particularly in the area of liability for loss, damage or delay to goods.

I would note that there is an easy way to check if a company is properly licensed. The FMCSA website lists all registered motor carriers, surface freight forwarders and brokers, and provides detailed licensing and insurance information. The website is www.fmcsa.dot.gov (select the "L&I System" from the menu).

My advice to shippers (and to carriers and brokers) is: "Do not do business with a company unless you have checked to see if they are properly licensed and insured!"

454) Limitation of Liability - No Bill of Lading

Question:

A carrier picks up a shipment but fails to issue a bill of lading. The shipment is damaged in transit. The carrier claims that its liability is limited to $50/load because the shipper did not declare a value on the bill of lading. Can the carrier enforce its limited liability provision?

Answer:

No. It is the carrier's responsibility to issue a bill of lading. Because the carrier failed to issue the bill of lading the shipper had no notice of the terms of the bill of lading and thus had no opportunity to declare a value.

455) Loading and Unloading - Driver Injuries

Question:

We are a large concrete accessories manufacturer and in 1993 we shipped some construction materials to a job site through a broker. The driver working for the broker decided to assist in unloading the product when he arrived at the site without our request to do so. He injured himself and he is now waiving his rights to workman's compensation and is suing the broker and my company instead. We did not have a specific contract with the broker at the time (our mistake), so I

believe that there is not a hold harmless clause to protect us. Where does our legal liability end in such a situation?

Answer:

This is not a simple question. There are dozens of reported court decisions involving liability for "loading and unloading" accidents. Many of these involve interpretation of insurance policies and various state laws, and often the cases are very fact-specific. A formal opinion as to your company's liability would require thorough analysis of the facts, research into applicable state law, etc.

I assume that your company has appropriate general liability coverage, and that this matter has been turned over to your insurance company for the legal defense of the lawsuit. If not, this should be done promptly.

Regarding contracts with brokers or motor carriers, we strongly recommend that shippers use properly drafted transportation agreements. Such agreements may contain provisions for indemnification, which would be helpful protection in situations such as you have described.

456) Loading of Freight - Responsibility

Question: Who is responsible for loading LTL freight? Is it the shipper or is it the trucker? We have some carriers loading themselves and others that don't. Pretty simple question but we're not sure why some do and some don't.

Answer: If the LTL carrier is a participant in the National Motor Freight Classification, and you are using a bill of lading that incorporates the NMFC, then Item **568** of the Classification would apply. That Item provides:

Item 568

HEAVY OR BULKY FREIGHT--LOADING OR UNLOADING

Unless otherwise provided in carriers' individual tariffs, when freight (per package or piece) in a single container, or secured to pallets, platforms or lift truck skids, or in any other authorized form of shipment:

(a) weighs 110 pounds or less, the carrier will perform the loading and unloading;

(b) weighs more than 110 pounds but less than 500 pounds:

(1) The carrier will perform the loading and unloading where the consignor or consignee provides a dock, platform or ramp directly accessible to the carrier's vehicle except when the freight exceeds 8 feet in its greatest dimension or exceeds 4 feet in each of its greatest and intermediate dimensions--See paragraphs (b)(2) and (d). Where the consignor or consignee does not provide a dock, platform or ramp, the truck driver, on request, will assist the consignor or consignee in loading or unloading.

(2) The carrier will perform the loading and unloading where the consignor or consignee provides a dock, platform or ramp directly accessible to the carrier's vehicle if such freight: (1) exceeds 8 feet but does not exceed 22 feet in its greatest dimension and does not exceed 2 feet in its intermediate dimension, or (2) does not exceed 10 feet in its greatest dimension and does not exceed 5 feet in its intermediate dimension and does not exceed 1 foot in its least dimension. Where the consignor or consignee does not provide a dock, platform or ramp, the truck driver, on request, will assist the consignor or consignee in loading or unloading.

(c) weighs 500 pounds or more, the consignor will perform the loading and the consignee will perform the unloading. On request of consignor or consignee, the truck driver will assist the consignor or the consignee in loading or unloading.

(d) exceeds 8 feet in its greatest dimension or exceeds 4 feet in each of its greatest and intermediate dimensions, the consignor will perform the loading and the consignee will perform the unloading. On request of consignor or consignee, the truck

driver will assist the consignor or consignee in loading or unloading. The provisions of this paragraph will not apply to the extent provisions are published in paragraph (b)(2) of this Item.

If the carrier is not a participant in the NMFC or you are not using a bill of lading that incorporates the NMFC, or you have a properly-drawn transportation agreement, then it is basically a matter of negotiation with the carrier.

457) Loading or Unloading - Driver Injury

Question: Our driver was rolling up a tie down strap adjacent to his trailer as a forklift driver was unloading steel beams. The forklift jarred the beams and they fell on the driver, crushing his legs. My question is what standards govern either the driver's duty to stay out of harm's way or the forklift driver's duty to exercise reasonable care in the unloading process?

Answer: This is not a simple question. There are dozens of reported court decisions involving liability for "loading and unloading" accidents. Many of these involve interpretation of insurance policies and various state laws, and often the cases are very fact-specific. A formal opinion as to your company's liability would require thorough analysis of the facts, research into applicable state law, etc.

I assume that your company has appropriate general liability coverage, and that this matter has been turned over to your insurance company in the event there may be a lawsuit. If not, this should be done promptly.

458) Logistics - Books and Educational Materials

Question: We are a small freight broker at this time. We are looking to become a full line logistics company. we have a shipper that would like for us to put together a package for them. I have found referance to the logistics business in some books and on the internet. The qustion that I have is that do you have any other books or sources of information on the subject that you recomend. I would like something that shows the in and the outs of the business from top to bottom.

Answer: I don't think there is any "book" that will tell you all you need to know to become a full line logistics company. The Council of Logistics Management is an organization which has various meetings and publications, but most of their focus is very theoretical and academic.

T&LC publishes an excellent seminar text on "Contracting for Transportation and Logistics Services" It has a lot of useful information on the legal and regulatory requirements, as well as contract outlines and other related materials.

459) Lumping Fees

Question: What should we do when we encounter receivers who require the trucker to pay unloading fees without any compensation to the truck operator? Doesn't the Interstate Commerce Act prohibit this?

Answer: Yes, section 14103 of the Interstate Commerce Act prohibits "lumping." This section provides that if the shipper or receiver requires a carrier to be assisted in loading or unloading a

truck, the shipper or receiver must either provide the assistance or compensate the carrier for the cost. This is a federal statute and violation is a federal crime. While there is no guarantee of a response, it is recommended that you report violations to the Federal Highway Administration and ask them to enforce the law. Try writing to them at:

Federal Highway Administration
Office of the Chief Counsel, HCC-10
Room 4232
400 Seventh Street, SW
Washington, DC 20590

The phone number for the Chief Counsel's office (Jerry L. Malone) is 202 366 0740.

460) Measure of Damages - Cost vs. Invoice Price

Question: I have been having major disagreements with UPS regarding damage claims. Until recently, we have never been questioned about filing for invoice price. We do not declare value, so the claims are never for more then $100.00. They have sent me a copy of their tariff, which states in part that they will pay at their option either for the damaged or lost goods not to exceed the actual cost or declared value of the property.

Another problem is that UPS is now requiring me to send claims to their claims manager in Birmingham, AL for review, which are then forwarded for payment. These new procedures are creating an inordinate delay in receipt of payments. I had previously been submitting the claims directly to the claims department in Ft. Worth, TX and I was receiving payment checks within 7-10 days. This year we will do roughly 2.3 million dollars with UPS but I am not happy with the treatment we are receiving.

Answer: I assume that you do not have a written transportation agreement with UPS, which would cover the liability provisions.

Under the Carmack Amendment, a carrier is liable for the "actual loss or injury to the property". The “cost” of the goods is irrelevant when the shipper is claiming for goods that have been sold to a customer. The legal reason is that, if the contract of carriage had been completed, the shipper would be entitled to its invoice price from the customer, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.2.3.

The problem is that, by using the UPS bill of lading - which is a contract - you have agreed that “All shipments are subject to the terms and conditions in the UPS tariff...

Item 535 of the UPS General Rules Tariff says it “... will pay at its option either for the damaged or lost goods not to exceed the actual cost or declared value of the property, whichever is lower, or for the cost of repair of damaged property provided such cost of repair does not exceed the actual cost or declared value of the property.” I would note that this language does not appear anywhere in the “Guide to UPS Services” which is usually provided to shippers, while the tariff is not.

Frankly, this is the first time I have heard that UPS was settling claims based on “cost” when the loss/damage occurs in transit to a customer. They should know better.

Regarding your dissatisfaction with the claims department in Birmingham, I would suggest documenting your complaints and sending them the Office of General Counsel, United Parcel Service, Inc., 55 Glenlake Parkway, NE, Atlanta, GA 30328.

461) Measure of Damages - FOB Terms

Question: We have a rail forwarder who is attempting to add a provision to our contract (based on what the rail carrier is telling them) which states that the proper measure of loss is

invoice value if the terms of sale are FOB origin but manufacturers cost if the terms of sale are FOB destination. Is here any legal basis for their position? It would seem that the claimant's loss would be the same regardless of the terms of sale.

Answer: You are correct. The claimant's loss would be the same regardless of the terms of sale.

The terms of sale only establishes who bears the risk of loss during the shipment. If the shipment were FOB origin, the consignee should be the party to file the claim for a loss in transit, even though shipper's often file claims in such instances. Obviously, in this scenario, there is no dispute that the invoice value should serve as the appropriate measure of damages.

If the freight is shipped FOB destination, the shipper should be the party to file a claim for a loss in transit. Under Carmack, the shipper is entitled to the full "actual loss" of the freight. This has been interpreted to mean the invoice value to the customer (i.e., which includes the shipper's profit). See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.2.3.

Finally, I am not aware of any legal precedent that would support the forwarder's position on this issue.

462) Measure of Damages - Invoice Price

Question: We are an importer of bicycles, parts and fitness equipment. We ship these goods to our customers in the United States via common carriers. When filing a freight claim for loss or damage, we have been submitting the invoice price to our customers. Carriers are now coming back to us asking for the original invoices from our overseas vendors. They then are paying based on actual vendor cost.

My question is which dollar amount is the legal amount that can be claimed? Can we claim the cost of overhead, duty, etc. on these goods?

Answer: Where you have sold goods to a customer, and the goods are lost or damaged in transit during delivery to the customer, your proper measure of damages is your invoice price to the customer. This subject is discussed at length in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.0.

It is true that many carriers are now attempting to reduce claims payments by offering "manufacturers cost" or "replacement cost", but these are NOT the proper measure of damages when goods have actually been sold to a customer. Your purchase price from your vendors or suppliers is not relevant.

One way to illustrate that the invoice price is the proper measure is to consider the situation where the goods are sold "FOB Origin", i.e., the risk of loss passes to the buyer at the point of shipment. In that case, if the goods are lost or damaged, the customer/buyer would still have to pay the full invoice price to the seller. Obviously, the carrier's liability should not be different depending on which party (seller or buyer) files the claim.

463) Measure of Damages - Invoice Value vs. Cost

Question: We are transportation brokers and have had a claim on a shipment with a specialized carrier. They took a load of lumber for us from LaGrande, OR to Belfast, ME and the load was damaged because of improper tarping. The carrier admits it is their fault but says it only needs to pay the invoice price from the original sawmill not the amount that my customer, a lumber broker, invoiced its customer, the consignee. I have read a similar question you have answered before, but I want to be sure that I'm right. Also the parties involved are 1. Sawmill 2. Lumber Buyer 3. Freight Broker 4. Trucking Company.

Answer: If I understand the facts, the shipment of lumber had actually been sold to the consignee. If so, the proper measure of damages is the invoice (selling) price to the consignee. Think of it this way: if the shipment had been delivered in good order and condition, the seller would have received his full selling price (the invoice price to the consignee).

464) Measure of Damages - Limits & Consequential Damages

Question: We recently purchased a used blueprint machine and had it shipped via common carrier to our business. When it arrived, on a pallet with 'Fragile' markings, the machine packaging was torn up. Upon inspection we found concealed damage.

We called a local company to repair the damage, noting the $25.00 per pound allowance on the freight bill. The final repair cost was less than $25/lb, but more than the value of the machine.

The carrier does not want to pay more than the value of the equipment, but we have found Rule 600 paragraph (A) of the Interstate Commerce Act that states 'carriers are liable for the full actual loss, damage or injury actually caused by such carriers while property is in their care...'.

This is not like a car, where a total loss can get you a similar one of the same value. This machine is hard to find. We also needed the machine the day it arrived, and could not wait for a replacement.

Who is right?

Answer: First of all, you should understand that the $25.00 per pound is a "limitation of liability"; if properly set forth in the carrier's bill of lading and/or tariffs, it would be a maximum amount the carrier would have to pay.

Second, there is a general principle that a shipper or consignee has a duty to "mitigate" the loss. Normally this means that you should not spend more to repair a damaged item than it would cost to purchase a replacement unit.

Third, the usual measure of damages - as set forth in the court decisions - is "destination market value". See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.0. Usually this is established by the invoice price from the seller plus the freight charges. However, there are exceptions to this general rule and there are cases in which a consignee of a shipment is entitled to the cost to replace a lost or damaged item.

In your case, you suggest that you were unable to purchase a replacement from the original vendor. This raises the question as to what it would have cost to buy a replacement locally (or somewhere else and have it shipped to you). What I would suggest is that you obtain quotes for a similar used machine, and if they are more than what you spent to repair the machine, submit them to the carrier as evidence of the replacement value.

Lastly, there may be an issue of what is called "special or consequential damages". You indicate that you could not wait for a replacement and had to have it repaired the same day. The carrier is not responsible for any additional damages (over the value of the property lost or damaged) unless it has some actual or constructive notice, at the time of shipment, that such damages may be incurred. In other words, if the carrier did not know that you had an immediate need for the machine, it should not have to pay for the amount which the cost of repair exceeded the replacement value.

465) Measure of Damages – Refused Merchandise

Question: I need help in finding the backup documentation that states when refused merchandise is returned due to duplicate ordering and damaged in transit a claim can only be filed for the manufacturing cost not the selling cost. Where can I find this information to give to my client?

Answer: As I understand your question, the goods were refused by the consignee-buyer, and were damaged during the return transportation to the shipper-vendor.

Clearly, if the goods had been damaged during the original shipment from the seller to its customer, the measure of damages would be the seller's invoice price. In other words, if the contract of carriage had been performed, the seller would have been paid the invoice amount.

The measure of damages for return goods is not as simple, since there is no sale. The question is "what would the goods be worth if they had been properly returned by the carrier to the seller without damage".

If the goods would merely have been placed back into inventory, the inventory value (probably the cost of the goods) would be appropriate. If the goods were in demand and could quickly and easily be sold to another customer, it can be argued that the retail selling price would be appropriate.

I would refer you to *Freight Claims in Plain English* (3rd Ed. 1995) and suggest you read Section 7.0, Damages, and particularly Section 7.2.7 and the discussion of the *Polaroid* and *Eastman Kodak* cases.

466) Measure of Damages - Released Rate Shipment

Question: When we released a shipment of pharmaceuticals at $2.00 per lb. and the shipment is stolen, are we entitled to the invoice value, or only $2.00 per lb., or as the carrier's insurance company claims, only our manufactured costs?

Answer: You are entitled to recover based on your invoice value if the goods had been sold, and were stolen while in transit to a customer. However, in most cases it doesn't matter whether invoice value or manufactured cost is used. If there is a valid limitation of liability, the most you can collect is $2.00 per lb. times the weight of the shipment.

467) Measure of Damages - Repair Cost

Question: We purchased a used machine that is hard to find, but it was damaged en route. As we needed it the day it arrived, we were forced to have it repaired the same day. The repair cost was greater than the cost of the machine, but less than the carrier's $25 per lb. limit. Are we entitled to recover the repair cost?

Answer: If you can obtain quotations for the cost of the same machine, use them as evidence of the replacement value. See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.0 for cases on the market value, including replacement costs.

468) Measure of Damages - Return Shipment

Question: We filed a claim against a carrier for the full invoice value of a shipment they had lost.

The carrier had offered the shipment for delivery but the consignee refused it because the purchase order was cancelled. Disposition was issued to the carrier to return the merchandise. Subsequently. the goods were lost by the carrier.

The carrier admits liability but claims the proper measure of loss to be the manufactured cost of goods. They say that, since the shipment was refused by the consignee, there was no actual sale so the value of the goods reverted to manufactured cost.

Answer: This is an interesting fact pattern, and I am not aware of any decisions directly on point.

The usual measure of damages is the "destination market value" and this is most often established by using the invoice price to the customer. However, since the P.O. was canceled (and the invoice also), the case falls more closely into the rationale of the *Polaroid* and *Kodak* cases (warehouse to warehouse movements) in which the claimant is entitled to its selling price (less expenses not incurred) because the goods would have been sold within a short time.

As I understand it, your customer returned goods for which Square D agreed to give a credit of the original invoice value. The goods were lost or damaged en route and you filed a claim based on the invoice value. The carrier has denied the claim and argues that the measure of damages is your inventory cost.

Analogous would the "warehouse-to-warehouse" situation in *Polaroid Corp. v. Shusters Express, Inc.*, 484 F.2d 349 (1st Cir. 1973) where the court stated:

> The fact that the plaintiff was transporting goods to its own warehouse and not to a buyer does not change the measure of damages. The affidavits established a more than reasonable likelihood that the hijacked goods would have been sold at the claimed market price.

Polaroid's reasoning was adopted in *Eastman Kodak Co. v. Westway Motor Freight, Inc.*, 949 F.2d 317 (10th Cir. 1991), in which the Tenth Circuit held that the defendant had not sufficiently established "special reasons" for departing from the market value rule.

The court noted that, "Kodak produced evidence that it sells virtually all of its sensitized photographic merchandise shortly after production is completed. This evidence tends to show that any damaged merchandise that could not be sold would result in lost profits." The court thus held that the full invoice (wholesale) price was the correct measure of damages since the carrier presented no evidence that the merchandise would have been sold at a lower price.

Cases involving goods which had been sold to a customer, and which awarded the invoice price, include:

Eastman Kodak Co. v. Trans Western Express, Ltd., 765 F.Supp. 1484 (D. Colo. 1991).

Philips Consumer Electronics Co. v. Arrow Carrier Corp., 785 F.Supp. 436 (S.D. N.Y. 1992)

Corning Incorporated v. Missouri Nebraska Express, 1996 WL 224673 (E.D. Pa. Apr. 29, 1996)

Robert Burton Associates, Ltd. v. Preston Trucking Co., unreported, Civ. No. 96-745(NHP), (D. NJ Mar. 24, 1997), aff'd on reh., (D. NJ May 22, 1997), reversed in part and remanded, 1998 WL 381711 (3rd Cir. Jul. 10, 1998)

469) Measure of Damages - Return Shipment

Question: When freight is refused from the carrier because the purchase order was cancelled, the carrier wants our claim to be amended to reflect "manufactured cost" because there was no longer a consummated sale. The carrier cites *Bernet, Craft & Kaufman Milling v. NYC and ST.L*, 2606 S.W., and *B & O v. Becker Milling*, 272 F. 933. Are these cases controlling?

Answer: It is apparent from the citations that these are old decisions obtained *from Miller's Law of Freight Loss & Damage*. Note that the citations do not include the year of the decisions, which is typical in Miller's citations.

You will find more current law in *Freight Claims in Plain English* (3rd Ed. 1995) Section 7.2.7. The *Polaroid* and *Kodak* cases discussed therein hold that if you can establish that the goods would have been sold within a short period of time (usually by introducing records of storage turnover rates for the products involved), you are entitled to the invoice value, not merely manufactured costs.

470) Measure of Damages - UPS Claims

Question: I was reading in the latest issue of *TransDigest* two questions regarding loss and damage claims being submitted for invoice price and carriers attemping to reduce these costs to manufacturing or replacement cost. I have not had any problems with L.T.L. carriers yet, but in the past several weeks have been having major disagreements with U.P.S..We have never been questioned about filing for invoice price up until recently. We do not declare value so the claims are never for more then $100.00. they have sent me a copy of their tariff which states in part that UPS "will pay at its option either for the damaged or lost goods not to exceed the actual cost or declared value of the property.

Another problem that I am having associated with the claims is that i was submitting them directly to their claims department in Ft. Worth, TX, now they have me sending them to their claims manager in Birmingham, AL for review and then he forwards for payment. Iwas receiving payment checks within 7-10 days with this new proceedure I have not received a check since the last week in September. At this point I feel that we are being singled out and its just harrassment.This year we will do roughly 2.3 million dollars with U.P.S.. Any advice will be greatly appreciated.

Answer: I assume that you do not have a written transportation agreement with UPS, which would cover the liability provisions.

"Actual cost" is not the proper measure of damages. The "cost" of the goods is irrelevant when the shipper is claiming for goods which have been sold to a customer. The legal reason is that, if the contract of carriage had been completed, the shipper would be entitled to its invoice price from the customer, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.2.3.

The problem is that, by using the UPS bill of lading - which is a contract - you have agreed that "All shipments are subject to the terms and conditions in the UPS tariff...

Item 535 of the UPS General Rules Tariff says it "... will pay at its option either for the damaged or lost goods not to exceed the actual cost or declared value of the property, whichever is lower, of for the cost of repair of damaged property provided such cost of repair does not exceed the actual cost or declared value of the property." I would note that this language does not appear anywhere in the "Guide to UPS Services" which is usually provided to shippers, while the tariff is not.

Frankly, this is the first time I have heard that UPS was settling claims based on "cost" when the loss/damage occurs in transit to a customer. They should know better.

Regarding your dissatisfaction with the claims department in Birmingham, I would suggest documenting your complaints and sending them the Office of General Counsel, United Parcel Service, Inc., 55 Glenlake Parkway, NE, Atlanta, GA 30328.

471) Missed Delivery Appointments - Liability for Fines

Question: What is the law concerning passing of fines to the carrier on missed delivery appointments. Different LTL carriers of ours have missed delivery appointments and our customers have imposed the fines on us, and we in turn have passed them onto the carrier in the form of a freight claim. The carriers have declined the freight claim under the heading "special damages". Our B/L clearly states that "All Delivery Fines are Passed to Carrier" Who is in the right in these instances, and what other resources do we have if the carrier is right in declining the freight claims?

Answer: There are two separate contractual relationships: vendor-purchaser and shipper-carrier.

The first question is whether the purchase order or terms of sale provide for a penalty for missed delivery appointments. If they do not, the purchaser has no legal right to charge a penalty.

The second question is whether the contract of carriage provides for delivery at a specific date and time, and for a penalty if the appointment is not met. It could be argued that the notation on your bill of lading is sufficient notice that penalties will be passed on to the carrier. Otherwise, the carrier's only obligation is to deliver with "reasonable dispatch" and your attempt to collect the penalties would be considered "special damages". See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.3.

The best advice is to have a written transportation agreement with each of your carriers in which you spell out the terms and conditions, and clearly define the obligations of the parties. You can include provisions governing delivery by appointment, and the penalties or other consequences if appointments are not met.

472) Motor Carrier Insurance

Question: I have filed a claim against a carrier who has either moved with no forwarding address, changed its name, or gone out of business. I understand from a T&LC seminar I attended that I can file a claim against the carriers insurance company (BMC 32 Endorsement). How do I find out the name of their insurance company, address, policy number, and the carriers M.C. number.

Answer: You can get information on the carrier's insurance on the Internet by accessing the FMCSA's website at www.fmcsa.dot.gov. Once you get into the site, start with the "SAFER System" and locate the carrier; then go to the "Licensing & Insurance" section, which will give you the insurance information.

473) Motor Carriers - Duty to Serve

Question: We do business with a company in Texas that manufactures ladders. Apparently carriers consider this to be “ugly” freight and we are having difficulty getting the freight hauled. We do one million dollars of business with this manufacturer and need to have product picked up. What recourse do we have?

Answer: At one time, during the days of the Interstate Commerce Commission, any common carrier that held an ICC certificate had a "duty to serve" and you could have actually forced common carriers to handle your shipments. That law is no longer on the books since the ICC Termination Act of 1995, and only the "laws of the marketplace" govern.

Unfortunately there are some kinds of freight such as ladders and flagpoles that many carriers don't like to handle. On the other hand, there are a lot of carriers that are looking for business today. You should be able to find qualified carriers that will handle your freight at a reasonable rate.

I would suggest that you make up a request for bids that describes your shipments and requirements and send it out to the regional and national carriers that service your area. You can find their names through the Internet or the old-fashioned way, the Yellow Pages.

474) Motor Carriers - Operating Authority

Question: I am using a truck to haul boats for a local manufacturer in my area. I have cargo liability and public liability insurance and follow length regulations for my state. Do I need operating authority on my own if I am hauling for a private company?

Answer: If you are transporting property (including boats) "for hire" - in other words, being compensated by the owner or shipper of the property, you probably need "operating authority".

If you are only working within a single state ("intrastate"), you will have to check with the Department of Transportation or the Public Service Commission of that state to determine what their requirements are. Most states now only require a "registration" which involves a simple application and fee; you usually have to file evidence of insurance and there may be some other local requirements.

If you are transporting property across state lines ("interstate"), you will have to register with the Federal Highway Administration. There is an application form and a filing fee, and you are required to file evidence of insurance plus obtain registered agents for service of process in all states in which you intend to operate.

475) Motor Carriers - Record Retention Regulations

Question: I'm a logistics analyst and work with a lot of our freight payment problems as they arise. I was wondering if you could tell me: Is the carrier responsible by law for retaining a bill of lading? If so, for how long?

Answer: Record retention requirements for motor carriers are set forth in regulations of the Federal Motor Carrier Safety Administration (formerly the ICC/FHWA).

49 C.F.R. Part 379 (formerly Part 1220) is entitled "Preservation of Records" and applies to motor carriers, brokers, water carriers and freight forwarders. It also applies to traffic associations, weighing and inspection bureaus and other joint activities maintained by such carriers, brokers or forwarders.

Appendix A to Part 379 is a schedule of the types of records and periods of retention. Documents such as bills of lading and freight bills generally must be retained for a minimum of one year. Obviously, if there is some claim or dispute, the relevant documents should be retained until the dispute is finally resolved.

476) Motor Carriers - Safety Information

Question: Our corporation is looking at reducing our less-than-truckload providers down to 5 “core” carriers. We are evaluating each carrier that we utilize most often. One of the criteria we have selected to rate them with is the carrier’s safety record. Where might I find this information? I have checked some of the carriers’ Web Pages, but have not had any luck locating the information I need.

Answer: The Federal Motor Carrier Safety Administration (FMCSA) has an Internet web site where you can get safety information on carriers.

Check out www.fmcsa.dot.gov and access the "SAFER" database.

477) Notice of Claim - Rail Shipments

Question: We are having a problem with railroads declining claims because they were not notified of the damage or shortage within 24 hours of delivery. This seems unrealistic. Is it legal?

Answer: While this seems unreasonable, it is probably enforceable if the 24-hour notice requirement is part of your contract or is included in the railroad's Exempt Circular.

However, liability conditions such as this can and should be negotiated out of the agreement at its inception. There are also many other unreasonable rules in railroad contracts and Exempt Circulars that you can be bound by, so it is imperative that any agreement with the railroad be reviewed and revised as appropriate

478) Notice of Refused or On-Hand Freight

Question: When a Bill of Lading instructs the carrier to bill a third party, and the shipment is refused by the consignee, who should the carrier notify, the consignor (shipper) or the third party?

Answer: Section 4. (a) 1. of the Uniform Straight Bill of Lading requires the carrier to attempt to provide notice to "the shipper or the party, if any, designated to receive notice" on the bill of lading. It does not require the carrier to notify a party merely designated as the "bill to" party.

On the other hand, since the carrier was placed on notice that a third party had an interest in the shipment, it would be reasonable to assume the carrier should have some obligation to send a copy of the notice to that party.

This question illustrates the benefit of having a formal transportation agreement which clearly spells out the obligations of the parties.

479) NVOCC'S and Ocean Freight Forwarders

Question: What is an "NVOCC" and how is it different from an ocean freight forwarder?

Answer: Prior to the Ocean Shipping Reform Act, an "NVOCC" (non-vessel-operating common carrier) was defined as "a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier", 46 CFR 510.2(k). Typically, NVOCC's consolidate less-than-container shipments into full container loads, which are then tendered to the ocean carrier. The NVOCC issues bills of lading to its shippers, and is liable to the shipper for loss or damage in transit. Rates and charges were required to be filed in tariff form with the FMC.

Ocean freight forwarders, on the other hand, were not carriers. Ocean freight forwarders were defined as "a person in the United States that: (1) Dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments on behalf of shippers; and (2) Processes the documentation or performs related activities incident to those shipments", 46 CFR 510.2(n). Forwarders act as agents of the shipper, prepare documentation, make shipping and insurance arrangements, handle billings and payments, etc.

The Ocean Shipping Reform Act created a new category of "Ocean Transportation Intermediaries" or "OTI's" which includes both NVOCC's and ocean freight forwarders.

OTI's are required to be licensed by the Federal Maritime Commission, and are required to file surety bonds. The FMC regulations continue to distinguish between an OTI that performs "NVOCC' functions and one that only performs "freight forwarder" functions. See 46 CFR Part 515.

It may be noted that, in countries other than the U.S., there is usually no distinction between an NVOCC and a forwarder, and forwarders often perform the functions of both.

480) Off Bill Discounting

Question: Have there been any cases regarding the legality of the practice of off bill discounting? I am referring to the practice of invoicing a customer a freight charge that is greater than what the shipper actually pays to the carrier for the service.

Answer: I am not aware of any reported court decisions on this issue. Some companies require vendors to ship "collect" to avoid this problem and some require vendors to use carriers with which they have transportation contracts, so they are billed their own contract rates.

Shippers involved in this practice should be aware that 49 U.S.C º13708(b) prohibits any person from causing "a motor carrier to present false or misleading information on a document about the actual rate, charge, or allowance to any party to a transaction."

While this prohibition does not impact the situations where the shipper invoices its customer for the freight charges directly, any shipper who itemizes freight charges and intentionally misrepresents the amount is probably in violation of various laws regarding commercial fraud.

481) Off-Bill Discounting

Question: I was told several years ago that if a shipper uses the word "Freight" or "Freight Charges" to describe the freight charges on the customers invoice then BY LAW they are required to show the exact freight rate there. That is why so many companies use terms like "Shipping and Handling", or “Value added Freight" to describe the shipping function. It also allows them to charge more than the actual freight cost.

Is this true? Is this a law somewhere?

Answer: Section 7 of the Negotiated Rates Act of 1993, and former regulations of the ICC in 49 C.F.R. 1051.2 were addressed to "off bill discounting". Essentially, these prohibited carriers from paying a discount or allowance to anyone other than the payor of the freight bill and required carriers to disclose all discounts or allowances on their freight bills. The statutory provision was carried forward in the ICC Termination Act of 1995 ("ICCTA"), and now appears at 49 U.S.C. § 13708, "Billing and collecting practices". The ICC regulations at 49 C.F.R. 1051.2 are no longer in effect. It should be noted that, in any event, the statutory provisions and former ICC regulations only applied to carriers, and not to shippers.

Thus, the real question is whether a purchaser could reasonably claim commercial fraud or misrepresentation if the seller adds an amount higher than the actual freight charge to its invoices.

Some companies place a notice, either in their terms of sale or on their invoices to disclose that the freight charges being invoiced do not reflect volume discounts or incentives received from the carrier. Others use wording such as "freight and handling" or "shipping and handling charge".

The best advice is to use a notice in your terms of sale and/or invoices which constitute a sufficient disclosure to your customer to avoid potential disputes with your customers.

482) Offsetting Claims Against Freight Charges

Question: Where does the law prohibit a shipper from deducting claims from freight charges owed to a carrier?

Answer: It doesn't. At one time carriers were prohibited from offsetting claims against freight charges on the grounds that it could result in discrimination among their customers. However, the anti-discrimination statute was repealed in ICCTA

However, before offsetting claims, a shipper should check the carrier's tariff rules for penalties, such as a loss-of-discount, for failure to pay freight charges within a specific time,. Some carriers prohibit offsetting in their rules tariff. Shippers can negotiate to waive these rules, and contract shippers can insert appropriate provisions in their contracts.

483) Offsetting Claims Against Old Unpaid Freight Charges

Question: Is it legal for a carrier to offset a claim payment with old unpaid freight charges that have nothing to do with the damaged shipment that is being claimed for?

Answer: As explained in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 12.3.6, there is no longer any legal reason why a shipper can't setoff loss and damage claims against freight charges owed to carriers. Conversely, there should be no reason why a carrier can't setoff freight charges against claims.

There could be problems if either the loss and damage claims or the freight charges are disputed, or are time-barred. However, if both parties acknowledge the respective liabilities, mutual debts can be setoff.

484) Operating Authority - Common vs. Contract

Question: What are the implications to the carrier and to a customer if a carrier holding only contract carrier authority is doing business with someone without a contract?

Answer: Under the current law there is no requirement for "contract" carriers to have written contracts in place. Nor is there a requirement for "common" carriers (except household goods carriers and carriers engaged in noncontiguous domestic trade) to have tariffs.

The current statutory provision relating to contracts provides that:

"A carrier [i.e., motor carrier] may enter into a contract with a shipper . . ." 49 U.S.C. § 14101(b). Because the statute uses the word "may," it is permissive or optional as opposed to mandatory.

Therefore, in my opinion, there is nothing under the current statutory scheme that would prevent shippers and carriers (common or contract) from entering into oral agreements.

However, consider the following:

There is a dispute between shippers and insurance companies regarding the applicability of the BMC-32 Endorsement to transportation services provided by a contract carrier. The insurance companies claim that the endorsement does not apply to shipments moving in contract carriage.

To support their argument, the insurance companies cite the transition rule at 49 U.S.C. § 13902(d). This statutory provision allows the FMCSA to continue issuing common carrier certificates and contract carrier permits. Indeed, the FMCSA continues to issue separate authorities rather than one authority for "motor carriers".

The statute further states that the terms "motor common carrier" and "motor contract carrier" are to be defined as they were prior to the passage of ICCTA, which became effective January 1, 1996.

Interestingly, prior to the passage of ICCTA, there was a statutory provision, former 49 U.S.C. § 10702(c), making it mandatory for a contract carrier and shipper to enter into a written agreement. This statute also set forth minimum requirements for such agreements, including:

(a) identification of parties;
(b) commitment by shipper to tender a series of shipments;
(c) rates; and
(d) the carrier would either have to state that it was dedicating equipment for the shipper's exclusive use or that it was meeting distinct needs of the shipper.

The point is this - if a "contract" carrier is to be considered a contract carrier under the pre-ICCTA statutory scheme, then does it follow that such a carrier would have to abide by the statutory provisions governing "contract" carriage prior to ICCTA? I do not think this was the intent of Congress when it passed ICCTA. But, if the courts ultimately find that the BMC-32 is inapplicable to so-called "contract carriage", then I believe the courts will be saying, either implicitly or explicitly, that the pre-ICCTA statutory regime should govern carrier-shipper relations.

485) Operating Authority - Motor Carriers and Brokers

Question: We have recently obtained our common carrier authority and are hauling for a man who says he is a broker. However, when I went into the FMCSA data bank I found that he has his common carrier authority and contract carrier authority, but no broker authority. He pays with a check but there is no statement or anything that goes with it. We have not signed any lease with this man of any kind. As a carrier, is he authorized to broker freight to other carriers? And if he isn't, what are the legal aspects that we need to be aware of?

Answer: There are a lot of companies today that are wearing multiple "hats", and offering services as a common carrier, a contract carrier, a freight forwarder, a broker, etc. and many of them ignore the legal requirements.

The Interstate Commerce Act defines carriers and brokers differently (49 U.S.C. § 13102) and imposes separate requirements for registration (Sections 13902 and 13904). The regulations of the Federal Motor Carrier Safety Administration (formerly the FHWA and the ICC) establish different requirements for carriers and brokers (see, e.g., 49 C.F.R. Parts 365, 366, 371, 387).

The bottom line is, if a carrier also wants to act as a broker, it needs to register as a broker, file a surety bond, and comply with the regulations governing brokers.

One obvious problem, aside from operating illegally, is that it may be difficult to tell who is the carrier and which party is liable to the shipper in the event of loss or damage to the shipment. Other potential problems might involve disputes over the collection or payment of freight charges.

It is important to know whom you are dealing with, and in what capacity. I would advise against doing business with someone who is operating illegally or without the required operating authority.

486) Overcharge Claims - A Solution to the 180-Day Rule?

Question: As new members of T&LC, we were wondering if you could please tell us if the below statement made at the time of freight bill payment legally fulfills the requirements of the 180-Day Rule?

> "In compliance with Public Law 104-88-December 29, 1995, Section 13710, paragraph (a)(3)(B), we hereby contest all freight charges being billed and paid on the below listed invoices and, thus fulfill the requirements of the 180-Day Rule."

If so, we would recommend that a shipper make this statement at the time of freight bill payment by way of an attachment to the check, a check stub statement or even a stamp reading this way on each paid freight bill.

Please let us know your opinion of this strategy to extend the statute for the filing of overcharge claims.

Answer: Your suggested procedure is novel, but it should work. There is no specific procedure to "contest" freight bills set forth in 49 U.S.C. Section 13710(a)(3)(B). I don't see any difference between your form of notice and the notices that carriers often print on the back of their freight bills or invoices.

487) Overcharges - Delay in Collecting

Question: Is there anything that can be done with the incredible long time frame involved with getting paid for freight overcharges by railroads. Our experience is terrible. Some of these claims are actually math errors, and the railroads take as long as a year to year and a half to refund. These are not questionable claims. These are clear cut extension errors, and duplicate payments. Any help would be appreciated.

Answer: The FMCSA (formerly ICC) regulations ("Procedures Governing the Processing, Investigation, and Disposition of Overcharge, Duplicate Payment, or Overcollection Claims", 49 CFR Part 1008) unfortunately only apply to motor carriers and freight forwarders; they have never been applicable to rail carriers.

In view of deregulatory legislation, including the ICC Termination Act, it is questionable whether the STB would have jurisdiction or would entertain a complaint on this subject, although you might try to contact the STB's General Counsel for an informal opinion.

The only practical suggestion I have for you is to try charging interest on unpaid claims. Keep re-submitting them and adding interest until they are paid. Good Luck.

488) Overcharges - Erroneous Classification

Question:

When a bill of lading showed an erroneous classification, which doubled the freight charges, and the freight bill was paid as billed, can the shipper or receiver recover the difference? The carrier in this case declined our claim stating that the BOL is a legal contract between the shipper and receiver and has nothing to do with the carrier!

Answer:

Obviously the carrier is uninformed. Although the bill of lading is a contract between the shipper and carrier, any rating errors therein can and should be corrected. An overcharge claim must be filed, but note that the freight bill must be protested within 180 days.

489) Overcharges - Household Goods Carriers

Question: Can you please advise the time period for the filing of overcharge claims on Household Goods shipments? I realize the 180-day rule applies to other than household goods movements. Does that mean the statute of limitations reverts back to the 3 years?

Answer: Under 49 U.S.C. § 13702(c), household goods carriers are required to maintain rates, rules and practices in a published tariff. The tariff must be made available for inspection by the Surface Transportation Board (STB) and shippers upon reasonable request. Thus, the tariffs are no longer on file with a federal agency, but must be maintained at the carrier's office and made available for inspection.

Under 49 U.S.C. § 13702(a), a household goods carrier is required to charge and collect only its tariff rate. In other words, the household goods carrier is still subject to the "filed rate doctrine".

Under 49 U.S.C. § 14704(b), a household goods carrier is liable "for amounts charged that exceed the applicable rate for transportation or service contained in a tariff" (i.e., an overcharge).

With respect to time limitations, you are correct the 180-day rule does not apply to household goods carriers.

Under 49 U.S.C. § 14705(b), the time period to bring a civil action (i.e., file a lawsuit) for overcharges is 18 months. But, it should be noted that this period is extended for six (6) months from the date the carrier declines the claim, as long as the initial claim was submitted to the carrier within the 18 month period.

You should also be aware that 49 U.S.C. § 14705(c) allows you two (2) years to file a complaint with the STB or Secretary of the Department of Transportation "to recover damages under section 14704(b)" (i.e., the overcharge section referenced above). You would then have one (1) year to bring a civil action to enforce a decision by the STB or Secretary. 49 U.S. § 14705(e).

You are probably wondering why Congress enacted two different time-frames. Unfortunately, when Congress passed The ICC Termination Act and re-drafted the entire Interstate Commerce Act, it did a very sloppy job. Congress indiscriminately chopped several sections. As a result, there are cross-references among various sections that simply do not make sense. The time limitations for overcharge claims is just one example of this poor drafting.

To be safe, your best bet when bringing an overcharge claim against a household goods carrier is to make sure that it is filed within 18 months.

490) Owner Operators - Federal Leasing Regulations

Question: We were leased on as owner/operators with a company in Oregon. My husband left the company after a dispute with the owner. We have been waiting for our security deposit to be released of $2,000. I spoke with the owner about it yesterday and after I challenged him about the length of time it was taking and that we may have to seek legal help - he said he didn't like my questioning him and said that he wouldn't return it at all. Seems like the freight companies have all the power...what can we do? Seems like it's just another way that the freight companies take adantage of small owner/operators.

Answer: The Federal Motor Carrier Safety Administration (formerly the FHWA and the ICC) has regulations which apply to owner-operators which are set forth in 49 CFR Part 376. From what you describe, I would think that the carrier is in violation of these federal regulations.

I would suggest that you tell the carrier that it is in violation of federal regulations and if necessary, file a complaint with the FMCSA. The Office of Chief Counsel may be able to give you some advice also: try Frank L. Calhoun or David C. Oliver at 202-366-0764.

Last, but not least, you can take the carrier to court; you may be able to sue in your local small claims court since the amount is only $2000.

491) Parcel Shipments - Terms of Sale and Liability Limits

Question:

I have a question regarding parcel shipments. Our company's terms of sale are FOB Origin Freight Prepaid. We do not insure any of the shipments to our customers and, when there is a claim, we tend to have many problems. What occurs is the carrier will only pay their limited liability of $100.00 per carton and on top of that claims they can only pay the shipper? Our customer then takes a deduction from us to recover their full losses because they feel that it is our responsibility to choose a carrier that fully insures the shipment. We are then faced with a difficult decision as to how we handle this with our customer. Based on what I have described above, is it the legal responsibility of the customer or my company to insure the shipment?

Answer: Your question actually has two answers.

First, you are correct in saying that the customer (consignee) has "risk of loss" when the terms of sale are "FOB origin". In other words, when the seller (shipper) tenders the shipment to the carrier at the place of shipment, the risk of loss or damage in transit transfers to the buyer (consignee). This is a presumption established in the Uniform Commercial Code, at U.C.C. 2-319, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 10.5.1.

However (without researching the issue), I do recall reading an old New York case in which the buyer successfully sued the seller because the seller neglected to insure a shipment, as a result of which the buyer's ability to collect from the carrier was limited because the carrier had a released rate or limitation of liability. I have not seen any recent court cases on this point, but it does certainly suggest that the shipper may have a legal duty to declare a value or insure a shipment when the carrier has limited liability such as $100 per shipment.

The seller's obligation would depend on whether there is some understanding or agreement between the buyer and the seller, or some custom and usage of the trade, as to whether shipments should be made at full value or at a released rate. At the very least, it would seem that you should notify your customers that your carrier's liability is limited, and ask whether they want to pay for the valuation charges or some kind of shipper-interest insurance.

492) Partially Damaged Goods - Mitigation of Loss

Question: Is a carrier liable for the full value of a shipment when the trailer overturned and damaged several of the cartons, but not all? The customer refused the load and instructed us not to reship any of the cartons in the wreck, as the products could not be thoroughly tested without destroying them. They were ordered to specification and could not be used for any other purpose.

Answer: The carrier will probably argue that the claimant has a duty to "mitigate the loss" or to salvage the undamaged portion of the shipment. It would probably be wise to have an independent expert report concerning the technical nature of the product, its intended use by the receiver, the dangers of using that product when it has been exposed to extraordinary handling in transit, the cost of testing the product, and whether or not it has any salvage value, even as scrap. See *Freight Claims in Plain English* (3rd Ed. 1995), Section 7, for a discussion of this subject.

493) Proof of Delivery - 'Subject to Recount' Notation

Question: On 2 or 3 recent truckload shipments to customers, the carrier has allowed the customer to add the notation 'subject to recount' on the final delivery receipt. The shipments were live unloads. The shipper has subsequently charged us back for a portion of the shipment that he says was short. This has put us in an awkward position. The carrier refuses to consider a freight

claim as he claims to have a clear POD and says he had no choice but to allow the consignee the stamp the POD. In addition, the carrier was never notified of the shortage.

I feel the POD is rendered invalid by the notation. We would like to go to our customer and advise them that they cannot legally use this notation. What is the rule here? What if anything, can we tell (or show) our customer?

Answer: There is no "law" that prohibits a consignee from entering a notation such as "subject to recount" on a delivery receipt.

However, from what you say, the principal problem is with your customer and not the carrier. The customer should be counting the cartons as they are being unloaded when there is a "live unload", and not waiting until after the driver has left. Essentially, the consignee is creating the same kind of problem as a "concealed shortage", i.e., how do you prove that the shortage did not occur after delivery by the carrier.

About the only suggestions I can give are: (1) talk to your customer and ask them to count on delivery, not afterwards; (2) include appropriate instructions or requirements in your sales contracts or confirmation of sale documents.

494) Rail - Carrier Liability - Diverted Shipment

Question: The facts are as follows: *Loaded railcar (hopper) ships from plant site and is billed to ship to consignee in Tracy, CA. Freight terms are prepaid by shipper. The railcar is diverted in route by the consignee to Mulford, CA and the consignee pays for the diversion. The shipper is unaware of diversion. The railcar is successfully diverted to Mulford, CA and it is weighed and is loaded. The consignee contacts the shipper and asks for the railcar to be diverted to City of Industry, CA. The railcar is successfully diverted by shipper, but it is NOT weighed. Upon placement at City of Industry, the railcar is empty.

My questions are:

What parties are legally able to divert railcars?

Once diversion takes place, is the party who requests diversion responsible for lading?

Does shipper remain responsible for lading (even though shipper did not request or know of initial diversion)?

Answer: Most rail shipments are subject to the railroad's "Exempt Circulars" (tariffs) that contain the rules applicable to diversion and reconsignment. Unless otherwise provided, either the shipper or the consignee named in the bill of lading can request that a car be diverted. Many shippers have transportation agreements with the railroads; often these agreements specify that only the shipper may request a diversion or reconsignment.

As for which party is "responsible" after a car has been diverted, there are two answers.

First, the carrier is responsible for any loss, damage or delay while the goods are in its possession, subject to the provisions of the bill of lading and tariffs.

Second, the risk of loss in transit generally depends on the terms of sale, i.e., the contract between the buyer and the seller. Normally, under the Uniform Commercial Code, if a shipment is "FOB Origin" or equivalent, the risk of loss passes to the buyer once the goods are tendered to the carrier at the point of origin. If the shipment is "FOB Destination", the risk of loss remains with the seller during transit. Without seeing your purchase agreement, I cannot give an opinion as to which party would have risk of loss under the circumstances described.

From the fact pattern you have described, it sounds as though the consignee may have actually received the car at Mulford and taken possession of the shipment. If so, regardless of the original terms of sale, delivery had been accomplished and any loss occurring after that point should be at the risk of the consignee.

495) Rail - Derailment - Special Damages

Question: We had 16 railcars on a train that involved in a derailment. We asked the railroad if any of our railcars was involved or delayed. The response was no. The NTSB impounded the train for 2 weeks. When we discovered we had railcars held up we had to ship tank trucks to a customer in order to meet our sales obligation. Can we claim the difference in transit costs against the railroad?

Answer: First, you have to determine whether you have a transportation contract with the railroad, or whether the shipments moved under a tariff or an exempt rail circular, etc. which would govern the carrier's liability.

Unless you have a favorable, shipper-friendly contract, the railroad will probably cite to some section of its tariff or exempt circular that excuses it from liability for "force majeure" - or any causes that are outside its control. Likewise, the railroad will probably argue that additional cost of substitute transportation would be "special damages" for which it is not liable, see discussion at Section 7.3, *Freight Claims in Plain English* (3rd Ed. 1995).

This doesn't mean that you shouldn't file your claim, and you might get lucky, but be prepared for a declination by the railroad.

496) Rates - Interline Shipments

Question: I have contracts with the LTL carriers I do business with and the contract clearly specifies in a section entitled “Interlining” that “if a shipment is handled by the carrier and a connecting carrier, it will be considered ‘convenience’ interlining and such shipments will transported at the rates and discounts set forth in the contract.”

My question is whether a carrier that signed the contract is legally bound to honor the standard rates and discounts for the interline shipment, or do they have the right to change the rate and discount on interlined shipments?

Answer: If you have a formal written transportation agreement, and it contains the provisions you have described, it should be enforceable. The only question I would have is whether you may have incorporated the carrier's tariffs into your contract by reference. If you did, it is possible that the carrier's rules tariff may have some provisions governing interline shipments and then there may be a dispute over which terms will apply.

497) Receiving Procedures - Opening Boxes for Inspection

Question: This is a two-part question and one that comes up more and more with our clients. (We are a 3rd party provider)

1. Is there a legal standard that says how long a consignee can take to examine their shipment or is this another subjective "within reason" deal? Example: a shipment of 30 boxes of bar stools packed two to a box. Can they insist on opening each one?

2. If this same customer receives 30 boxes and opens some of them finding damage, can they refuse just those boxes, even after opening them?

Answer: 1. Many motor carriers have tariff rules that essentially establish a presumption of delivery in good condition if concealed damage is not promptly reported, usually 15 days. All this means is that the consignee has a more difficult burden of proving that the damage did not occur after delivery. As to whether a consignee can open packages to inspect the contents, why not? I would think it would be a good practice to inspect the contents upon delivery, so if there is any damage it can be promptly reported and investigated.

2. As a general rule, when only part of a shipment is damaged, the consignee should attempt to "mitigate the damage". When it is practical to do so, the goods should be sorted and segregated;

undamaged goods should be retained and only the damaged goods should be rejected to the carrier. I would refer you to *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.1.4 and Section 10.9 for a detailed discussion of this subject.

498) Receiving Procedures - Verification of Carton Count

Question: On motor carrier shipments to one of our DC's, local standard receiving procedures are to not only verify carton count, but also verify the pieces in each carton versus what is noted on the packing list. After verifying both counts they then sign the delivery receipt, noting not only the carton count but also any shortages within the cartons. We recently had a shipment of 215 cartons, which the receiving department noted on the delivery receipt as the number received, the receiving department then attempted to note on the delivery receipt that 2 pieces of model xx was missing out of one of the cartons. The carrier refused to let them put that on the delivery receipt. I have since instructed the DC that they cannot open each carton, prior to signing for them, unless damage or loss is suspected do to the condition of the carton. My question is on what grounds can a carrier refuse from letting the DC sign a bill in this manner?

Answer: If you find shortage or damage at the time of delivery, you are entitled to (and should) make an appropriate notation on the delivery receipt. If the driver gives you any flack, call his boss.

Reply: Thanks for the response. My concern had to do with one package, where there was no evidence of pilferage or damage, yet as I mentioned previously, the carrier allowed us to inspect all of the cartons. The carrier told our receiving department, that since there was no sign of actual pilferage and/or damage, that they would not allow them to note any shortages, within the carton, on the delivery receipt, and that they would put the freight back on the truck if we insisted on signing the delivery receipt in this manner. Does your answer in regards to concealed damage still apply in regards to this situation, or can a carrier, when there was no evidence of pilferage or damage to the carton, but did allow us to open prior to delivery, refuse to allow us to sign noting the concealed damage?

Answer: Usually it is impractical to try to open a large number of cartons at the time of delivery to check the contents. Drivers can't be expected to wait around until this is done. On the other hand, if there is some external sign of damage, or evidence that a carton has been opened or tampered with, the driver should be asked to stay until the contents have been checked.

If there is a shortage from a carton, which is discovered at the time of delivery (and the driver is still there), it can and should be noted on the delivery receipt.

If a shortage is discovered some time after delivery (and after the driver has left), then it falls into the category of concealed shortage, and should be handled accordingly.

499) Record Retention – Shipping Documents

Question: I am responsible for freight invoice payment for my company and I need to determine how long both paper invoices and EDI 210's transactions should be retained. Outside of our normal financial requirements, are there any other requirements for record retention that I need to be aware? Please let me know if you can assist me with this information.

Answer: With respect to freight bills and related shipping documents, we generally recommend retention for a minimum of three and one-half years. The reason is that the statute of limitation for carriers to recover their charges is 18 months, and, if a carrier goes bankrupt, the statute can be extended for another 2 years. As for your EDI records, I presume that you have an

appropriate backup for any magnetic media, and would have the ability to print out hard copies of the information if it were needed.

500) Refusal of Damaged or Misdirected Shipments

Question: If an inbound shipment is freight terms FOB Origin - freight collect, and there is a problem with the shipment i.e:

1. Partial damage: can you refuse the damaged items?
2. Misdirected Shipment: can you refuse the shipment?

My understanding is that the consignee must pay the freight bill as originally presented. Understanding that any shortcomings with the shipment are properly noted on the dock receipt. And, a freight claim must be generated to recover on any loss or damage. If this is accurate, can or should the consignee refuse deliveries of any shipments thinking they are free and clear of freight payment? Or, should they take in the freight, note it on the bill and file claim?

Answer: On partially damaged shipments, as a general rule the consignee should not reject the shipment, but should receive it and attempt to mitigate the damage. Depending on the nature of the damage, it may be possible to repair or repackage the item, sell it for salvage value, etc. See Section 10.9, Rejection vs. Acceptance of Damaged Shipments in "Freight Claim in Plain English" (3rd Ed. 1995), which is available from the Transportation & Logistics Council.

If damage is observable at the time of delivery, you should always make a notation on the delivery receipt or bill of lading, notify the carrier and request an inspection. Claims must be filed in writing and should be done promptly. In addition to the value of the damaged goods, you can also claim for any reasonable expenses that you incur in mitigating the damage.

On a "misdirected" shipment, if you are not the consignee named in the bill of lading, you have no obligation to accept the shipment. If you are the named consignee - and the vendor or shipper has shipped the wrong goods - you should accept the goods, immediately notify the vendor or shipper, and request disposition instructions.

501) Refusal of Non-Conforming Goods

Question: We are the consignee and arrange and pay for the transportation. We ordered 10 different products from a shipper, who then shrink-wrapped the order on a pallet. One of the products the shipper put the skid was labeled incorrectly and this error is found as the load is coming off the truck during delivery. Unfortunately, we cannot use this particular product in its current state. What are we as the consignee required to do? Can we refuse this part of the shipment? Are there any regulations or laws concerning this type of thing and if so, what are the consequences of failing to comply? Does the shipper have a certain number of days to get the freight out of our warehouse?

Answer: From you description, this is not a problem with the motor carrier, but a problem with your vendor, who has shipped the wrong merchandise ("non-conforming goods") to you. If your purchase agreement with the vendor requires a particular labeling, then failure to properly label the goods would be a material breach of the purchase agreement, i.e., the goods would be considered "non-conforming goods" within the meaning of the Uniform Commercial Code ("U.C.C."). It would be improper to reject these goods to the carrier, because they were not damaged in transit and the carrier is not at fault. Your remedy is with the vendor, but note that under the U.C.C. the vendor would normally have a right to have the goods returned, or to cure the defect (repackage, relabel, etc.).

In any event you have a duty, as a bailee, to hold the goods, notify the shipper, and request disposition instructions. The duties and responsibilities of the parties are covered in the U.C.C. and

you shouldn't just abandon or dump the goods without notifying the vendor and asking for disposition instructions.

There are a number of sections in the U.C.C. that could be relevant, but the one which I had in mind was Section 2-602, Manner and Effect of Rightful Rejection. This section applies when the buyer has received the goods and says that he has a duty after rejection to "hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them...." Section 2-603 and 2-604 cover storage and sale by the buyer if the seller fails to give reasonable instructions for disposition of the goods.

The implications of failing to comply with these regulations depend on what the consignee does. If the goods are abandoned or destroyed, the consignee could be subject to a lawsuit by the owner.

502) Refused Freight - Purchasing Refused or Undelivered Freight

Question: Is it possible to purchase freight/products that cannot be delivered for one reason or another?

Answer: Many motor carriers have refused or undeliverable freight which is sold at public auction from time to time. Generally they are required to post notices of these sales in local newspapers. There are also companies that specialize in handling salvage and they also have public sales. You can find them through the web or try looking in the yellow pages for your area.

503) Refused or Rejected Freight

Question: What happens with freight collect shipments that are refused by the consignee? (The refusals were not related to damages.) It is my belief that, once abandoned, the carrier would dispose of the goods through sale or auction of some sort.

Answer: I think you have correctly evaluated the situation. The carrier has certain responsibilities when a shipment is refused or can't be delivered. It must use reasonable efforts to protect the property, notify the shipper and owner that the goods are on hand, etc. The carrier has a lien for its freight charges, and can sell the goods to pay its lien, provided that certain procedures are followed. If the goods are sold, the proceeds would then be first used to offset the original outbound freight charges and pay any expenses associated with the sale. If the sale did not generate enough revenue to cover the freight and expenses, the balance would be billed to the shipper. If the freight and expenses were fully paid from the sale revenue, the balance should be sent to the shipper.

Take a look at Section 4(a) of the contract terms and conditions on the reverse side of the Uniform Straight Bill of Lading, and also see Section 10.10, Salvage Procedures, in *Freight Claims in Plain English* (3rd Ed. 1995) for a full explanation.

504) Refused or Undeliverable Freight - Sale by Carrier

Question: We have been notified through a claim we filed on a shipment that our product was sold as salvage. What should the carrier's steps have been before they sold our product for salvage.

And how do you avoid this from happening again. We do not have any records showing that we were notified of a salvage attempt. Please respond to this, thanks

Answer: I assume that these goods were refused by the consignee or undeliverable.

If the goods moved under a Uniform Straight Bill of Lading, the carrier's duties are spelled out in Section 4 of the terms and conditions, and require the carrier to give notice of the refusal and notice of the sale to the shipper, see Section 10.10.4 of *Freight Claims in Plain English* (3rd Ed. 1995). There are also provisions in the Uniform Commercial Code and/or other state law requirements.

If the carrier failed to comply with these requirements, it could be guilty of "conversion" and therefore liable to the shipper for the value of the goods plus any consequential damages that resulted from its improper acts.

505) Refused Shipment

Question: I recently shipped goods and the consignee has chosen to refuse part of the shipment based upon our alleged noncompliance with their packaging standards. The issue concerns goods that were shipped loose on skids as opposed to shipped in cartons. The consignees packaging standards do not stipulate either way.

1. Is the carrier liable for damages/shortages incurred as a result breaking apart the shipment integrity?

2. Is the consignee liable for shortages or storage charges incurred by the carrier resulting from this action (refusal of goods)?

3. Is there a governing NMFC rule stipulating that the carrier cannot deliver partials regardless of consignees concerns, meaning take all of the cargo or none of it.

Answer: I'm not sure whether your problems are with your consignee or with your carrier.

Obviously, carriers are responsible if they damage your freight, regardless of how it is packaged, unless they can establish that the damage results solely from your improper packaging without any negligence on their part.

However, the consignee should not refuse shipments to the carrier because of some disagreement with the shipper as to packaging. A shipment should only be refused if the carrier has damaged it so badly that it is "practically worthless", see Section 10.9 of *Freight Claims in Plain English* (3rd Ed. 1995). If they abandon the freight to the carrier, the carrier becomes a "warehouseman" and, although it does have a duty to protect the freight, it has a lesser standard of care.

I am not aware of any provision of the NMFC that prevents a carrier from delivering a partial shipment.

506) Refused Shipments - Sale by Carrier

Question: All of the bills of lading I have seen include a provision for the disposal of perishable goods if the consignee refuses the shipment or "fails to receive it" promptly or within a reasonable time. What does "fail to receive a shipment" mean? How does that happen?

Answer: The language in the Uniform Straight Bill of Lading in the National Motor Freight Classification says, "If the consignee refuses the shipment... or the 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..." It further provides that the carrier should attempt to contact the shipper or other party designated in the bill of lading for disposition instructions, and that the carrier can put the goods into storage. If no disposition instructions are received following reasonable notice, the carrier may then sell the property at public auction.

507) Released Rates - National Motor Freight Classification

Question: Section 14706(c)(1)(C) of Title 49 prohibits collective establishment of "rules to limit liability." If a motor carrier receives a shipment pursuant to a Uniform Straight Bill of Lading, which incorporates the National Motor Freight Classification, and there is no other provision concerning limitation of liability/released rates in a tariff, does a limitation of liability exist for the shipment?

Answer: Unless there is a valid binding transportation contract between the shipper and the carrier, the Uniform Straight Bill of Lading, as set forth in the National Motor Freight Classification (NMFC), incorporates by reference both the applicable "classifications" and the carrier's "tariffs".

There are some "released rates" (limitations of liability) that were approved many years ago by the ICC (in the form of "released rate orders) that are found in the NMFC. One of the conditions imposed by Congress in the Motor Carrier Act of 1980 (deregulatory legislation) was that no additional released rates could be established or included through collective action after July 1, 1980, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 15.2.5. However, today, most carriers publish their own "unfiled" tariffs that contain various liability limitations, as well as other rules, accessorial charges, etc.

The answer to your question requires a careful analysis of the bill of lading (or other shipping contract) which was used, a determination of whether the carrier was a "participant" in the NMFC, whether the NMFC contains an applicable released rate, whether the carrier had properly published a tariff containing a liability limitation applicable to the shipment in question, whether the carrier offered adequate notice and a reasonable opportunity to choose between full value and limited liability (choice of rates), etc., etc.

In other words, there is no simple answer.

508) Remedies - Carrier Holding Freight Hostage

Question: We have had some disputes with a trucker over freight bills. We found he was overcharging based on his tariff, and cut the bills back to the proper rate. Yesterday we gave him a shipment, and now he is holding the shipment "hostage" for the total amount that he claims is due (about $3,700). The freight for this particular shipment is only $360. Can he do this?

Answer: Carriers have a "carrier's lien" on any shipment they are transporting, but only for the freight charges relating to the shipment in their possession, and not for previous shipments. If you tender the $360 for the freight charges on this shipment, the carrier legally must release the shipment. If he doesn't, he will be "converting" your property and you have a remedy in court.

509) Responsibility for Consequential Damages

Question: I am the Assistant Manager of an automotive component manufacturer with numerous facilities. We are a major "tier one" supplier for the Big Three in North America, Canada & Mexico. We also supply parts to most of the North American automotive transplant operations as well as various automotive joint venture operations.

We are currently in a very delicate position with one of our customers located in Canada. Our terms of sale with this customer are "F.O.B. DESTINATION" but the transportation system is controlled by this customer and they pay all transportation costs.

In January, we were notified by the customer that we had short-shipped on a previous shipment and that we needed to make an expedited shipment to prevent a line shut-down. In order

to make the delivery before their line shut-down, our only option was to arrange an air charter from our Missouri plant to Canada.

We immediately began making such arrangements and everything was in place to get the parts to Ontario airport by 2:00 p.m. that same day. When we contacted our customer to inform them of our arrangements and make a delivery appointment, the customer instructed us to cease our efforts. They informed us that they wanted their carrier to handle this expedited delivery.

They instructed us to arrange for an expedited carrier to pick up the shipment, take it to their carrier's consolidation facility in Ohio. We were informed that their carrier would arrange the air charter from their consolidation point in Ohio to Canada. Since this customer normally controls and arranges the transportation, we consented to their direction for this shipment also.

The expedited carrier picked the shipment up from our facility and took it to their consolidation location in Ohio where is was put on a truck, not an airplane, for delivery to Canada. Needless to say, the truck did not make it to the plant in time to prevent the line shut-down.

Now the customer is attempting to hold us responsible for $20K in down-time expenses for the "delivery failure."

We are contending that we should not be held responsible because we were not in control of the transportation arrangements. Had we been in control, the shipment would have arrived at their location several hours before the stated shut-down time.

The customer is alleging that because the terms are "F.O.B. DESTINATION", we are liable for these charges. I am arguing that the F.O.B. point is irrelevant in this situation because the parts themselves were undamaged and in acceptable condition at time of delivery. It was their delivery system which failed and caused the line shut-down. Our parts did not cause this line shut-down.

As far as a contract between our company and this customer, one does not exist to my knowledge. I am trying to get a copy of this customer's Purchase Order to us to see if it addresses the issue of consequential damages, but my initial guess is, no such issues are addressed.

I feel that this customer is being directed by their carrier to hold us responsible because the carrier doesn't want to be held responsible. I believe that if we could present the opinion of a "recognized authority" in matters such as these to the customer, the customer would be able to see where the responsibility for the failure truly lies.

Please give me your opinion.

Answer: I will attempt to reply based on your description of the facts.

First, there are two separate contracts involved: (1) between buyer and seller, and (2) between shipper and carrier.

The first contract appears to be a "just in time" arrangement between a supplier and its customer, although you indicate that there is no written contract between the parties. As to the purchase order, it would be helpful to have a copy to review in order to determine what (if any) provisions cover delays or late deliveries.

The "terms of sale" (FOB Destination) which you refer to generally relate to risk of loss in transit, i.e., loss or damage to the property while in the hands of a carrier. If the terms of sale are FOB Destination, under UCC 2-319, there is a presumption that the seller has risk of loss in transit. However, I do not see how this provision of the UCC (or the related provisions such as 2-503, 2-509, 2-510, etc.) would have any bearing on your customer's claim for consequential damages.

It would be my opinion, (in the absence of contrary provisions in the JIT contract or the purchaser order) that your customer, by having made the transportation arrangements with its own carrier, assumed responsibility for any delay resulting from the use of that carrier.

The second contract is between shipper and carrier and is subject to principles of transportation law, e.g. the "Carmack Amendment", etc. As to a possible claim against the trucker, a claim for "down time" resulting from delay is a classic example of "special damages". Special damages are recoverable from a carrier only if there is actual or constructive notice, at the time of shipment, of the consequences of delay or non-delivery. If the carrier was on notice of the urgency of this shipment and that delay would cause a plant shutdown, it is possible that the carrier could be

held liable. There is an extensive discussion of special damages in Section 7.3 of *Freight Claims in Plain English* (3rd Ed. 1995), if you wish to explore this in greater depth.

From what you have told me, I would suggest that your customer should pursue its claim for damages against the carrier, and not against your company.

510) Retention of Bills of Lading and Similar Documents

Question: How long should shippers keep bills of lading, freight bills, etc?

Answer: Bills of lading and freight bills may be important if you have a dispute with a carrier over freight charges, or if the carrier goes bankrupt and its "auditors" try to assert claims for undercharges or late payment penalties. The time limit in the Interstate Commerce Act for a carrier to bring an action for freight charges is now 18 months. However, under the Bankruptcy Act, statutes of limitation are extended by 2 years from the date the petition in bankruptcy is filed. Thus, to be safe, you should probably hang on to these records and documents for a minimum of 3 1/2 years.

Also, if you have a loss and damage claim pending for a long period of time, you should keep all files on that shipment until it is closed. You will need those files to establish good condition at origin, invoice prices, sales contracts, quality control documents, loading diagrams, etc. in the event of trial. These records should be kept for at least two years after declination of the claim if you intend to institute suit within that period.

511) Retention of Shipping Documents

Question: In light of the most recent changes to the Interstate Commerce Act, what period of time do you recommend we use for shipping document retention? We want to direct a uniform document retention plan for our Distribution Centers.

Answer: Unlike carriers, who are required by the Code of Federal Regulations (CFR) to maintain certain documents for various periods of time (49 CFR §379), there are no similar provisions for shippers. Therefore, we generally recommend that freight bills and bills of lading are retained for a minimum of 3 1/2 years. The reasoning is that the statute of limitations on recovery of freight charges by a carrier is now 18 months and statutes of limitation can be extended by 2 years if a carrier files for bankruptcy. Note that this recommendation does NOT take into account any record retention requirements that might be imposed by the IRS, SEC, other federal, state or local jurisdictions or other regulatory agencies.

512) Return of Damaged Goods

Question: Could you please comment on carrier responsibility for return of damaged goods.

I ship regularly with a specific carrier and have experienced some minimal damages. The problem is that, due to the nature of our product, it must be returned to our facility for verified disposal. My question is related to the return of damaged product.

Who is responsible to pay for the return of damaged goods to my facility?

The carrier has, until now, been returning the product on a free astray basis. They have recently informed me that, since I am filing claims on this damaged and unusable product, I am responsible for the cost of returning the product to our facility. I disagree.

It seems to me that since THEY damaged the product, THEY should be responsible, not only for the cost of the damaged goods, but also for any related costs incurred as a result of this damage. In my view, due to the necessity of disposal at our facility, they are responsible for the free astray return of the goods.

If they do decide to "charge" me for the return transportation, am I within my rights to include those charges in my claim.

Answer: There are no "black and white" answers when you get into the area of measure of damages for a loss and damage claim. However, let's start with the concept that you have a duty to mitigate damages. This means that reasonable costs and expenses to sort, segregate, inspect, repair, etc. are part of your damages and thus includable in your claim. If damaged goods have to be brought back to your facility as part of the salvage procedure, any freight charges for the return of the goods should be a legitimate element of damages. (As you note, many carriers handle this on a "free astray" basis without any charge.)

You can find an extensive discussion of damages in Section 7 of *Freight Claims in Plain English* (3rd Ed. 1995); Freight charges are covered in section 7.4.9.

513) Return Shipment - Risk of Loss

Question: Currently my customer "C" ships defective merchandise returns to my company's PRC freight prepaid. I am considering having "C" accumulate and send full trailer load quantities of defective merchandise for credit directly to my as-is buyer/refurbisher "B" to eliminate processing in my PRC and then sending them to B from my PRC.

B is currently arranging piggyback rail transport from my PRC to their facility freight prepaid and they are invoicing me for the cost. I would like to handle this as merely a ship to address change for C. To sweeten the deal for C, I plan to offer to pickup the freight charges if they guarantee full trailer load consolidation. To make it simple for me I plan to have B arrange piggyback rail transport from C to B's facility freight prepaid and then are invoice me for the cost.

If there is a trailer seal discrepancy when load arrives at B's resulting in a shortage, which is responsible for filing a freight claim? Who owns the product? At what point does ownership of the merchandise pass from C to me to B? Does it depend on who arranges the transport or who pays for the freight charges? Can it be dictated by agreement between the 3 companies?

Answer: We have an "apples and oranges" situation here.

The Uniform Commercial Code establishes various rules and presumptions in the absence of an agreement between the parties or some recognized custom and usage of the trade. These rules hinge on the "terms of sale" (FOB terms), not who arranges for transportation or pays the freight charges. See Section 10.19 of *Freight Claims in Plain English* (3rd Ed. 1995).

I would assume that your purchase agreement with your customer "C" provides the conditions under which defective merchandise is returned for credit.

Ordinarily, when "C" ships a return item, the presumption would be that "title" and risk of loss would shift back to your company when the goods are given to the carrier at "C's" facility.

The fact that the return goods are going to your contract refurbisher "B" instead of being returned to your company does raise a question of who "owns" the goods and has risk of loss in transit. This becomes a question of what is your agreement with the contract refurbisher. In the parlance of the UCC, are you selling the defective goods to the contract refurbisher "FOB C's facility" (a "shipment contract") or "FOB B's facility" (a destination contract"?

My suggestion is to decide how you want the risk of loss in transit to be handled, and to state it clearly in a written contractual agreement, signed by the parties. That way, you will avoid the potential for disputes and/or litigation.

514) Risk of Loss in Transit

Question: Our company purchased some goods FOB Seller's Plant. When the goods arrived at our dock, it was clear they were damaged, so we refused the goods. The carrier took the goods back to the seller, who refused to accept them. Now the carrier is demanding that we pay them, but the carrier is probably at fault because the carrier signed the BOL without objection at the seller's dock. What do we do? I don't want to pay for the goods because they are non-conforming, but both the carrier and the seller are pointing the finger at each other.

Answer: 1. As a general rule, if the terms of sale were "FOB Seller's Plant", the risk of loss in transit is on the buyer/consignee. In other words, if conforming goods were tendered by the seller/shipper in good order and condition to the carrier at origin, you will have to pay the seller for the goods, even though they arrived damaged.

2. If there was transit damage (caused by the carrier) you, as the buyer/consignee, should have filed a loss and damage claim with the carrier. Freight charges, if paid, are includable as part of your claim.

3. The claimant (in this case the buyer/consignee) has a duty to "mitigate loss". Unless the goods were damaged so as to be substantially worthless, you probably should have accepted them and attempted some kind of repair or salvage. Since you refused them to the carrier, the carrier also has a duty to mitigate the loss if it is reasonably possible to do so. Any salvage proceeds should be credited against your account.

I should note that these subjects are covered thoroughly in *Freight Claims in Plain English* (3rd Ed. 1995), available from T&LC.

515) Risk of Loss in Transit

Question: I receive shipments from a vendor “freight allowed” and they have chosen the carrier. They assert that all material is mine at the time it leaves their facility. Who is responsible to file a claim for damages with the carrier?

Answer: Risk of loss in transit is governed by the "terms of sale", and not the freight payment terms. As a general rule, the customer (consignee) has "risk of loss" when the terms of sale are "FOB origin". In other words, when the seller (shipper) tenders the shipment to the carrier at the place of shipment, the risk of loss or damage in transit transfers to the buyer (consignee). This is a presumption established in the Uniform Commercial Code, at U.C.C. 2-319, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 10.5.1.

516) Sales Tax on Freight Charges

Question: I would like to learn if sales tax is levied on freight charges built into the price of the goods sold and received in each state? If so, are they added as a separate item on the invoice for the cost of goods, or are they paid directly by the receiver in each state on a collect basis?

Answer: Sales tax laws vary from one state to another, so there is no universal rule.

Normally, transportation services are not subject sales tax. However, if a seller sells on a "delivered" basis, so that the invoice does not separately show the transportation charges, most states will levy sales or use tax based on the invoice price.

517) Sales Tax on Transportation Services

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518) Salvage - Food Products Damaged in Transit

Question: Our company ships edible foods, and when product is rejected by a customer, the carriers usually claim that the product is saleable. We usually find, however, that the product is far below our product standards and is not edible. What can we do to protect our company against product liability suits, and recover for the value of goods damaged in transit?

Answer: The owner of damaged goods has a right to determine whether or not a shipment meets its quality standards, or is fit for human consumption under F&DA rules. An affidavit from a qualified expert will suffice. If not fit for human consumption, it may have some value for animal feed, and that value must be established and credited to the carrier. The owner must control the disposition of all damaged goods to protect against release of questionable products to the public, at the risk of being sued for personal injury or death from the damaged goods

519) Salvage - Inspection of Damaged Shrubs

Question: We had a shipment of shrubs (junipers, etc.) in one gallon containers on the floor of the trailer. The driver did not run the reefer unit and the shrubs were refused due to heat damage. Now the carrier wants us to inspect all 6000 pieces and determine which ones can possibly be saved. Part of the problem is that you can't really tell whether they will survive without watering them and waiting a few weeks to see what happens. What should we do?

Answer: The claimant does have a duty to mitigate damages - sort, segregate & salvage. You should have a USDA or Plant expert inspect the damaged goods and get a formal written report. You can do a representative sample rather than a 100% inspection.

You should file a claim for the entire amount. The amount of the claim can be reduced later if there is salvage value.

520) Salvage Allowance - Safety Risk

Question: Our company ships automotive lamps and other types of light bulbs. When a box is damaged the product is no longer safe to use due to the nature of automotive lamps (they may appear useable, however, the testing to determine if they are safe costs more than the bulbs are worth). The carrier maintains that these broken light bulbs have salvage value, but we do not wish to release these bulbs over to the carrier due to the fact a bulb may have internal damage making it

a possible fire or explosion hazard. With a product of this nature what type of salvage value would it have?

Answer: This is always a gray area, because shippers have an obligation to mitigate damages when it is reasonable, under the circumstances, to do so, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.1.4, Duty to Mitigate Loss.

You make two good arguments for not allowing salvage: (1) the cost of testing exceeds the value of the light bulbs, and (2) there is a legitimate concern over exposure for product liability, see FCIPE at Section 10.10.6, Product Liability Considerations.

I would think that if you make these points known to the carrier, it should pay the claim in full and not expect a salvage allowance.

521) Salvage Allowance; Arbitrary Percentage

Question: We ship resin, which can become contaminated in transit. Once a package is opened, the resin can become contaminated by dirt, pieces of packaging or other foreign material that can jam processing machinery or cause flaws in the finished products. Moisture can also cause problems for our customers, and therefore, they absolutely refuse to accept any product when the package has been compromised. Therefore, our corporate quality control policy requires that all damaged product be returned by carriers, and we deduct a 10% salvage allowance on our claims. Some carriers claim that they can sell this damaged product for 25%. How do we proceed to resolve this dispute?

Answer: Your policy of requiring the return of all damaged product is the correct procedure when contaminated product can cause further damage or injury. However, the problem is that any arbitrary percentage for a salvage allowance is just that: arbitrary. Obviously, the shipper wants the product to be returned to prevent it entering the market as distressed merchandise, and possibly compromising its trade name, reputation for quality, etc. or creating a possible product liability or warranty problem. If the product is not substantially worthless due to the damage, the shipper does have a duty to mitigate damages and attempt to salvage what it can. (See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 10.9 - 10.10 for a detailed discussion.) However, 10% (or 25%) may not reflect the real salvage value. You really should attempt to determine what it actually costs to inspect, handle, re-process, re-package, etc. and what the salvaged product can be sold for. Then you will be in a better position to argue with the carrier as to the proper amount as a salvage allowance.

P.S. If the shipper has a written transportation contract with its carriers, it can include provisions governing salvage of damaged product and avoid this kind of dispute.

522) Salvage Procedures & Regulations

Question: If a claim is filed against a carrier for damages and it has been established as part of the claim that the damaged product, while still in the carrier's possession, "is considered worthless to both the shipper and consignee, and the carrier has the right or responsibility for salvage or disposal of the product", is an invoice or some other document required to be sent to the carrier to show transfer of ownership to the carrier? Or, is the claim and supporting documents sufficient enough documentation to allow the carrier salvage rights?

Answer: As a general rule, unless there is some requirement for registering "title" (such as for an automobile), there would not be any requirement for a bill of sale or invoice to transfer ownership of ordinary personal property.

Assuming that there is an agreement between the owner and carrier that the carrier can salvage the goods, it is neither customary nor necessary to have any formal document to transfer title. On the other hand, if the carrier were to sell the owner's goods without any notice or other communications establishing the owner's consent, the carrier could be taking the risk of being charged with conversion of the goods.

I would your attention to the FMCSA (formerly ICC) regulations at 49 C.F.R. § 370.11, Processing of Salvage, which states:

> 370.11 Processing of salvage.
>
> (a) Whenever baggage or material, goods, or other property transported by a carrier subject to the provisions in this part is damaged or alleged to be damaged and is, as a consequence thereof, not delivered or is rejected or refused upon tender thereof to the owner, consignee, or person entitled to receive such property, the carrier, after giving due notice, whenever practicable to do so, to the owner and other parties that may have an interest therein, and unless advised to the contrary after giving such notice, shall undertake to sell or dispose of such property directly or by the employment of a competent salvage agent. The carrier shall only dispose of the property in a manner that will fairly and equally protect the best interests of all persons having an interest therein. The carrier shall make an itemized record sufficient to identify the property involved so as to be able to correlate it to the shipment or transportation involved, and claim, if any, filed thereon. The carrier also shall assign to each lot of such property a successive lot number and note that lot number on its record of shipment and claim, if any claim is filed thereon.
>
> (b) Whenever disposition of salvage material or goods shall be made directly to an agent or employee of a carrier or through a salvage agent or company in which the carrier or one or more of its directors, officers, or managers has any interest, financial or otherwise, that carrier's salvage records shall fully reflect the particulars of each such transaction or relationship, or both, as the case may be.
>
> (c) Upon receipt of a claim on a shipment on which salvage has been processed in the manner prescribed in this section, the carrier shall record in its claim file thereon the lot number assigned, the amount of money recovered, if any, from the disposition of such property, and the date of transmittal of such money to the person or persons lawfully entitled to receive the same. In addition, the terms and conditions on the reverse side of the Uniform Straight Bill of Lading also contains provisions that address the carrier's right to sell undeliverable or refused freight:
>
> Sec. 4. (a) 1. If 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.
>
> 2. If the carrier does not receive disposition instructions within 48 hours of the time of carrier's attempted first notification, carrier will attempt to issue a second and final confirmed notification. Such notice shall advise that if carrier does not receive disposition instructions within 10 days of that notification, carrier may offer the shipment for sale at a public auction and the carrier has the right to offer the shipment for sale. The amount of sale will be applied to the carrier's invoice for transportation, storage and

other lawful charges. The owner will be responsible for the balance of charges not covered by the sale of the goods. If there is a balance remaining after all charges and expenses are paid, such balance will be paid to the owner of the property sold hereunder, upon claim and proof of ownership.

3. Where carrier has attempted to follow the procedure set forth in subsections 4(a) 1 and 2 above and the procedure provided in this section is not possible, nothing in this section shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law. When perishable goods cannot be delivered and disposition is not given within a reasonable time, the carrier may dispose of property to the best advantage.

523) Salvage Value - Returned Damaged Freight

Question: When our freight is delivered in damaged condition we have the carrier return the freight to us to protect our product name. Although the carrier agrees to return the freight, it denies our claim for damages because it has agreed to return the damaged freight to us. Can they do this?

Answer: No. The carrier is entitled to a credit for the salvage value, if any, to reduce the amount of the damage claim and may even charge you freight charges for the return shipment. (Since you want the freight returned to you, it would be incumbent upon you to establish the salvage value.) But the carrier cannot simply decline the claim because it agreed to return the damaged freight.

524) Seals - Truckload Shipments

Question: On a truckload move to a customer, is there any implication if the carrier applies his own seal to the load and notes the seal number on the bill of lading (if the driver counts the number of cartons and signs the bill of lading accordingly?)

Answer: I am assuming that the carrier's driver has counted the cartons as they were being loaded, and has signed the bill of lading or receipt showing the actual carton count (with no qualifying language such as "said to contain", etc.) Under these circumstances, it would appear that the application of a seal is solely for the carrier's protection, in other words, so the carrier would be able to tell if the doors were opened at any point during transit. I don't see how it would affect the carrier's liability.

I would note that we sometimes hear of cases where goods are missing from sealed containers or trailers, and upon investigation it is found that hinges or seals have been tampered with. Just keep this in mind if you ever have a "seal intact" declination from a carrier.

525) Setoffs - Freight Claims vs. Freight Charges\

Question: Is it legal for a carrier to offset a claim payment with old unpaid freight charges that have nothing to do with the damaged shipment that is being claimed for?

Answer: As explained in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 12.3.6, there is no longer any legal reason why a shipper cannot setoff loss and damage claims against freight charges owed to carriers. Conversely, there should be no reason why a carrier cannot setoff freight charges against claims.

There could be problems if either the loss and damage claims or the freight charges are disputed, or are time-barred. However, if the respective liabilities are acknowledged by both parties, mutual debts can be setoff.

526) Shipper Liability - Injury to Third Parties

Question: I am interested in recent trends towards shipper liability in cases where a shipper has "unknowingly" contracted a load to a carrier that "knowingly" has violated log entries etc...(i.e. didn't get the required break dictated by law)...and causes damage, injury, or death to pedestrians in route. I remember several years ago that this issue was leaning towards some level of shipper liability, putting some responsibility to shippers for contracting / ensuring compliant carriers.

I would like an update on this issue...recent court decisions..etc. Legal liability? Civil?

Answer: The federal regulations governing motor carrier operations and safety are found in Title 49 of the Code of Federal Regulations. These are binding on CARRIERS, not on shippers or consignees. These cover a range of subjects, including carrier responsibilty for safe loading (49 CFR § 392.9), etc.

In general, it is the owner and/or operator of the truck which is liable to the general public in the event of a highway accident resulting in personal injury or property damage. There are some situations in which a shipper may have liability exposure if some act or omission of the shipper causes or contributes to the accident, i.e., shipper's negligence. Examples might include involve improper loading by the shipper which results in a large machine or steel coil falling off the truck, or a load shift causing the truck to overturn. I doubt that a shipper could be found liable if a driver falsified his logs and caused an accident because he was over-tired.

527) Shipper Liability for "Dropped Trailers"

Question: Our carrier drops reefer trailers at our facility which we subsequently load. What sort of liability are we incurring, if any?

Answer: There are really two issues involved with regard to carrier trailers dropped at your facility for loading. First, you may become a "bailee" of the equipment, i.e., since you have possession and control over another person's property, you become responsible for it. You could become liable if the trailer is damaged (or stolen) while on your premises. Your should have your risk manager or insurance department check to make sure your general liability policy adequately covers the equipment.

Second, you should always inspect trailers before loading product into them, especially refrigerated food products. Any trailer that is defective, dirty, etc. should be rejected. There should be no additional liability exposure because you inspected a carrier's equipment.

You should note that there is a line of cases involving liability for improper loading, where the improper loading causes an accident (load shift, cargo falling off the truck, etc.) or an injury to a driver, shipping/receiving employee, etc. Liability, as between the shipper and carrier, usually turns on whether the defect is "latent" or "patent". However, as far as the carrier's equipment is concerned, it is clear that federal (FMCSA) regulations make the carrier primarily liable for the safety of its equipment.

528) Shipper Load & Count

Question: Can a shipment still be considered a true "shipper, load & count" (SL&C) if the carrier has broken the shippers seal to verify carton count?

Does a SL&C shipment lose its integrity if a shipment is processed through a consolidation hub where it is removed from the original trailer and reloaded before delivery? Can the carrier be held liable for a shortage if one occurs?

Where can we find more information on SL&C regulations?

Answer: A "Shipper Load & Count" notation of a bill of lading means exactly that: the shipper loads and counts (usually a full trailer load, and sealed upon completion of loading). So long as the trailer remains closed and the seal intact, there is a presumption that any shortage found upon delivery did not occur in transit.

If the carrier opens the trailer at an intermediate point for consolidation or transfer to another truck, it should count the contents and report any discrepancy. Unless a shortage is noted at this point, the carrier is no longer entitled to any presumption arising out of the original "Shipper Load & Count" notation on the bill of lading.

The subject of "Shipper Load & Count" is covered in greater detail in *Freight Claims in Plain English* (3rd Ed. 1995) at Sections 4.8.3 and 5.2.2.

529) Shipper Load & Count - Validity of Notation

Question: We received a "shipper load and count" shipment collect as consignees, and the merchandise was damaged. The vendor is claiming that they are not liable because the driver, not the shipping manager, wrote the "SL&C". Both signatures are on the Bill of Lading. Is that a valid dispute?

Answer: We need more information to properly answer your question. As a general rule, when the shipper loads and seals a full trailer without the driver being present or having an opportunity to count the packages, it is proper for either the shipper or the driver to put "SL&C" (shipper's load and count) on the bill of lading. If there is a shortage at destination, the carrier may rely on this notation to decline a shortage claim.

530) Shipper's Domestic Truck Bill of Lading

Question: Where can I purchase a 2-sided, multi-part Bill of Lading form called: Shippers Domestic Truck Bill of Lading - Non-Negotiable? JJ Keller in Menasha, WI no longer carries this form.

Answer: The Transportation & Logistics Council has a "kit" which it sells for $50 containing a booklet with a detailed explanation of the "Shipper's Domestic Truck Bill of Lading" and a copy of the form, together with a floppy disk with the same information in MSWord format. You can create your own bills of lading and customize them to fit your particular requirements, and either print them on your own printer or have them reproduced by any local printer.

The Council did have an arrangement with J.J. Keller to market the T&LC bill of lading kit, but Keller discontinued it from their catalog. I would note that J.J. Keller is still selling the Uniform Straight Bill of Lading forms that are published in the National Motor Freight Classification (NMFC 100 Series). The Classification, as you probably know, is published by the National Motor Freight Traffic Association, and endorsed by the American Trucking Associations and all of the major LTL motor

carriers. Obviously, the carriers are opposed to a "shipper-friendly" bill of lading, and this may be the reason why J.J. Keller discontinued the T&LC bill of lading.

We strongly recommend to our clients that they enter into written transportation agreements with all of their motor carriers. If you have a properly drawn contract, you can specify not only the rates, but all of the terms and conditions of carriage in your contract, and provide that the contract governs regardless of the provisions of the NMFC or the carrier's unfiled tariffs which might otherwise be incorporated by reference through the Uniform Straight Bill of Lading.

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I would like to make a suggestion. We strongly recommend to our clients that they enter into written transportation agreements with all of their motor carriers. If you have a properly drawn contract, you can specify not only the rates, but all of the terms and conditions of carriage in your contract, and provide that the contract governs regardless of the provisions of the NMFC or the carrier's unfiled tariffs which might otherwise be incorporated by reference.

532) Shipper's Duty - Proper Loading

Question: I heard about a court decision which said that a shipper has a common law duty to verify its carrier has properly secured its load for shipment. This bothers me tremendously, I do not see how a company can be held responsible for an area that is not within a company's expertise. The securing of loads should be left up to the carriers who are both responsible and have the experience in this area, not people out on a company's floor. Just looking for your view on this and any suggestions as to what the outcome might be.

Answer: According to a number of recent court decisions, shippers do have a common law duty to properly prepare, package, etc. and, if the shipper does the loading, to do it safely. On the other hand, both the case law and the federal DOT/FMCSA regulations make it clear that the carrier is responsible to check the load and make sure it is properly secured.

533) Shipper's Load & Count - Multiple Stop-off Shipments

Question: Our carrier has denied a shortage claim on the basis that the shipment was "Shippers Load & Count." In addition, the shipment involves multiple stop-offs. What should we do?

Answer: If the shipment was actually "SL&C", the burden of proof essentially shifts to the shipper as to what was loaded into the trailer. In other words, if there is a shortage at delivery, the shipper must establish, through appropriate testimony, documents, etc. that the goods were actually tendered to the carrier at the origin.

If you load, count and seal the trailer and the driver is not present to witness the loading, it is properly a SL&C shipment. Merely asking a driver to break the seal (at origin) and look into a trailer loaded to full visible capacity would probably not change the nature of the SL&C shipment as there is no way for the driver to verify the pallet or carton count.

On multiple stop-off shipments, the driver is responsible to make sure that the right pallets or cartons are delivered to the right consignee, and get a count and signature on the delivery receipt. Your best protection is to require your carriers to provide copies of delivery receipts as a condition for payment of their freight bills.

534) Shippers' Associations and Agents

Question: Where can I find rules governing Shippers Co-operative and Associations?

Answer: There really are no "rules" governing Shippers Co-operatives and Shippers Associations. *Freight Claims in Plain English* (3rd Ed. 1995), however, does contain a discussion of this subject at Section 13.3 & 13.4, reproduced below:

13.3 SHIPPERS' AGENTS

A true shippers' agent is neither a carrier, a freight forwarder, nor a broker, and is not subject to the provisions of the Carmack Amendment. See, e.g., *Adelman v. Hub City Los Angeles Terminal, Inc.*, 856 F.Supp 1544 (N.D. Ala. 1994). The term "shippers agent" is not defined in the Interstate Commerce Act. However, the legislative history to the Freight Forwarder Deregulation Act of 1986, P.L. 99-521, 1986 U.S. Code and Cong. News at p. 5031, offers the following definition:

> A shipper agent collects TL shipments and consolidates them into multiple trailer lots in order to take advantage of the quantity discounts offered by most railroads on TOFC service. Shipper agents represent a rapidly growing segment of the transportation industry and are not subject to ICC regulations as long as they provide service only at the origin or destination of a shipment. Shipper agents are profit-making firms. They do not assume liability for loss and damage of freight.

Any liability that a shippers' agent may have is to its principal - the shipper - and is based on the law of principal and agent. Thus, an agent may be held liable for negligence in carrying out his responsibilities, such as failure to communicate instructions regarding declaration of value, requirements for protective service, selection of an unsuitable carrier or improper equipment, etc.

The first question, of course, is whether a particular entity is in fact a shippers' agent, or whether it is holding itself out as a carrier, freight forwarder, or broker. In this regard, the case law dealing with brokers and other intermediaries may be helpful in determining the legal status of the parties.

Some of the key differences between a shippers' agent and carriers, freight forwarders and brokers is worth noting:

- Carriers and brokers are regulated by the FMCSA, a shippers' agent is not.
- Carriers hold themselves out as transporters of freight, a shippers' agent merely makes arrangements for transportation on behalf of the shippers.
- Carriers and freight forwarders are subject to the provisions of the Carmack Amendment, a shippers' agent is not.

· A broker is typically an independent contractor, while a shippers' agent, as the name suggests, is an agent of the shipper.

· A freight forwarder generally consolidates LTL shipments, whereas a shippers' agent usually arranges for the transportation of full trailer or container loads.

13.4 SHIPPERS' ASSOCIATIONS

Former section 10562(3) of the ICA (49 U.S.C. § 10562(3), Appendix 16) provided (under the heading: "Exempt freight forwarder service") that the ICC does not have jurisdiction over:

> (3) the service of a shipper or a group of shippers in consolidating or distributing freight on a nonprofit basis, for the shipper or members of the group to secure carload, truckload, or other volume rates. . .

In the course of enacting the Freight Forwarder Deregulation Act of 1986, P.L. 99-521, section 10562 of the ICA was "repealed", effective Oct. 22, 1986. The legislative history, *see* 1986 U.S. Code and Cong. News at pp. 5028 et. seq., describes a shippers' association as follows:

> A shippers' association is organized to perform in much the same manner as a freight forwarder. A shippers' association is a group of shippers who pool their LTL shipments and then buy transportation from for-hire carriers, thereby receiving the lower rates and the better service accorded to large shipments; shippers' association use TOFC as their primary linehaul mode. Shippers' associations only can transport freight belonging to their members; as long as they adhere to this requirement, shippers' associations are not covered by any ICC regulation. They are nonprofit associations, with transportation saving distributed to the shipper members. Shippers' associations collectively represent the most significant competition to surface freight forwarders; these associations have enjoyed a steady growth rate over the years.

The legislative history sheds no light as to why § 10562(C) was repealed, except for a general statement to the effect that, "All freight forwarder service will be deregulated." *Id* at 5039. Apparently the drafters of the legislation mistakenly assumed that a not-for-profit shippers' association was the legal equivalent of a freight forwarder (which it is not).

Determining if an entity is truly a shippers' association will turn on whether the association is a non-profit organization and whether the members have the ability of control the association's day-to-day operations. *See Central States Trucking Company v. J.R. Simplot Company*, 965 F.2d 431, 434 (7th Cir. 1992) However, whether the members choose to exercise their control is irrelevant. *Id* For cases discussing the legal nature of a shippers' association, *see Columbia Shippers, etc. v. U.S*., 301 F.Supp. 310, 312 (D. Del. 1969, 3-judge court); *Southern Pac. Transp. Co. v. Continental Shippers Ass'n, Inc*., 485 F.Supp. 1313 (W.D. Mo. 1980, *aff'd*, 642 F.2d 236 (8th Cir. 1981); *Metro Shippers, Inc. v. Life Savers, Inc.*, 509 F.Supp. 606 (D. N.J. 1980); *Central States Trucking Co. v. Perishable Shippers Ass'n,* 765 F.Supp. 931 (E.D. Ill. 1991), *aff'd sub. nom, Central States Trucking Co. v. J.R. Simplot Co.*, 965 F.2d 431 (7th Cir. 1992).

In general, questions of liability for shippers' associations and those who deal with them are the same as those relating to shippers' agents, because a shippers' association is considered an agent for each of its members. Thus, both shippers' associations and shippers' agents are governed by the law of principal and agent. The key differences between these two intermediaries are: (1) a shippers' association is a non-profit organization, whereas a shipper's agent operates for profit; (2) a shippers' association is comprised of members, whereas a shippers' agent acts on behalf of individual shippers.

With respect to liability for loss or damage to shipments, it should be remembered that a bona-fide shippers' association is the agent of the shipper; it is not a freight forwarder or a carrier. The association does not issue a bill of lading to the shipper-member, nor does it assume any liability for loss or damage. The association acts as a shipper with respect to

the carrier performing the transportation, and the beneficial ownership of the respective members whose goods comprise the consolidation may or may not be known to the carrier. Nor do the members generally know what carrier will be performing the transportation, or whether their shipments may be subject to limitations of liability. *See Co-operative Shippers, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 840 F.2d 447 (7th Cir. 1988), in which the association negotiated a volume contract with the railroad which was subject to liability limitations in the carrier's exempt TOFC circulars.

Due to the principal/agency relationship, a shipper may be exposing itself to any number of unforeseen risks with respect to freight claims and payment of freight charges when dealing with a shippers' association. For example, in Metro Shippers, supra, a member-shipper (Life Savers) had paid over $200,000 in freight invoices to its shippers' association (Sentinel) for transportation services performed by a shippers' agent (Metro Shippers), which was employed by the association. However, the association failed to remit the payment to the shippers' agent, and the shippers' agent commenced suit against the member-shipper. Finding in favor of the shippers' agent, the court held:

> What Sentinel did with the funds supplied by Life Savers is not known, nor can it affect the outcome here. There are many ways in which shippers' associations may be provided by their members with working funds. Whatever the method, having authorized Sentinel to make contracts on its behalf as principal and beneficial owner of the goods shipped, Life Savers must carry the risk of loss if the agent misapplies the funds. The duty of loyalty and the obligation to account runs from the agent to the principal, not from the third party to the principal. See *Campagna v. U.S.*, 474 F.Supp. 573, especially at 585-586 (D.N.J., 1979). *Metro Shippers*, 509 F. Supp. at 614.

While it is true that a shippers association may be able to negotiate favorable rates, members should consider the risks. Unless the members know all of the terms and conditions of the contracts with carriers, and actively monitor the association, there can be substantial exposure to liability.

535) Shipping Records - Retention

Question: In light of latest provisions of the ICC Termination what period of time do you recommend for retention of shipping documents? I would like to prepare a uniform document retention plan for our Distribution Centers.

Answer: We generally recommend a minimum of 3 1/2 years to retain freight bills and bills of lading. The reasoning is that the statute of limitations on recovery of freight charges by a carrier is now 18 months and statutes of limitation can be extended by 2 years if a carrier files for bankruptcy.

536) Shock and Impact Recorders

Question: Our customer ships motors via an LTL carrier and they use the Tip-N-Tell device on each of the cartons they ship. When the product was delivered to the customer the Tip-N-tell was activated although there was no other apparent damage to the cartons. In some instances the product was returned to them and was inspected and the product was found to be OK, so a claim was filed for the inspection of the product. In other situations the product itself was damaged and a claim was filed for the repair cost.

The LTL carrier has declined these claims. They state the Tip-N-Tell doesn't establish carrier liability. The carrier also asserts that these devices and other shock warnings are unreliable and their experience is that these products go off during normal transit down the highway. Since this damage would not normally be noted upon delivery, but is noted only because the consignee sees that the Tip-N-Tell has been activated, would this be considered concealed damage even though it was noted as damaged upon delivery? What recourse or advice can you give the shipper to collect these claims.

I know in the past it's been illegal to deduct claims from freight revenue. Since the contract between the shipper and carrier doesn't include any provisions to do this, can they still deduct anyhow? What would the repercussions be if they did deduct, other than a strained relationship between the two parties? Is it illegal to deduct freight claims and if so what are the penalties for so doing? Is this provision to not deduct a law or regulation that is still in place?

Answer: In my opinion, if a Tip-N-Tell device is triggered, it is equivalent to seeing a damaged carton (dented, ripped, etc.) and it is only common sense that the carton should be opened and inspected for possible damage to the contents.

The cost of such an inspection, and any re-packaging, is a reasonable expense incurred in mitigation of damages. And, obviously, if the contents are in fact found to be damaged, the cost of repairing the item is a proper measure of damage.

As far as the reliability of the Tip-N-Tell products, it is my understanding that these products have been used for many years and have undergone extensive field testing. I would suggest that the manufacturer would be more than happy to tell the carrier that it is a good, reliable, tested product and would stand behind a claimant who used the products.

It is not illegal to setoff loss and damage claims against freight charges owed to carriers, but there are some ramifications with regard to possible late-payment penalties if the carrier does not agree. See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 12.3.6 for a full discussion of this subject.

537) Shortages - Rail Shipments

Question: Is the railroad liable for shortages when a car is shipped from a warehouse without a signed bill of lading, and delivered without a consignee's signature?

Answer: As a general rule, the railroad is still a "common carrier" and should be liable for loss or damage occurring in its possession. However, your rail boxcar shipments are probably exempt and subject to the railroad's "exempt circular" (tariff). Most rail circulars provide that the railroad will not accept liability without physical evidence of a forced entry into the car. Railroads usually will not pay shortage claims if there is a sealed car and the seals are intact at the destination.

Rail cars should be sealed immediately upon loading, their seals checked before opening the doors, and product counted carefully during unloading. Doors and seals must be carefully checked and their condition recorded before removing product from the rail site. Shortages should be reported immediately to allow the carrier to inspect the car, its doors, seals, etc. Keep the seals and show them to the rail inspector if you suspect tampering.

538) Shortages - SL&C v. SLDC Shipments

Question: Drivers are required to count on "live loaded trailers". They are currently responsible for sealing the trailer for bills clearly printing "SLDC" on the bill. A sign is posted in the

security office advising the drivers to count and it can be seen when signing in at our facility. Our BOL prints SLDC on "live loads", but some drivers will attempt to change that by writing in SLC when signing their name. This has been addressed in our Customer/Carrier Policy and is unacceptable.

Carriers have denied claims on SLDC signed bills because the seal was intact when the shipment delivered. Because of that we stopped giving seals to the drivers. They continue to deny shortage claims even though their acting agent/driver signed for X number of cartons on SLDC loads.

Most all of these loads are shipped FOB Origin Collect and are customer routed with their designated carriers. When the carriers deny the claims the customers deduct payment from their invoice to our company. I think this should be resolved between the customer and their designated carrier, but we spend a great deal of time resolving claims on SLDC BOLs for our customers. We value our customers, but there has to be a better and faster way to resolve these claims.

When the bill reads SLDC shouldn't the carrier be held responsible for any shortages, whether it's sealed or not and whether it's the first or the last stop on the trailer?

We have a Claims Policy along with the Customer/Carrier Policy. I thought we had everything covered, but the carriers do not want to pay the claims. Prevention is the key and we will continue to work towards improvement in this area.

We also have carriers who drop trailers on our yard and we load at our convenience. These trailers are sealed when loading is complete and are billed & signed as "SLC". Even though product is scanned it's almost impossible to prove anything, especially when the trailer is dropped at the destination for unloading via the customer.

We do have carrier contracts, but most often the real problems are on the customer routed shipments and their carriers.

What can we do to resolve these issues and avoid the claims, especially on "SLDC" loads?

Answer: The bill of lading is said to be "prima facie" evidence of the description and count shown on the face of the bill of lading, when it is signed by the driver. If the drivers are present during loading and have opportunity to count the cartons, your Shipper Load, Driver Count (SLDC) notation is proper and should be enforceable.

Shipper's Load and Count (SL&C) shipments are a different story. If the carrier drops a trailer and it is loaded without the driver present, the shipper has a greater burden of being able to prove what was loaded. This is usually done with accurate shipping records and documents, stroke tallies, etc. together with a signed statement or affidavit from the shipping supervisor or some other employee having actual knowledge regarding the loading of the trailer.

Part of your problem seems to be with your customers. If there is shortage on a shipment which is sold "FOB Origin" the consignee/customer has risk of loss in transit and should be the one who files the claim. I also suspect that you may not be getting cooperation in documenting shortages on delivery (proper shortage notations on the delivery receipt, OS&D reports, receiving reports, etc.) and this should be taken up with your customers.

Lastly, if you have legitimate claims and the carriers are not paying them, you should consider sending them to a claims recovery specialist or a transportation attorney for collection.

539) Special Damages - Customer Chargebacks

Question: I have two concerns about special damages.

First, we have a customer that has been charging us approximately $100-$200 per shipment if the envelope of related documents (packing list) is missing. We list this envelope on the bill of

lading as a piece of freight, and the driver signs for all the freight, including the envelope of related documents.

When I filed a claim against the carrier for the missing envelope, the carrier denied the claim, because it doesn't represent "full actual loss, damage, or injury to such property." They also attached a portion Miller's Law, Fourth Edition to emphasize their point. In other words, the carrier believes that our company or our customer is trying to make a profit from this claim. On the other hand, aren't we alerting the carrier to the value of the envelope by listing it on the bill of lading? Shouldn't the carrier be liable, since they signed for the envelope, and they lost it? What is a reasonable charge for a missing envelope of related documents?

Second, we have several customers that are charging us approximately $100 per shipment for bad pallets. I filed a claim for $100.00 for bad pallets. We tendered the freight to the carrier on slip sheets, and the carrier placed the freight on pallets for their own convenience. When the shipment delivered, the customer documented "5 bad pallets" on the delivery receipt. Despite this, the carrier is denying my claim, because it falls under special damages. Shouldn't the carrier be liable for providing unsolicited pallets to our customer?

I appreciate any help, as more customers are starting to charge us for errors of this nature.

Answer: 1. The carrier is definitely liable for the loss of your document package. However, the question is: what is the proper measure of damages?

Since you don't "sell" the documents to your customer, or place a dollar value on them in your invoice to the customer, it could be argued that the value is merely the cost to reproduce another set and send it to the customer. The carrier is somewhat correct in arguing that the $100 - $200 "charge" from your customer is "special damages" because it is not within the contemplation of the parties or foreseeable at the time of shipment. See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.3 for a full discussion of "special damages". If you don't have a copy, it can be ordered from T&LC at (631) 549-8964 or through the web page.

If you want the carrier to be liable for a specific dollar amount, you probably would have to put some explicit language on the bill of lading to the effect that the carrier will be liable for $xxx if the document package is not delivered to the consignee along with the shipment.

Obviously, if you have a transportation agreement with your carrier, this would be a provision which could be negotiated and included in your contract. (We recommend to all our shipper clients that they enter into written transportation contracts with their carriers. If you need assistance in this regard, please contact us.)

There is another issue here also: what gives your customer the right to charge you for missing documents? Is this some provision in the contract of sale or in the purchase order? If not, you don't have to accept the charge.

2. I don't understand how (or why) a customer would charge you for "bad pallets" (or "good pallets" for that matter). The customer is not paying you for the pallets, and I presume that the pallets would normally be returned to the carrier. You shouldn't be involved in this at all, and the same comment as above (is there a provision in the contract of sale or purchase order) applies here also.

540) Special Damages - Delay to Ocean Shipment

Question: We made a shipment from our plant in Wisconsin to a customer in Australia via an ocean carrier. The shipment was 14,000 lbs. and was shipped about April 14th.

Sometime in May we received a call from the carrier stating it had misrouted the shipment to Austria instead of Australia. The carrier asked what should they do. We checked with the customer, and they wanted the shipment air shipped to them. The carrier said it would ship a couple skids but

not the whole shipment. We knew a couple skids would not hold the customer until the shipment arrived, and said we needed all to ship.

The carrier reloaded the shipment on a ship to Singapore, which should have arrived around June 2nd. When the shipment got to Singapore, the carrier asked again what needed to be done. We informed them that our customer might charge us with down time and this was a new customer with a potential of $14,000,000 in sales. Therefore, we insisted again that they air ship the shipment. The carrier said it would cost $13-14,000 to ship all and it wasn't willing to do that. The shipment is expected to deliver today, July 7th.

My question is: If we are charged down time from the customer or possibly lose the customer's business, can we file a claim for our loss?

Answer: As a general rule, carriers would not be liable for "special damages", i.e., consequential damages which result from delay, unless the damages are "foreseeable" or there is actual notice of the potential damages given to the carrier at the time of shipment. This subject is covered in detail in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.3.

There are, of course, always exceptions and it is possible that your communications to the carrier in May and June may have been sufficient to give the carrier notice of the consequences of failing to deliver the shipment in a timely and proper manner.

There is also another issue. The carrier would most likely argue that its liability, if any, is limited by the Carriage of Goods by Sea Act (COGSA) to $500 per package. If so, the counter argument would be that the COGSA limitation is unenforceable because of the carrier's "deviation", see FCIPE at Section 17.2.5.4.

541) Special Damages - Express Freight Charges

Question: We ship transformers that are manufactured in Puerto Rico and then warehoused in El Paso, TX. When a transformer is damaged it often has to be sent back to Puerto Rico for the repairs to be made. However, because the customer often needs to have the product back quickly, it needs to be sent back by air. Is the LTL carrier responsible for damaging the transformer obligated to pay this additional expense, and if not, what can we recover?

Answer: Questions as to recoverable damages require analysis of the specific facts and circumstances of each shipment. There are cases in which express freight charges for replacement of lost or damaged shipments have been allowed, and cases in which they have been denied (as "special damages"). *Freight Claims in Plain English* (3rd Ed. 1995), Chapter 7, Damages, has an in-depth discussion of these issues.

In this situation, it could be argued that the air freight charges are reasonable and foreseeable as an effort to mitigate the damage, i.e., to have the transformer repaired and delivered to the consignee as promptly as possible. Be prepared, however, for the carrier to say that the air freight charges are "special damages" because it was not given notice of the consequences of failure to deliver with reasonable dispatch.

542) Standard Rates and Charges

Question: My company wants to expand into hauling freight. I want to know if there is a publication I can purchase, that would give me standard rates. I have started the authority process, and will probably go the contract carrier route. I just wanted to know if there is a book about normal rates I can use in case of a back haul situation.

Answer: Rates and charges for trucking services are essentially subject to negotiation between the parties as a result of the deregulation of the trucking industry. Most large LTL carriers (such as Yellow Freight) use the National Motor Freight Classification (NMFC) to determine the classification of articles, and then apply rates from a Class Rate tariff which can be individually published or published by a Rate Bureau such as the Middle Atlantic Conference.

I would guess that you would not need to participate in the NMFC or bureau rates, and would want something simpler.

My suggestion would be to contact a consultant such as Bruce Hocum at Samuel Rubenstein Consultants in Minnesota, and ask them to put together a simple tariff for your use. You can reach Bruce at (612) 542 1121.

543) Statutes and Regulations

Question: Can you tell me what are the important DOT, OSHA, or any other regulations or laws that may apply to the transportation industry. Particularly to shipping docks and land transportation.

Answer: The principal statute is the Interstate Commerce Act (Title 49 of the U.S. Code), and the principal regulations are the DOT and Federal Highway Administration regulations (Title 49 of the Code of Federal Regulations). These are available from any law library and the regulations can be purchased directly from the Government Printing Office. Most of this info can also be obtained on line through the Internet.

I should also mention that The Transportation & Logistics Council publishes a monthly TransDigest which covers a variety of current issues including cargo security, loss and damage, etc. There are also texts and other educational materials dealing with loss and damage, although not specifically with the role of a security manager.

544) Stolen Goods - Driver's Responsibility For

Question: I am a driver for a trucking company. The company is looking to me to be liable for a load of freight which was stolen from my truck. Briefly, the truck was parked outside the consignee's yard overnight waiting for them to open. While sleeping in the sleeper compartment, person or persons unknown broke into the trailer and stole $800.00 worth of the freight.

At the beginning of employment I signed an agreement stating that the driver would be responsible for any damage or loss due to the drivers negligence. The company is deducting a weekly amount until it is paid. Can they do this?

Answer: Here is my view: First, the motor carrier would be primarily liable to the shipper or owner of the goods which were stolen, since the carrier issues the bill of lading contract, and common carriers are legally liable for loss, damage or delay to goods in their possession.

Second, if the driver has signed an agreement with the carrier (his employer) whereby he agrees and assumes liability for loss - including theft - from the vehicle, that agreement should be enforceable by the carrier against the driver.

545) Storage on Refused Shipments

Question: This question applies primarily to LTL transportation. When can a carrier begin charging storage on refused shipments. I have been unable to find anything in the NMFC rules that sets time limits on this.

Depending on the carrier and the business volume associated with a specific carrier, the rules seem to change. Since I handle multiple shipping locations, I am trying to get some consistency in our OS&D program and would like to know if there are any rules governing storage and the carrier's obligation to notify the shipper (as well as the required mode of notification) on refused shipments.

Answer: Assuming that you are shipping by common carrier under a Uniform Straight Bill of Lading, the relevant provisions are found in Section 4 of the terms and conditions on the reverse side of the bill of lading. This section provides

"If the consignee refuses the shipment... the carrier's liability shall then become that of a warehouseman. Carrier shall promptly attempt to provide notice...to the shipper of party, if any, designated to receive notice on this bill of lading.... Storage charges, based on the carrier's tariff, shall start no sooner than the next business day following the attempted notification..."

In other words, the Uniform Straight Bill of Lading essentially defers to the individual carrier's tariff for details as to storage rates and rules.

This is one of the reasons why shippers must always be careful to demand a copy of the carrier's rules tariff before doing business, since these tariffs contain the rules governing storage charges (as well as other rules governing accessorial charges, credit terms, liability limitations, etc.).

I would point out that the problems you discuss can be obviated by a properly drafted Transportation Contract, and we always recommend that our clients use such contracts with their motor carriers.

546) Surface Transportation Board

Question: What is the Surface Transportation Board? What responsibilities and/or authority does it have in relation to freight transportation?

Answer: The Surface Transportation Board was created by the ICC Termination Act of 1995 (effective 1/1/96) to take over the remaining responsibilities of the ICC after it was "sunset" by Congress. The STB has some of the powers of the former ICC to investigate complaints, adjudicate disputes, and to enforce specified provisions of the Interstate Commerce Act, such as the freight undercharge provisions in the Negotiated Rates Act.

Other regulatory functions of the former ICC were transferred to the Federal Highway Administration or to the Secretary of Transportation.

547) Tariffs - Applicability

Question: Two carriers are involved in a movement and the goods are damaged. The goods are used. One carrier's tariff indicates their liability for used goods is $2.50 per lb. The other carrier's tariff is $.10 per lb. Whose tariff should apply? Is it the carrier who damaged the goods or the carrier who picked up the goods? There is no declared value on the Bill of lading.

Answer: The shipper's contract is with the first carrier (the "receiving" carrier).

Assuming that a uniform straight bill of lading was used, and that it properly incorporated the carrier's classifications and tariffs, the shipment would be governed by the first carrier's applicable tariff.

548) Tariffs - Construction

Question: A client's shipments are often subject to linear foot rules published by LTL carriers. In order to avoid these rules, they often separate their shipments on two bills of lading thus avoid exceeding the carrier designated linear foot designated. This practice has resulted in lower charges for the client. A carrier has changed the bills of lading and combined both shipments into one shipment. The two shipments were tendered on the same day, from the same location to the same destination. What charges are applicable? Can the carrier combine shipments when they result in higher charges to the shipper (client)?

Answer: The usual rule of tariff construction is that the shipper is entitled to the lowest rate that can be found under the tariff, but it is necessary to see what the tariff actually says. You should ask the carrier for its tariff authority to combine the shipments and charge the higher rate; request a full and complete copy of the carrier's rules tariff.

549) Tariffs - Duty to Furnish on Request

Question: Since carriers could change their rules and regulation at any time, wouldn't I have to get a copy or revision daily of their rules and regulations to see if any changes had occurred? If so, this seems to be an awful burden on shippers!

Answer: Your observation is quite correct. Motor carriers are only required to furnish copies of their tariffs "on request of the shipper". Carriers can, and do, make unilateral changes to their tariffs without notice shippers, as witnessed by the recent flurry of fuel surcharges.

The actual statutory language is found in two similarly-worded sections of the the Interstate Commerce Act, 49 U.S.C. § 13710(a)(1) and 14706(c)(a)(B), the text of which is reproduced below.

> Sec. 13710. Additional billing and collecting practices
>
> (a) MISCELLANEOUS PROVISIONS-
>
> (1) INFORMATION RELATING TO BASIS OF RATE- A motor carrier of property (other than a motor carrier providing transportation in noncontiguous domestic trade) shall provide to the shipper, on request of the shipper, a written or electronic copy of the rate, classification, rules, and practices, upon which any rate applicable to its shipment or agreed to between the shipper and carrier is based.
>
> Sec. 14706(c)(1)(B) [Carmack Amendment provisions]
>
> (B) CARRIER NOTIFICATION- If the motor carrier is not required to file its tariff with the Board, it shall provide under section 13710(a)(1) to the shipper, on request of the shipper, a written or electronic copy of the rate, classification, rules, and practices upon which any rate applicable to a shipment, or agreed to between the shipper and the carrier, is based. The copy provided by the carrier shall clearly state the dates of applicability of the rate, classification, rules, or practices.

550) Tariffs - Limitations of Liability

Question: A carrier's tariff contains a limitation of liability provision that limits its liability to $5.00 per pound or 5 times the total freight charges. It allows the liability to be increased, for an additional freight charge of $1 per $100 up to a maximum of $100,000 plus the 5 times total freight charges. The carrier accepts a shipment with a value in excess of $1 million. No value is declared on the bill of lading. No other freight rates exist for the cargo. The shipper purchases liability insurance from a third party insurer. What is the limit of liability, if any? Is it 5 times the freight? Is there no limit because no choice of rates has been offered which encompasses the full value of the shipment?

Answer: Limitations of liability are a complicated and thorny issue, and more than one-half of the litigation over loss, damage or delay to goods in transit involves some form of liability limitation. Whether limitations are enforceable depends on a very detailed and technical analysis of the facts and the applicable legal principles. I would refer you to *Freight Claims in Plain English* (3rd Ed. 1995), which devotes some 81 pages to this subject (Section 8.0).

To properly answer your question, I would have to review all of the facts and the shipping documents, bills of lading, tariffs, etc.

551) Tariffs - No Duty to Provide Changes or Revisions

Question: Under 49 U.S.C. § 13710 a carrier is required to provide their rates to a shipper upon request. I thought that there was requirement that once a carrier had provided a shipper with a copy of the carrier's rates the carrier could not then change those rates for 1 year without first giving 30 days notice. I have been unable to find any info on such a requirement. Is there such a requirement?

Answer: Unfortunately, motor carriers are NOT required to advise shippers of changes to their rates or rules, even when the shipper has requested and been furnished a copy of their tariffs.

Carriers can (and do) unilaterally increase rates, include limitations of liability and other rules such as a loss of discount or other penalty for late payment, etc. in their tariffs at any time.

552) Tariffs - Participation by Carriers

Question: Is a carrier required to execute a power of attorney to participate in a collectively-made tariff that has been obtained by a shipper through a license agreement for the purpose of establishing rates in a contract between the carrier and shipper (e.g., NFTB 2000, CZAR-Lite, etc.)?

Answer: Carriers are required to "participate" through a power of attorney all in collectively-made tariffs, e.g., the National Motor Freight Classification or the class rate tariffs published by the rate bureaus (MAC, RMB, SMC, etc.) see 49 U.S.C. section 13704.

However, you have to distinguish between collectively-made tariffs and proprietary tariff products which they may publish. for example, Czar-Lite is a proprietary product of SMC. As such, carriers would not have to participate if you want to incorporate Czar-Lite into your transportation agreement. if you want to confirm this, call Jack Smith at Southern Motor Carriers, (404) 898-2265.

553) Tariffs - Rules Governing Claims

Question: A carrier tariff states "governed by L. Agnew Myers Jr., Loss and Damage Claims and Processing Salvage, ICC MLJ 100." Does this publication mimic rules set forth in the National Motor Freight Classification? Would we be wise to get a copy?

Answer: Without seeing the tariff, I have no idea as to what it may contain.

From your description it sounds as though the carrier is referring to a "rules tariff" that may have been filed at one time with the I.C.C. (before enactment of TIRRA in 1994). Unless the tariff was republished and/or adopted by the carrier after the effective date of TIRRA (August 26, 1994), it is legally "null and void", see 49 U.S.C. § 13710(a)(4).

Under any circumstances, you should ALWAYS demand a full and complete copy of any carrier tariffs that may be applicable to your shipments. Better yet, you should enter into written transportation contracts with your carriers that provide that such tariffs are NOT applicable, except and to the extent expressly made part of the contract.

554) Terms of Sale - Liability and Risk of Loss

Question: I arranged transportation with a broker for a drop shipment to our dealer's end user. The Bill of Lading (B/L) was marked prepaid and our sales terms are f.o.b. origin, but neither f.o.b. origin nor f.o.b. destination was marked on the B/L. The shipment was severely damaged and while pictures were taken by the consignee at the time of delivery, they failed to note any exceptions on the B/L when they signed for the shipment. About a week later, our dealer notified us of the situation right after they had been informed of the problem by the end user. I called the broker to advise him of the damage and about a week later forwarded him the pictures after I received them from the end user.

The dealer picked up the damaged shipment and sent it back to us for reconstruction. The dealer is suing the end user for non-payment for goods. The end user is refusing to pay for the goods because they don't have the shipment. No one has filed a claim with the broker, although the end user told me he was going to. I believe any of us can file a claim, but would we be declaring ownership if we filed it?

Also, what, if any, is our liability if we get sued?

Answer: The Uniform Commercial Code establishes certain presumptions about "risk of loss" based on the terms of sale specified in the sales contract. UCC 2-319 provides that where FOB place of shipment is specified, risk of loss passes to the buyer once goods are put in possession of the carrier at origin.

Either the shipper or the consignee may file a claim (regardless of the terms of sale), and, in many "FOB Origin" situations the seller still files claims for loss or damage. Obviously, both parties cannot file a claim for the same loss; this is why the standard form for presentation of loss and damage claims refers to a "bond of indemnity" and carriers often require one.

Your obviously have a problem with your customer. Many customers just want to have undamaged, conforming goods delivered to them and don't want to be bothered with loss and damage claims or other problems with carriers. Some don't understand the significance of the terms of sale, or they don't care, and simply refuse to accept goods damaged in transit. It is really a business decision as to what terms you insist on in your sales contract and whether you enforce your rights at the risk of losing a customer.

The damage claim should be filed with the carrier, as the freight broker is not usually liable for damage to shipments unless it contractually undertakes such liability. (Brokers will often assist shippers with pursuing claims against the carrier as a customer service.) As to your liability, I don't see how you could be liable, unless there was some negligence on your part.

555) Terms of Sale - Presumptions

Question: If the FOB is not specified, is it implied to be origin or destination?

Answer: As a general rule, if the contract of sale (or purchase order, invoice, etc.) is silent as to whether the terms of sale are "FOB place of shipment" or "FOB place of destination", there is a presumption that it will be "FOB place of shipment". This presumption is not expressly stated in the UCC per se, but comes from the court decisions. See, e.g. Windows, Inc. v. Jordan Panel Systems Corp., 177 F.3d 114 (2nd Cir. 1999).

556) Terms of Sale and Risk of Loss

Question: At what point does a shipment qualify to be recorded as a valid sale? Is it when the freight is tendered to the carrier or is it when the freight is delivered? There has been a question raised in relation to a recent legislative measure by the FCC. I am not familiar with any such legislation. Any guidance would be appreciated.

Also, what are the legal definitions for FOB origin / FOB destination?

Answer: It is not clear whether your question relates to "ownership" or "risk of loss in transit".

The risk of loss in transit depends on the contract between the buyer and the seller. "Risk of loss" is usually equated to ownership or title to goods, but the parties may vary this assumption in their contract.

Under Section 2-319 of the Uniform Commercial Code, there are certain presumptions: if a shipment is "FOB Origin" or equivalent, the risk of loss passes to the buyer once the goods are tendered to the carrier at the point of origin. If the shipment is "FOB Destination", the risk of loss remains with the seller during transit. See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 10.5.2 for an explanation of the UCC provisions.

The UCC definitions are:

F.O.B. Place of Shipment - U.C.C. 2-319 provides that where F.O.B. place of shipment is specified, the seller is bound to ship the goods at that place and bears the risk and expense of putting the goods in possession of the carrier. Thereafter, the risk of loss is on the buyer.

F.O.B. Place of Destination - When the term is F.O.B. place of destination, the seller must transport the goods to that place at his own risk and expense and tender proper delivery. Thus, the risk of loss is on the seller during transit.

F.A.S. means “free along side” and requires the seller to deliver the goods to the pier or dock. Risk of loss remains on the seller until such delivery is completed.

C.I.F., in a contract for the sale of goods, refers to “cost, insurance and freight” and means that the price includes the freight and surface costs to the named destination. Risk of loss, however, passes to the buyer once the seller has delivered the goods to the carrier at origin, prepaid the freight, obtained insurance and mailed the shipping documents to the buyer.

C.&F., another common shipping term, imposes the same obligations on the seller except the requirement to pay for insurance.

557) Third party Logistics Providers

Question: We are in the process of revisiting our agreement with our 3rd party logistics provider. In referencing one of your manuals, “Protecting Shippers’ Interests”, am I to assume that the legal status of an asset based 3PL, could actually be any of the following depending on the transportation arrangement:

1. Motor carrier- when they arrange for their affiliated motor carrier to pickup a shipment;
2. Broker- when they arrange for a carrier not affiliated with them to pickup a full truckload; or
3. Freight Forwarder - when they arrange for a LTL carrier, such as CF, to pickup and deliver a shipment.

Answer: You are correct. Third party logistics providers may wear a number of different "hats" and often do. That is why it is so critical to make sure that you have well-drafted contractual agreements with 3PL's and also that you check them out to make sure they are properly licensed and registered as required by applicable laws and regulations.

558) Third Party Logistics Providers

Question: We utilize a third party logistics provider (3PL) to manage the process of getting our merchandise from our vendors into our distribution centers. My understanding is that the 3PL is merely acting as broker on these loads and typically is not liable for loss and damage outside of their negligence or contractually assumed liability. My question is, what if, on the Bill of Lading (BOL), the shipper shows the 3PL as the carrier, when in reality the load is actually brokered to another carrier, who signs the BOL with aforementioned noted. By allowing the carriers to do this, has the 3PL held itself out as a motor carrier, and thus liable as a motor carrier under the Carmack Amendment?

Answer: There is no black and white rule for determining whether an intermediary is acting as a broker or a carrier. Each case turns on the individual facts: the representations which were made, the relationship of the parties, the course of dealing, etc. - as well as the documents. I am not aware of any case which says that a broker becomes liable as a carrier merely because it was shown in the "carrier" space on a bill of lading.

Your question once again points out the importance of having carefully drawn, written agreements between shippers, intermediaries and carriers.

559) Third Party Provider - What Are You?

Question: We are a logistics technology provider that coordinates tours or continuous moves with freight from multiple shippers, which is then moved by a single common carrier at a discounted rate. The tour is “planned” using our technology and tendered to a preferred carrier by our own agents. The dedicated linehaul contract is negotiated between the shipper and carrier. However, we manage the settlement by collecting the linehaul and accessorial charges from the shippers and paying the carrier. Are we considered a broker in this scenario?

We prefer to not be liable for the freight or service. Should there be special considerations in the contract to ensure operational liability lies with the shipper and carrier?

Answer: The definition of a “broker” is found in the FMCSA (formerly ICC or FHWA) regulations at 49 C.F.R. Part 371, and provides:

(a) “Broker” means a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport.

* * *

(c) “Brokerage” or “brokerage service” is the arranging of transportation or the physical movement of a motor vehicle or of property. It can be performed on behalf of a motor carrier, consignor or consignee.

As to your first question, it would appear that your activities fall within the definition of a “broker”. Accordingly, the Interstate Commerce Act requires that you must “register” with the Department of Transportation (FMCSA), see 49 U.S.C. §§ 13901 and 13904. This registration requirement replaces the former statutory requirement to obtain a “license” from the ICC. The FMCSA has established regulations governing applications for broker registration that are published at 49 C.F.R. Part 365.

As to your second question, I would certainly recommend that you have written agreements with both your shippers and your carriers. Matters such as liability for loss, damage or delay to shipments and liability for freight charges should clearly be set forth in the contracts.

560) Time Limits - Air Freight Carriers

Question: When filing a concealed damage claim, what are the legal time limits for filing with the air freight carriers? I know that the air carriers have set their own time restraints, generally 14-15 days, but I seem to remember something about the same rules applying for concealed damage as with loss and damage claim filing.

Answer: Damage Claims: The time limits for filing claims on domestic air freight are set forth in the individual carrier's air waybill and tariffs, see The Official Local Cargo Rules Tariff (No. 95), published by ATPCO. Time limits vary from 14 days in the case of visible damage to 9 months and 9 days for non-delivery.

The time limit for filing loss and damage claims varies significantly from one carrier to another, and it is important to check carefully the conditions on the air waybill and the carrier's rules tariffs. Note that time limits for filing claims on small package shipments are usually even shorter - 45 or 60 days.

Notice of Concealed Loss or Damage: Claims procedures for domestic air freight carriers are generally covered in Rule G60 of the carrier's rules tariff. A typical rule provides that notice of loss or damage after a clear receipt has been given must be made within 15 days, and that the carrier has the privilege of making an inspection within 15 days of receiving such notice.

Receipt without an exception generally establishes prima facie evidence that the shipment was delivered in good condition, but numerous variations of this rule are published in carriers' tariffs. Claims may not be offset against freight charges owed, and will not be entertained unless freight charges are paid. Some carriers make an exception in the case of undelivered freight.

A few carriers provide for filing a notice of intention to file a claim within 30 days after delivery, or within 90 days for non-deliveries.

Note: For a detailed discussion of this subject, see *Freight Claims in Plain English* (3rd Ed. 1995) at Sections 16.2.4 & 16.2.7.

561) Time Limits - Claims Against Air Freight Forwarders

Question: We recently filed a shortage claim with a major air freight forwarder. Our claim was denied because it was not received within the specified filing limit. They claim that all claims must be filed in writing within 120 days from the date of acceptance of the shipment by the carrier. We were lead to believe that the time limit was 180 days. Would like to have your response to this question.

Answer: In the case of a domestic air freight forwarder, the time limit for filing claims is determined by the terms and conditions of the forwarder's air waybill, and its tariff or service guide, which are incorporated by reference in the air waybill. If the shipment was an international air shipment, then the provisions of the Warsaw Convention or the Montreal Protocol #4 would govern.

This subject is covered in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 16.0 and 16.3, which is available from T&LC.

562) Time Limits - Collecting Freight Charges

Question: I represent a motor carrier and filed an action for unpaid freight charges and penalties in state court. Prior to suit the shipper was represented by a freight consultant who disputed the classification of the freight and therefore the rate charged. Although most of the invoices were more than eighteen months old at the time, he never mentioned a statute of limitations defense. When I filed the lawsuit, one of the twelve invoices was within the eighteen month statute of limitation period.

The shipper's attorney raised a statute of limitations defense to all but the one invoice.

Does the statute of limitations run from the date of last account activity, e.g., charge or payment, or is each invoice viewed separately? Does the fact that part of the amount being sued for is penalties and not freight charges per se make a difference as to the running of the statute? Is there anyway to keep the case in state court where the state statute of limitations (3 years) would apply?

Does a partial payment on an invoice change the time from which the statute is deemed to begin running?

Answer: As you probably are aware, 49 USC 14705 provides:

"A carrier providing transportation or service subject to jurisdiction under chapter 135 must bring a civil action to recover charges for transportation or service provided by the carrier with in 18 months after the claim arises."

As a general rule, this statute of limitations is applicable to any interstate transportation of property by motor carrier with the exception of (1) property which is "exempt" under 49 USC 13502 - 13506, and (2) property transported under a written transportation contract pursuant to 49 USC 14101 where the contract expressly waives the provisions of the statute.

Section 14705 expressly provides the claim arises upon delivery of the shipment. I am not aware of any cases that indicate that hold that partial payment affects the running of the statute of limitations.

563) Time Limits - Contract Carriers

Question: I was under the impression that a contract carrier must resolve a claim for damages within a 120 day period of receiving a claim and/or notify me within the 120 day period if additional information is required from me to resolve or further investigate the claim.

I filed a claim for $10,048 for damaged goods and as of today (well after the 120 period) I have received no response from the carrier other than their initial response that they had received my claim. How should I proceed to collect the $10,048 that we are owed from the carrier?

Answer: My first question is: "What does your contract say?" If you have a properly drafted transportation agreement, it should spell out the procedures for filing, acknowledging and processing claims. You should look there first.

If your contract is silent on these issues, the former ICC (now FMCSA) claim regulations are applicable. These are "Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage", at 49 CFR Part 370. The regulations are set out in full at Appendix 65 of *Freight Claims in Plain English* (3rd Ed. 1995).

If you are not getting a response, you may try reminding the carrier about the claim regulations and demand that they comply. Of course, your ultimate remedy, if the carrier refuses to pay a legitimate claim, is to bring a lawsuit.

564) Time Limits - Freight Charges on Shipment to Canada

Question: One of our clients was recently billed for several shipments from Kentucky to Ontario. These shipments took place in 1996. Please advise the current Statute of Limitations for US to Canada and also advise where this statute is published.

Answer: The Interstate Commerce Act contains a statute of limitations which is applicable on interstate and foreign commerce FROM the U.S. TO "adjacent foreign countries" including Canada and Mexico.

The time limit for a motor carrier to bring suit to collect its charges is 18 months, and the citation is 49 U.S.C. § 14705.

565) Time Limits - International Air Freight; Partial Loss

Question: Last Fall '98, we uncovered a clever scheme by someone wherein they were resealing opened cartons with a tape that camouflaged their activity/theft. Unfortunately, several cartons from previous shipments were not uncovered until ten days after receipt. In our operation, we have a "case reserve" situation where only cartons/items that are required in our "active picking" warehouse are opened and checked in (or if there is evidence of pilferage). I reported these concealed/post-dated freight claims to our forwarding agent who prepared a "notice of concealed pilferage" to airlines. I subsequently filed a freight claim with the air carrier. Our insurance company in Italy last week informed me that due to the passing of "7 days after receipt" on filing "notice of concealed pilferage," they will not honor claim. Claim is for around $3000.

Answer: I assume this is an international shipment, in which case the air carrier's liability is governed by the Warsaw Convention. Article 26 of the Convention states that "...in the case of damage" a claim must be made within 7 days from the date of receipt of the goods.

However, this section does not specifically address a non-delivery or partial loss. The court decisions come up with different (and sometimes conflicting) results, depending on the particular facts and the terms and conditions of the air waybill. You may well be able to avoid the 7-day time limit, based on what you have outlined.

I would refer you to Section 16.4.6 of *Freight Claims in Plain English* (3rd Ed. 1995) for a detailed discussion of this issue.

566) Time Limits - Overcharge & Undercharge Claims

Question: A question has been raised within our organization regarding the time limit for filing overcharge and undercharge claims. It is stated as 9 months from date of shipment in the transportation agreement. Is there a specific citation in the C.F.R. that states this limit? If not, could you provide a brief explanation as to why 9 months is stated?

There is an interpretation within our organization that the time limit is 120 days. I am not clear as to basis of this interpretation, therefore, I am looking for any background information to support and/or clarify 9 months.

Answer: The time limits relating to freight charges, overcharges and undercharges are as follows:

1. Freight charges, in general -- A motor carrier has 18 months to file a lawsuit to recover freight charges. 49 U.S.C. § 14705(a).

2. Undercharges -- A motor carrier has 180 days from the date its original freight bill is received by the shipper to issue a freight bill for "charges in addition to those billed and collected" (i.e., undercharges). 49 U.S.C. § 13710(a)(3)(A).

Based on the applicable statutes, if the carrier is seeking to collect original freight charges, it has 18 months from date of delivery to commence a lawsuit to recover those freight charges.

If the carrier is seeking to collect "undercharges", it also has 18 months to begin a lawsuit. BUT, the carrier is required to send the shipper a freight bill for the undercharge amount within 180 days of receipt of the original freight bill as a condition precedent to filing suit to recover its undercharges.

3. Overcharges -- A shipper has 18 months to file a lawsuit to recover overcharges. 49 U.S.C. § 14705(b). BUT, a shipper is required to "contest" all original freight charges (which would include overcharges) AND additional charges (which would include undercharges) within 180 days of receipt of the bill seeking the original charges or additional charges, "in order to have the right to contest such charges." 49 U.S.C. § 13710(a)(3)(B).

In other words, when a shipper is seeking to collect overcharges it must submit a claim with the carrier (or otherwise contest the charges) within 180 days of receipt of the freight bill as a condition precedent to filing a lawsuit. If the shipper contests the bill within the 180 day period, it then has 18 months from the date of delivery to file a lawsuit.

4. The 9 month time period you reference probably stems from the time limits for filing a claim for loss, damage or delay of cargo. Under the Carmack Amendment (49 U.S.C. § 14706) a shipper has a minimum of 9 months from the date of delivery (or a reasonable time after the expected date of delivery) to file a cargo claim. The shipper then has a minimum of 2 years from the date the carrier declines the cargo claim to file a lawsuit. (Note: these are minimum time periods, because they can be extended by agreement, but they cannot be reduced).

5. The 120 day time period you reference probably stems from the federal credit regulations at 49 C.F.R. Part 377. Under the credit regulations a carrier may extend credit to a shipper allowing for the delayed payment of freight charges. The standard credit period under the regulations is 15 days, unless a carrier establishes a longer credit period. The longest credit period that a carrier is authorized to establish is 30 calendar days. Most carriers have a 30 day credit period.

The credit regulations also allow carriers to assess liquidated damages to cover collection costs associated with overdue freight charges. The carrier's collection costs may be expressed as either a separate additional charge or a loss of the shipper's discount.

Before a carrier can recover its collection charges for late payment it is required to send a revised freight bill or notice to the shipper imposing the late payment charge. This revised freight bill or notice of imposition of a late charge must be sent by the carrier within 90 days after the applicable credit period has expired. Since most carriers have a 30 day credit period, the revised freight bill imposing the late payment charge would have to be sent within 120 days (30 day credit period + 90 days to send notice imposing late charge).

You should note that courts are split as to whether a carrier's attempt to collect late payment charges constitutes an "undercharge" claim.

You should also note that it is permissible to alter all of the time limits discussed above in written transportation agreements.

567) Time Limits - Overcharge Claims

Question: What is the time limit for filing overcharge claims? I hear that it is 6 months, but I cannot find anything to substantiate this. If it is 6 months (180 days) what constitutes what the 6 month period? Does it have to be FILED within 6 months or received by the carrier within months?

Answer: Section 13710 of the Interstate Commerce Act (49 USC 13710) covers "Billing Disputes" and provides that

"If a shipper seeks to contest the charges originally billed or additional charges subsequently billed, the shipper may request that the Board [STB] 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."

The statute does not say whether an overcharge claim must be sent or received within the time period. The Surface Transportation Board's opinion, as stated in Docket 41826 (April 9, 1997)is that:

"a document that is faxed or postmarked on the 180th day, in our view, is timely"

Notwithstanding, to avoid problems with carriers I would suggest mailing overcharge claims in sufficient time so that the carrier receives them within the 180 days. If time is short, you can also submit your claims by fax.

Note also that Section 14705 of the Interstate Commerce Act provides for an 18 month statute of limitations for bringing a lawsuit for overcharges.

568) Time Limits - Payment of Freight Charges

Question: What is the legal time period for carrier to be paid by a broker for services?

Answer: There is no "legal" time period for a broker to pay its carriers. However, most reputable brokers pay their carriers promptly (between 7 -15 days) after the load has been delivered. If a broker is not paying you promptly, you should be very leery of handling more work since it may be an indicator that the broker is having financial problems. If you have a question about a particular broker or a complaint, you may try contacting the Transportation Intermediaries Association (TIA) in Washington, D.C. - phone (703) 329-1894.

Lastly, if you have a serious problem with getting paid by a broker, you may wish to consult a lawyer, and you may have to take legal action.

569) Time Limits for Filing Overcharges

Question: We used a transport tanker company for over two years and shipped to several customers on a regular basis. We do not have a signed contract. Our problem is that the freight charges have not been consistent, even on similar shipments. How far back can we go to seek relief from the transport company for overcharged invoices?

Answer: The first question is what was the basis of the original rates? Were these negotiated over the phone, documented in writing in any way, based on the carrier's tariffs, or what? In order to have an "overcharge" you must have some agreement as to what rate was supposed to be charged. It is difficult to answer your question without this information.

The answer would also depend on whether the transportation involved was interstate or intrastate. If the shipments were intrastate, it is possible the state's statute of limitations for contracts may govern (which varies from state to state, but generally ranges from 3 to 6 years). If the shipments were interstate, the time limits for filing overcharges with motor carriers, are in 49 U.S.C. §13710(a)(3)(B), which provides:

> "If a shipper seeks to contest the charges originally billed or additional charges subsequently billed, the shipper may request that the [Surface Transportation] 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."

Most motor carriers interpret this section to mean that overcharge claims must be submitted within 180 days or they will be time-barred.

Furthermore, even if you "contest" the freight bills within 180 days, 49 U.S.C. §14705(b) requires that a civil action must be commenced within 18 months after the claim accrues.

570) Time Limits: Exceptions to "9-Month" Rule for Filing Claims

Question: Are there any exceptions to the rule that a claim must be filed within 9 months or the carrier need not pay it? We filed a claim form but left the "Amount of Claim" box blank because we didn't know the exact amount of our loss. The carrier's agent told us that we should file the claim immediately even if we didn't know the amount actually lost.

Answer: Yes, there are exceptions. However, the first question should be whether the documentation filed within 9 months met the legal requirements for a claim. The regulations require that the claim state a "specified or determinable amount of money." Therefore, some amount must be stated, preferable the maximum value of the shipment, or an estimate of that value. If no amount is stated, some courts have found under these circumstances that no claim was filed within the 9 months limit.

When an estimated amount was stated within 9 months, the 9th Circuit has held that a claim was sufficient even when the actual loss was not determined until later. See INA v. G.I. Trucking, 783 F. Supp., 1251 (N.D. Cal. 1991), reversed on appeal, 1 F.3d 903 (9th Cir. 1993), cert. den., 114 S.Ct. 690, 126 L.Ed 2nd 658 (1994).

As to your being told by the carrier's agent that it wasn't necessary to know the amount of loss before filing, some courts have applied the principles of waiver and estoppel under similar circumstances. See Sections 8 & 9 in *Freight Claims in Plain English* (3rd Ed. 1995) for a thorough discussion of this subject.

571) Time Limits; 9-Month Limit for Filing Claims

Question: Is there any way to get around the fact that a claim was not filed against a carrier within 9 months? The carrier was notified by telephone of a $12 million claim in time, and we attempted to salvage the damaged goods, but failed to finalize the claim until after 9 months.

Answer: Assuming that the shipment moved on a uniform straight bill of lading, the shipper was required to file a claim in writing within 9 months of the date of delivery. The court decisions generally uphold the 9-month time limit in the uniform bill of lading, with only a few exceptions. (The subject of "Time Limits" is discussed in detail in Chapter 9 of *Freight Claims in Plain English* (3rd Ed. 1995); also see Section 10.2.3, "No Formal Claim Filed".) I would say that, even though there were other communications that might have led the shipper to believe the carrier was still considering its claim, this would still not cure the late filing. However, a claim of this size would appear to warrant extensive research and study of the facts and circumstances.

572) Trade Show Returns

Question: We send freight to a number of industry trade shows throughout the year. Nine out of ten shipments are usually returned or should I say "Forced" via the convention center's house carrier. The freight desk always claims that our carrier did not show up for the shipment. We always make sure that one of our contractual LTL carriers are on the list of carriers for the show, we make sure that the bill of lading is marked for that carrier, but without fail the freight is forced. In the case of full load, we get the drivers call number in the marshalling yard, but it seems they are never called to load.

1. What recourse if any do we have with conventions centers exhibition service ?
2. Can we short pay the carriers freight bill to reflect the charge we would have paid using our carrier?
3. What are your suggestions for convention returns?

Answer: Unfortunately, the situation you have described is all too common. Many of the major carriers have set up their own agents at convention centers, often at the official "transportation desk". These agents usually receive a commission for any business they can steer to the carrier. Often unscrupulous agents will claim that your carrier did not show up, or missed the "window" for picking up the exhibits, or give some other flimsy excuse as to why the freight was not given to your designated carrier, in order to get their commission.

When your shipment is given to the agent's favored carrier, it generally is rated at full tariff class rates (no discount), resulting in freight charges which can be two or three times higher than the rates you have negotiated with your own carrier. In addition, your shipment may be described as "used" equipment with a low released rate such as 10 cents per pound.

If you encounter these problems, you should file a formal written complaint with the convention management and with the offending carrier (send T&LC a copy too!).

As for short-paying the freight bill, you can try it, but the carrier may institute collection proceedings or a lawsuit. The carriers, by the way, usually take the position that the agents at the convention center are the agent of the shipper, and can thus bind the shipper to the rates, charges and other tariff provisions which may be incorporated through the bill of lading.

573) Transportation Contracts - Requirements

Question: Is there any need to include "distinct needs" or refer to a "series of shipments" in new motor carrier contracts? I know I should purchase your model contracts disk, but I am wrestling with a deadline. My feeling is that motor contracts no longer require these little tricks.

Answer: Technically, there is no longer a requirement for "distinct needs" or "a series of shipments" in a motor carrier contract. The previous ICC regulations were eliminated and the statutory requirements were superseded by the ICC Termination Act of 1995. The only statutory provision (49 USC 14101) says that a carrier "may enter into a contract with a shipper... to provide specified services under specified rates and conditions..."

We still include language in the boiler plate contract which refers to distinct needs and a series of shipments (out of an abundance of caution); this is only because if a contract were to be questioned, it might be easier to convince a court that the transportation services were contract as opposed to common carriage.

574) Truck Drivers - Overtime

Question: I have searched but have never been able to find any of the laws that actually exclude the trucking industry from paying their employees "overtime" when working in excess of the "standard" 40 hour week.

I fully understand the regulations concerning the 70 hour/8 day rules and 60 hour/7 day laws, BUT those are plainly stated as MAXIMUMS.

In the State I live in (Utah) there are numerous trucking companies who never pay their drivers ANY overtime, regardless of how many hours they work.

I guess I have a couple of questions for now:

1. Can a Company "force" you to work more than 40 hours in any consecutive 7 day period?
2. If you do work the full 70 hours in 8 days, why no overtime after 40 hours?

It appears to me that this has just become more of a "standard practice" instead of being actual laws. please enlighten me.

Answer: The answer to your question involves the interaction of a number of federal and state laws. I would suggest the following:

1. If you are a member of a union, contact your union representative. Overtime compensation is usually covered in the collective bargaining agreement between the union and the employer.
2. If you are not in a union, contact the personnel or human resources department in your company and ask them about the company's overtime policy.
3. If you are not satisfied with the result, contact the local office of the department of labor in your state.

575) Unreasonable Rules in Railroad Contracts

Question: I need your opinion on the following matter. Railroads often insert statements like "we must be notified of damage or shortage within 24hrs of delivery". This statement seems somewhat unreasonable in real terms. They then use this statement to decline claims not reported within the specified period.

Is this valid? Shouldn't there also be a statement that says they will decline claims for damage not reported within their terms?

Is this a legal procedure?

Any light you can shed on this would be greatly appreciated.

Answer: Check your railroad contracts or Exempt Circulars for the claim rules. Some require 24 hr. notice as a condition for liability. Yes, this is unreasonable, and should be negotiated out of the agreement at its inception. There are many other unreasonable rules in railroad contracts.

576) Waiver - Carmack Amendment Provisions

Question: Can a trucking company waive the statutory provisions governing liability to shippers in the "Carmack Amendment" to the Interstate Commerce Act? I am referring to things like liability limitations, time limits for filing complaints or actions against the trucking company if goods become damaged or missing, etc.

Answer: The ICC Termination Act of 1995 provides that a carrier may enter into a contract with a shipper to provide specified services under specified rates and conditions.

Section 14101(b) also provides that "If the shipper and carrier, in writing, expressly waive any or all rights and remedies under this part for the transportation covered by the contract, the transportation provided under the contract shall not be subject to the waived rights and remedies and may not be subsequently challenged on the ground that it violates the waived rights and remedies. The parties may not waive the provisions governing registration, insurance, or safety fitness..."

In other words, if the parties enter into a formal written transportation contract, and expressly waive provisions of the Act, they can change the minimum time limits for filing claims and bringing suit, or provide for limitations of liability which would not otherwise be allowed.

577) What's in a Name? - Carrier Mergers and Name Changes

Question: We are experiencing carrier mergers, acquisitions, etc, and are receiving bills of lading with the old carrier's name on them. Are we safe in continuing to ship on these bills without naming the new carrier? Some say "an affiliate of _____".

Answer: Based on our experiences with undercharge cases, shippers must insist on legally correct bills of lading and contracts showing the proper carrier name. Bankruptcy lawyers will attempt to renounce any contract in the name of a carrier that was merged or acquired unless there has been an adoption of the contract or tariff. A properly drawn contract would have a clause referring to the assumption of the contract by successors, but only with the shipper's consent. Without such a restriction, a shipper could readily acquire a contract carrier controlled by undesirable interests.

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