Transportation & Logistics *Q&A in Plain English*

Books 7, 8 & 9 - A Compilation

By
George Carl Pezold
and
Raymond A. Selvaggio

Transportation & Logistics Council, Inc.
120 Main Street, Huntington, New York 11743

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Library of Congress Catalog Card Number: 99-075736

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Printed in the United States of America.

INTRODUCTION

"Transportation & Logistics - Q&A in Plain English - Books 7, 8 & 9 is a compilation of the seventh, eighth and ninth books in this series of the Council's popular texts that were originally published in 2009 through 2013 .

Based on hundreds of actual questions submitted to the Transportation & Logistics's "Q&A" forum on the Internet, to the T&LC HotLine and to the *TransDigest* by shippers, carriers and logistics professionals, the new text is loaded with informative 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.

"Transportation & Logistics - Q&A in Plain English - Books 7, 8 & 9" is intended to be a useful deskbook, and a refresher and handy reference for experienced transportation and logistics professionals. It will also serve 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 texts and educational materials, such as *Freight Claims in Plain English* (4th Ed. 2009), 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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ACKNOWLEDGEMENTS

The authors wish to thank Stephen W. Beyer, Editor of the TransDigest, and Michael Bange, of Champion Transportation Services, for their invaluable assistance in editing and proofreading the text.

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BANKRUPT CARRIERS – TRUSTEE RETENTION OF RECORDS

Question: In the case of a carrier bankruptcy, what becomes of the bankrupt carrier's legal documents, and in particular proof of delivery information? Put another way, does the trustee of the bankrupt carrier's estate have a legal obligation to maintain the carrier's records and provide information relating to delivery/non delivery?

Answer: The federal requirements governing record retention are found in the Federal Motor Carrier Safety Administration's ("FMCSA") regulations at 49 CFR Part 379 - Preservation of Records, and apply to all motor carriers and brokers. The regulations specify various time periods depending on the type of record.

I would think that a debtor in possession or a trustee would have a duty to retain records at least for the time specified in the FMCSA regulations, or until authorized by the bankruptcy court to destroy the records.

BILLS OF LADING – BLIND SHIPMENTS

Question: We have a customer who wants their shipments in truckload form and they go out "blind" showing their complete name and address. The bill of lading ("B/L") is faxed to us. They do not want any part of our name or address shown on the B/L and their B/L is not as stringent as ours. I was under the impression the driver had to have a document that showed his actual place of pick up, as far as city/state goes. They are in another city and state altogether. Should the "exit" city/state and/or zip be shown on the original B/L and if that party does not pay the freight, are we responsible? I have no idea what the terms of sale are because we are not privy to same.

Our customer forwarded his B/L to use and I do not like using another B/L, for obvious reasons. It is apparent the driver's place of pick up, if stopped by the Department of Transportation, would certainly not match his paperwork. I did not contract the carrier he is using and was not sure if we could be held liable for payment of the freight charges should our customer neglect to pay this carrier.

Answer: Remember that the bill of lading is a legal document - the "contract of carriage".

The federal regulations at 49 CFR Part 373 specify the minimum requirements for a bill 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 suggest that your bills of lading should show the correct (actual) shipping address and delivery address. This would avoid any problems in rating the shipment, or if there should be any reason for the carrier to return the goods (unable to deliver, refused or rejected by consignee, transit damage, etc.).

You can show your customer's name as the consignor if you are authorized to do so. If you do this, and the bill of lading is "prepaid", then the carrier will look to your customer as the shipper for the payment of freight charges.

BILLS OF LADING – COMPARED TO DELIVERY RECEIPTS

Question: I purchased your book a few years ago and it has been very helpful. I am trying to drill down on a particular issue when it comes to liability though. I am finding a gray area between the Bill of Lading and a Delivery Receipt/Proof of Delivery.

As our understanding, the Bill of Lading is the legal document of the pack. Whenever we are short or have damages, we notate the Bill of Lading next to where the goods are listed if something is amiss with the load.

We have some of our carriers that are stating that their Delivery Receipt/Proof of Delivery is what they go off of. Most of the time, these documents only state what a general load is - number of pallets or just a container number. Our warehouses do not notate on these - they notate on the bill of lading.

Is there something in the book that talks about which one is more accepted from a legal standpoint?

Answer: Carriers are required by law to "issue" a bill of lading or receipt for goods, 49 U.S.C. §14706. In practice, bills of lading can be prepared by the shipper or by the carrier. The bill of lading is often referred to as the "contract of carriage", and most bills of lading contain terms and conditions on the face and/or the reverse side, or they incorporate other documents such as the National Motor Freight Classification and carrier's tariffs.

The bill of lading is not the same as a delivery receipt, although it may serve that purpose.

Practices vary -- For most truckload shipments, the carrier's copy of the bill of lading travels with the shipment and is used as a delivery receipt, with over, short or damage ("OS&D") notations made on the bill of lading at the time of delivery. Many less-than-truckload carriers, however, convert the information from the bill of lading and print out a "pro" that travels with the shipment, and serves as a delivery receipt. In such cases the bill of lading may not accompany the shipment to destination.

It really does not make any difference from a legal point of view which type of document is used for a delivery receipt. The purpose of the delivery receipt is to show that the consignee received the goods shown on the document, and that any OS&D conditions that were observed at the time of delivery are noted and adequately documented.

I realize that some forms of delivery receipt ("pros") do not have the same level of detail regarding the quantity, description, weight, etc. of the goods that are shown on the bill of lading. If this is the case, it is important that any OS&D notations are carefully made to describe exactly what was over, short or damaged with an adequate description of the item and the problem. Many shippers also create a separate OS&D report to support potential claims.

BILLS OF LADING – EFFECT OF MISDESCRIPTION ON CLAIM

Question: We had several trucks from one carrier go to a shipper and pick up loads. They were loaded and given a bill of lading ("B/L") instructing them to take the product to the receiver (a recycling company) and the description of the product on the B/L was scrap. On the way to delivery one of the trucks was broken into and product was stolen. Police report was made and customer was notified. After arriving at the receiver the carrier was notified to have all trucks return as the shipper had made a mistake and loaded new test product on the trailers instead of

scrap as indicated. This was very expensive electronics and so the carrier put team drivers on the loads and sent them back to the receiver.

The customer has now filed a claim and they want the full value for the stolen electronics. The carrier believes they should only be liable for what the customer would have gotten for scrap for that material and that the warehouse that loaded the product should be liable for the rest. I am not disagreeing with the carrier but I was wondering if there was any case law that would have a similar situation to this that I might use to explain to the customer why this would be true.

Answer: Your question raises a number of factual and legal questions.

1. Why would anyone steal a load from a trailer when the shipping documents describe the contents as “scrap” - unless the person knew that there was a valuable shipment inside? (Further investigation would be indicated.)

2. Was there any applicable and enforceable liability limitation in the carrier's bill of lading or tariff? (Need to check the bill of lading and carrier's rules tariff, if any.)

3. Does the misdescription of the product on the bill of lading bind the shipper so as to limit the carrier’s liability to the value of “scrap”? This is an interesting question and there are only a few court decisions dealing with the subject. I realize that this may be a lengthy answer, but the following is a memorandum on this subject.

* * * * *

The Carmack Amendment, 49 U.S.C. 14706, provides that the measure of damages for loss or damage is the claimant’s “actual loss”. The question is whether there would be circumstances where a shipper would not be entitled to its actual loss where the shipper has misdescribed the commodity being shipped on the bill of lading. The following court decisions have dealt with this issue.

1. *Mass v. Braswell Motor Freight Lines, Inc.*, 577 F.2d 665 (9th Cir. 1978) involved the loss of a part of a shipment of rare and valuable old movie posters and display stills. The question was whether the shipper could recover the full value of the lost material (about $18,000) because it was misdescribed on the bill of lading as “printed material”.

The carrier contended that the shipper deliberately failed to state the value of the shipment to the rate-clerk in order to obtain a lower freight rate. The carrier pointed to the freight bill for $102.66 for 48 cartons of “printed material” weighing 1342 pounds shipped from New Orleans to Los Angeles. This bill was based on the freight rate for shipping printed material of “no specific exchange value, premium value or redeemable value.”

The court referred to a common law rule that a shipper who intentionally fails to disclose the high value of his shipment in order to get a lower freight rate is barred by his misconduct from recovery for a loss the carrier did not anticipate and cited *Semi Metals, Inc. v. Pinter Bros.*, 135 N.J. Super. 464, 343 A.2d 757 (App. Div. 1975); *Allied Vans, Inc. v. Smith*, 28 Colo. App. 85, 470 P.2d 926 (1970) (both construing the Carmack Amendment), and II Kent’s Commentaries 603-604 (990-991) (14th ed. 1896).

It should be observed that this principle requires that the rate is dependent on the value of the commodity being shipped, that there are two or more rates in the carrier's tariff that could be applied based on the value stated by the shipper, and that the shipper intentionally misdescribes the commodity in order to get the lower rate.

The court noted that the shipper has shipped similar materials before that had incurred damage and had not declared any value on the bill of lading, and remanded the case back to the lower court, stating that it should have submitted the carrier's defense of fraudulent misdescription to the jury.

2. *A.I.G. Uruguay Compania v. AAA Cooper Transp.*, 334 F.3d 997 (11th Cir. 2003) involved a shipment of cellular phones worth $126,000 from Motorola in Illinois to Miami, Florida, where they would be shipped onward to Uruguay. The customer had engaged a freight forwarder, Miami International Forwarders ("MIF"), which in turn contracted with Cooper to handle the movement to Miami. The shipment mysteriously disappeared while in Cooper's possession.

One of the issues in the case was whether the carrier was entitled to a limitation of liability, because the commodity was misdescribed on the bill of lading.

The description of the commodity on the bill of the lading was "NMFC 61700, Class 100", which covers "Electrical Appliances or Instruments . . . in inner containers, in cloth bags, or in boxes." Cooper argued that the appropriate category for this shipment was actually NMFC 62850, which applies to "Radio-telephones, cellular (Cellular Telephones), . . . in boxes."

According to NMFC 62851, NMFC 62850 applies to those phones "not specifically released as to value in accordance with the provisions of item 62820 at time of shipment". Because the form bill of lading used by Motorola in this case had no space for a declaration of released value, it would be impossible to comply with item 62820, which requires that any released value "must be entered on shipping order and bill of lading in [a specific] form."

Although the court did agree with Cooper that NMFC 62850 was the appropriate classification, it did not agree that this would have limited its liability, stating:

> However, the only effect of re-classification to NMFC 62850 would be that Cooper would have charged more to transport the Motorola shipment. NMFC 62850, like the misrepresented category NMFC 61700, does not contain within its terms a limitation of liability. At this point, re-classification to NMFC 62850 would probably only allow Cooper, if it wished, to collect the difference between the shipping charge, but, as Cooper refunded the entire shipping charge once the shipment was lost, that avenue of recovery appears waived.

Cooper also argued that the court should re-classify the shipment as a punitive measure for its misrepresentation of the commodity on the bill of lading, but the court rejected the argument, stating "we have no reason to believe that the misdescription was fraudulent, rather than a mistake."

The court concluded:

> So the only difference in this case if the shipper had correctly represented the contents of the shipment is that Cooper may have charged a higher rate for the transportation of those goods. The goods still would have disappeared, AIG would still have paid the claim for loss to Abiatar, and AIG as subrogee would still sue Cooper for the full value of the shipment. We find in this circumstance that preserving the contract-based relationship between carrier and shipper would be more prudent than reading in a limited liability provision for punitive purposes. Therefore, we find that the district court did not err in determining that Cooper did not limit its liability for the Motorola shipment.

3. The most recent case is *Diane's Trucking, LLC v. Holmes QST, Inc.*, Case No. 05-72635 (E.D.Mich. July 31, 2006). In this case, Sovereign Sales, a distributor of perfume products requested Diane's Trucking d/b/a Load One to transport a shipment from its contract packer, Pak Rite in Michigan to its customer, Walgreens in Florida. Load One apparently brokered the shipment to Holmes QST, which engaged an owner-operator, Robert E. Foster, d/b/a TAB Transportation to handle the movement. En route, the truck was broken into and a quantity of the product was stolen. Load One paid Sovereign's claim in the amount of $71,745; Sovereign assigned its claim to Load One, and Load One then sued Holmes and Foster, alleging negligence, breach of contract and indemnification under the Carmack Amendment.

Holmes did not move for summary judgment on the merits of the underlying claim. Rather, Holmes contended that the claim was barred because Load One intentionally misdescribed the

cargo as "toilet preparations" and, therefore, it should not be found liable for the resultant damages. Holmes argued that under the Bills of Lading Act, 49 U.S.C. Section 80116, any intentional misdescription serves as a bar to the recovery of damages. The court disagreed, stating:

> Defendant Holmes states that 49 U.S.C. Sec. 80116 provides criminal penalties for intentionally misdescribing cargo. Title 49 U.S.C. Sec. 80016 is a criminal statute, and Defendant Holmes has provided no authority for utilizing this particular criminal statute as a bar to filing a civil suit. Further, the statute imposes criminal penalties only upon a showing of a specific intent to defraud. In this civil action, this Court does not find specific criminal intent to defraud Holmes based on the cargo label "toilet preps full value." Thus, the Court finds that 49 U.S.C. Sec. 80016 does not support Defendant Holmes' contention that Plaintiff's claim is barred.
>
> Holmes also stated that it would not have accepted the cargo for shipment had the value been known because its insurance policy coverage limit was $100,000.00, and the cargo in question was valued at over $140,000.00. Holmes argued that the failure to disclose the exact nature and value of the cargo established a situation where there is no valid bailment of goods, and precluded a finding of liability.

The court noted that Holmes never requested an explanation of either the exact nature of the goods, or the specific value of the cargo, and that in any event, the shipper would not have had to pay higher shipping costs for more valuable cargo, i.e., the rate was not dependent on value.

The court found that Holmes failed to show that Load One or Sovereign had a duty to provide any more detail on the bill of lading other than what was provided by Sovereign, and failed to show that the description "toilet preps - full value" was an inaccurate manner of describing the cargo. There was also no proof that the shipper was trying to fraudulently conceal the value of the goods. The court concluded:

> Consequently, even if the cargo did contain an inaccurate description, Defendant Holmes has not met its burden of proving that the alleged misdescription caused or contributed to the eventual loss.

Based on the facts as you have described them, there is apparently no evidence that the shipper misdescribed the commodity in order to get a lower freight rate. It is most likely that the rate was a spot truckload rate quoted by the carrier, and not a tariff rate that was “dependent on value”. It is also unlikely that the carrier inquired about the value of the shipment, and the shipper had no obligation to tell the carrier. Under the court decisions discussed above, it would be my opinion that the shipper is entitled to its actual loss.

BILLS OF LADING – INCORPORATING NON-STANDARD TERMS

Question: I have a question relating to a sentence highlighted in yellow at the bottom of the shipper’s Bill of Lading. This sentence reads, “The driver whose signature appears below, acknowledges receipt, understanding, and compliance with the Driver Safety and Disclaimer Sheet.” The second sheet within the attachment contains the Driver Safety and Disclaimer Sheet. I was told that the signed Driver Safety and Disclaimer Sheet is not kept for future reference.

I was under the impression that the shipper could not insert statements to the Bill of Lading that specifically burdens the carrier with additional liability. Is that allowed?

Answer: Although the law requires the carrier to “issue a receipt or bill of lading”, 49 USC 14706, it is common for shippers to prepare bills of lading, which the driver signs to acknowledge receipt of the goods.

I don't think there is any "legal" reason why a shipper can't include special instructions on a bill of lading. After all, carriers include provisions that incorporate the terms and conditions of the Uniform Straight Bill of Lading, classifications, tariffs, etc. by reference in their bills of lading all the time.

It would be my opinion that if the carrier accepts a shipment pursuant to a bill of lading that is prepared by the shipper, it would be bound by the provisions of that contract of carriage.

I would only note that the particular bill of lading you furnished does include some very old (pre 1998) language at the top that incorporates the "classification and tariffs in effect on the date of this Bill of Lading". It is possible that there could be some conflict (or ambiguity) with the shipper's "Driver Safety & Disclaimer Sheet" that could be a problem.

Bills of Lading – Is Weight Required?

Question: I have a simple question that I want to see what the correct answer is...I'm second-guessing myself. Does a bill of lading/driver paperwork have to have the weight of the load on it? I have a load out of California to Texas that has paperwork that says "transfer order" with a list of the product and case count but not weights per item or total weight for the transfer? And yes, of course, I have a problem with it.

Answer: The only legal requirement that I am aware of that relates to bills of lading and weights is found in the Federal Motor Carrier Safety Administration ("FMCSA") regulations at 49 CFR 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).

Presumably, the carrier that picked up the freight at origin should have shown the weight on the bill of lading it issued for the shipment. However, it is questionable whether this requirement in the FMCSA regulations would apply to a "transfer" (on an interlined shipment).

Bills of Lading – Multiple Parties and Shipments

Question: I wanted your opinion on a direction one of our customers is taking with purchased freight. They want to partner with another of our customers and have us consolidate freight on same truck. Purchase terms are FOB Origin, Freight Terms are collect - their carrier picks up.

They want their backhaul allowance to be based on the final ship to (in Maine) and the carrier will cross-dock in Pennsylvania. My concern is the bill of lading will indicate Maine as the final ship to and the carrier will be asked to off load in Pennsylvania. What is the shipper's responsibility in providing paper work accurately? I am also concerned with any damages along the way, if product is damaged at cross-dock or in route from cross dock to final they may want to come back and claim it was damaged at pickup.

Also, if customer A's carrier takes possession - Customer B would not have the ability to claim against customer A's carrier if there were issues.

If our customer asks us to show the destination as Pennsylvania on both deliveries, would there be legal implications, knowing the destination customer was actually in Maine. I guess there could be some tax implications with sales tax if it were different or if the final was going to a different country. What are your suggestions?

Answer: It seems to me that you really have two separate shipments: one to Customer B in Pennsylvania and one to Customer A in Maine. It probably would be best to cut two bills of lading showing you as shipper, with Customer A's carrier as the carrier, and with the respective customers (A&B) as the consignees with the actual origin and destination points.

I would think that your Customer A could work out the freight charges with their carrier, so that it would be the same as a through movement from you to Customer A, with a stop-off en route.

If Customer B loads additional product on the truck at its facility in Pennsylvania, for delivery to Customer A, a separate bill of lading should be cut for that shipment.

It is always a best practice to show the actual parties (shipper, consignee, carrier) on the bill of lading to avoid confusion and problems, since the bill of lading constitutes a "contract of carriage". In any event, since your terms of sale are "FOB Origin", under the Uniform Commercial Code the risk of loss in transit should pass to the consignee-buyer(s) when the goods are tendered to the carrier at origin.

I don't see how this would affect your liability as the shipper. However, for Customer A in Maine, it could be construed as two separate shipments: one from your facility to Pennsylvania, and one from Pennsylvania to Maine. If there was loss or damage, and the place of the loss could not be determined, it could be difficult for Customer A to meet its burden of proof (good order & condition at origin; loss or damage at destination).

Bills of Lading – Section 7 Non-Recourse Provision

Question: Does a "physical" signature of the consignee's agent need to be in the Section 7 box and at the bottom of the Bill of Lading to have an executed contract or can a "pre-printed" corporate name i.e. XYZ FOODS, INC., serve to execute the intent of the contract?

I'm not sure our shipping clerks have the authority to execute this document.

Answer: I assume you are using some version of the Uniform Straight Bill of Lading.

If so, "Section 7" (the non-recourse provision) can be pre-printed on the bill of lading with the shipper's name (not the name of the consignee).

As far as signatures at the bottom of the bill of lading, there is no legal requirement for the shipper to sign the bill of lading. If the bill of lading is to be used as a delivery receipt, e.g., for full truckload shipments, then the consignee should note any exceptions (damage, shortage, etc.), sign and date the bill of lading (and retain a copy).

Bills of Lading – Signature Requirement

Question: We are changing our bill of lading ("B/L") form from a dot matrix printer 4-part form to a laser printer printed document that will give us 2, 3, or 4 printed separate B/L forms. With this many forms for one shipment times the number of shipments/day, the question has been asked, if the B/L signature line can be stamped by the shipping clerk or does it legally need to be signed?

Answer: There is no legal requirement for a shipper to sign a bill of lading. (Obviously, it is important for the carrier's driver to sign the B/L, since it is your evidence that the carrier received the goods.)

However, if you are shipping hazardous materials, the federal regulations do require a certification:

49 CFR §177.817 Shipping papers.

(a) General requirements. A person may not accept a hazardous material for transportation or transport a hazardous material by highway unless that person has received a shipping paper prepared in accordance with part 172 of this subchapter or the material is excepted from shipping paper requirements under this subchapter. A subsequent carrier may not transport a hazardous material unless it is accompanied by a shipping paper prepared in accordance with part 172 of this subchapter, except for § 172.204, which is not required.

(b) Shipper certification. An initial carrier may not accept a hazardous material offered for transportation unless the shipping paper describing the material includes a shipper's certification which meets the requirements in §172.204 of this subchapter. Except for a hazardous waste, the certification is not required for shipments to be transported entirely by private carriage and for bulk shipments to be transported in a cargo tank supplied by the carrier....

*   *   *   *

§172.204 Shipper's certification.

(a) General. Except as provided in paragraphs (b) and (c) of this section, each person who offers a hazardous material for transportation shall certify that the material is offered for transportation in accordance with this subchapter by printing (manually or mechanically) on the shipping paper containing the required shipping description the certification contained in paragraph (a)(1) of this section or the certification (declaration) containing the language contained in paragraph (a)(2) of this section.

(1) "This is to certify that the above-named materials are properly classified, described, packaged, marked and labeled, and are in proper condition for transportation according to the applicable regulations of the Department of Transportation."

Note: In line one of the certification the words "herein-named" may be substituted for the words "above-named".

(2) "I hereby declare that the contents of this consignment are fully and accurately described above by the proper shipping name, and are classified, packaged, marked and labeled/placarded, and are in all respects in proper condition for transport according to applicable international and national governmental regulations."

*   *   *   *

(d) Signature. The certifications required by paragraph (a) or (c) of this section:

(1) Must be legibly signed by a principal, officer, partner, or employee of the shipper or his agent; and

(2) May be legibly signed manually, by typewriter, or by other mechanical means.

BILLS OF LADING – USE OF PROPER DOCUMENTATION

Question: I have a couple of shipping locations that give work orders or pick tickets to carriers instead of bills of lading. What can I tell them to make them realize that this is not a smart thing to do?

Answer: The Carmack Amendment, 49 USC §14706, and the Federal Motor Carrier Safety Administration ("FMCSA") regulations require that a motor carrier issue a "receipt or bill of lading" for property that it receives.

Most shippers prepare some form of a bill of lading, which is provided to the carrier's driver for signature to acknowledge receipt of the goods by the carrier. Some accept the carrier's bill of lading, and some use other documents such as shipping orders or delivery orders to document that the carrier has received the goods.

The federal regulations at 49 CFR Part 373 specify the minimum requirements for a bill 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).

Bills of lading usually contain additional information: freight payment terms (prepaid, collect, bill to third party), special instructions (protective service, delivery appointments, COD collection), agreed or declared value (liability limitations), carrier information (SCAC code, trailer number, seal number), etc.

Formal bills of lading, such as the Uniform Straight Bill of Lading published in the National Motor Freight Classification, are considered by the courts as "contracts of carriage" because they usually contain terms and conditions that are either printed on the bill of lading or incorporated by reference (such as classifications, tariffs, service guides, etc.)

Obviously, a shipper needs to obtain a receipt for any goods that it tenders to a carrier for a number of reasons: to prove to its customer that it shipped the goods so it can get paid, to establish receipt by the carrier in good order and condition in the event of any loss or damage in transit, etc. - AND it should contain the basic required information.

This does not necessarily mean that shippers must use a "standard" form bill of lading such as the Uniform Straight Bill of Lading. Many shippers do not want to use a carrier's form bill of lading because they don't want to be subject to the terms and conditions, liability limitations, and other tariff provisions that are incorporated in such bills of lading. We often recommend that shippers develop their own bill of lading forms, with appropriate provisions that are more "shipper-friendly".

In conclusion, I would not recommend using "work orders or pick tickets" instead of a bill of lading since it is very unlikely that they would contain basic essential information.

BILLS OF LADING – USE OF VICS BILL OF LADING AND DIGITAL IMAGES

Question: We have recently incorporated use of the VICS bill of lading ("B/L") form and are now printing the form on a laser printer instead of using a preprinted form. The one issue we are having is that we have to have four copies signed to give two to the driver and to distribute

the other two internally. Currently, we are having the driver sign one copy and then making photocopies for the other three.

Our IT department is looking into a solution where the driver can sign the B/L using a digital device (similar to the type used when signing for credit card purchases.) That would allow us the ability to capture a digital image of the entire document including the driver's signature.

Also, it will prevent our clerks from having to make additional copies on a copier.

My

question is: Do you see any legal issues with this procedure?

Answer: Obviously it is always important to obtain the driver's signature as evidence that the carrier received the goods described on the bill of lading.

Digital images are becoming widely accepted for many purposes, and I don't see any reason why the procedure that you have described would create any legal problems, so long as the name of the carrier and the driver, and the driver's signature are clearly recorded.

Many shippers, as an additional precaution, are also scanning the driver's license and recording that information in the system.

I would note that it is also important to record the carrier's USDOT number, and the tractor and trailer license plate numbers.

BILLS OF LADING – VICS

Question: We are ready to implement the VICS Bill of Lading ("B/L") in our company. I have noticed the VICS B/L comes with some standard legal statements. I would like to know if you recommend any other legal statements that can be included in the B/L to protect my company for any future claim mitigations.

Answer: The VICS B/L essentially adopts some of the "legal statements" from the Uniform Straight Bill of Lading as published in the National Motor Freight Classification. Typically, the B/L incorporates the classification and tariffs in effect on the date of shipment, including the carrier's unfiled rules tariffs, which include liability limitations, late payment penalties, various accessorial charges, and other provisions that shippers might want to avoid.

We usually advise clients to delete or modify these terms and conditions, or better yet, to make sure that all transactions are covered by a properly drafted transportation contract.

BILLS OF LADING – WHAT NEEDS TO BE PRINTED ON FORM

Question: As a small third party logistics provider ("3PL") we would like to know if it is necessary to print the uniform straight bill of lading terms and conditions on the reverse side of all of our bill of ladings; we use 3 part paper which is very expensive to print both sides.

Also is it necessary to print the standard contract terms and conditions for merchandise on our inbound invoice for the same reasons?

Answer: As to your first question, I assume you are operating a warehousing and distribution facility and are preparing bills of lading for your customers' outbound shipments.

While you can use the Uniform Straight Bill of Lading that is published in the National Motor Freight Classification, you do not need to do so, and can use any form that contains the necessary information (name and address of the shipper & consignee, description of the goods, etc.).

If you want to use a Uniform Straight Bill of Lading, you can use the "short form" version that has no terms and conditions on the reverse side. The "short form" version incorporates the

terms and conditions on the reverse side of the "long form" version by reference with this language:

> . . . every service to be performed hereunder shall be subject to all of the terms and conditions of the Uniform Bill of Lading set forth in the National Motor Freight Classification 100-X and successive issues.

Regarding your second question, I am not sure what you are asking. If you are receiving inbound shipments for your customers in the capacity of a warehouseman, you probably should issue a warehouse receipt as provided in the Uniform Commercial Code. Your warehouse receipt can incorporate a tariff or other document containing your rules and regulations.

BILLS OF LADING – WHOSE NAMES SHOULD BE INCLUDED

Question: We are a third party logistics provider ("3PL") and a client of ours wants us to fill out all of their bills of lading ("B/L") for shipments they make from their facility as their previous 3PL did..

The shipper claims that they have never once filled out the B/Ls for their shipments and that their previous 3PL did it for them.

I am uncomfortable doing so, as I think we could have some liability by filling B/Ls out for them. Is my apprehension justifiable or am I missing something?

Answer: I don't see a problem IF:

1. You show the customer as the shipper, and the actual carrier on the bill of lading. Do NOT show your (3PL) name as the shipper or the carrier.
2. You should get specific written instructions from the shipper as to whether or not the shipper wants you to declare a value or to ship under a released rate.

It is also recommended that brokers or other 3PLs have written transportation agreements with both their shippers and the carriers that they use.

BROKERAGE – DOCUMENTS FOR IMPORTATION

Question: Can you provide me with a source for sample import brokerage contracts, terms & conditions, and whatever other documents would be germane for contracting brokerages for import customs clearance?

Answer: All licensed customs brokers use a fairly standard "Customs Power of Attorney" form, which is required by the regulations. In addition, there are other forms such as a corporate certification, etc. and most brokers use the "terms and conditions of service" that have been promulgated by the National Customs Brokers and Forwarders Association of America.

You can access a typical set of these forms on the UPS website:
http://ups-scs.com/tools/forms/POA_SCS.pdf

BROKERS – COLLECTION AGAINST SURETY BOND ON INTRASTATE SHIPMENT

Question: I moved two loads for a freight broker who went out of business and left my company holding the bag for about $1,000. They did have a surety bond and I called to make a claim. I was told by the bond company that because the moves we made for the broker were "intrastate" and not "interstate" that they were not liable to pay any claims for the work we did. I don't understand what the difference would be from intra to inter in payment of claim.

Is this correct and what explanation is there for this loophole?

Answer: The bonding company is probably correct. The Federal Motor Carrier Safety Administration ("FMCSA") broker surety bond applies to interstate transportation, since the statutory basis is the Interstate Commerce Act. Thus, it would not apply to a purely intrastate movement. (It would not also apply to an "exempt" movement such as fresh fruits or vegetables.)

That, of course, raises another question: was this particular movement part of a continuous movement in interstate or foreign commerce (even though the carrier may have only handled the portion of the movement within a single state)? I note that this subject is covered in *Freight Claims in Plain English* (4th Ed. 1995), which is available from the Council.

BROKERS – DOES FACTORING RECEIVABLES IMPACT CHARGES AND CLAIMS

Question: A shipper is dealing with a broker who finds carriers for its shipments. The broker factors its receivables out to a 3rd party (broker entity may be going under). Shipper has outstanding freight charges due but also has a freight claim that it wants to setoff. Is the shipper's right to setoff extinguished by the factoring arrangement?

Answer: Yes, I'm aware of this situation. The first step is to look at the respective contracts between the shipper and broker, broker and factor, and whether the shipper signed off on anything with the factor. In my opinion, if the shipper has a right of setoff in its contract with the broker, then that right should not be affected by the factoring agreement, because the factoring agreement is between the broker and factor. In other words, there is no privity of contract vis-a-vis the shipper under the factoring agreement.

If the shipper does not have the right to setoff under its contract with the broker, the shipper may not automatically be entitled to assert a setoff. One of the things you should consider is whether the carrier/broker admits it is liable for the claim. If the broker and/or carrier declined liability for the claim, they will take the position that the shipper does not have a valid claim and therefore can't exercise a setoff.

BROKERS – FILING AGAINST BROKER SURETY BOND

Question: As a freight forwarder, we do a lot of business with brokers. The broker will contract us to have a load moved from Point A to Point B.

If the broker does not pay for our services, we file on their surety bond to recapture as much of the revenue as we can - we normally do not have any issues doing so.

However, during the filing process on one of the brokers, their surety bond company responded and stated that on the bill of lading, it shows other companies moving the loads and that only the company that actually moved the load may file on the bond - she further states that "brokers cannot file against brokers".

I could not locate any regulation or law regarding this situation.

Answer: The language of the broker surety bond (BMC-84) makes it quite clear that the bond is for the protection of both motor carriers and shippers:

> WHEREAS, this bond is written to assure compliance by the Principal as a licensed Property Broker of Transportation by motor vehicle with 49 U.S.C. 13906(b), and the rules and regulations of the Federal Highway Administration, relating to insurance or other security for the protection of motor carriers and shippers, and shall insure to the benefit of any and all motor carriers or shippers to whom the Principal may be legally liable for any of the damages herein described.

> NOW, THEREFORE, the condition of this obligation is such that if the Principal shall pay or cause to be paid to motor carriers or shippers by motor vehicle any sum or sums for which the Principal may be held legally liable by reason of the Principal's failure faithfully to perform, fulfill, and carry out all contracts, agreements, and arrangements made by the Principal while this bond is in effect for the supplying of transportation subject to the ICC Termination Act of 1995 under license issued to the Principal by the Federal Highway Administration, then this obligation shall be void, otherwise to remain in full force and effect.

Clearly the language does not limit coverage to claims by an unpaid motor carrier.

If you have a situation where the broker has defaulted, and you have paid the actual carrier, you should be able to seek reimbursement under the surety bond. If the bonding company still refuses to pay your claim, I would suggest that you get a letter from the motor carrier assigning its claim for the freight charges to your company.

BROKERS – LEGAL LIABILITIES

Question: I am the owner and sole operator of a shipping business. I utilize 3rd party logistic companies to find the most cost efficient means to transport shipments for people. Basically, I search UShip.com to find shipments and put the shipment details into carrierrate.com or freightquote.com to see what it would cost to ship the item(s). Then, I post a bid on UShip.com for the listing. I am basically the “middle man” and do not see or touch the item(s) being shipped. So, I was wondering what legalities I would have to consider if a shipment was damaged during shipment and a claim submitted to the trucking company used is declined/dismissed.

I do mention in my bids that declared value insurance is available at an additional cost. Are you able to offer any legal advice or information that I need to consider if this was to happen? Thank you for taking your time to read and consider this email. Have a great day!

Answer: From your description of the services that you provide, it seems to me that you are falling within the definition of a property broker, and that you should be registered with the Federal Motor Carrier Safety Administration (“FMCSA”).

49 U.S.C. Section 13102 defines a “broker” as follows:

> (2) Broker. - The term “broker” means 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.

Brokers are required to register with the FMCSA. You can have this done by your transportation attorney, and you can also do this yourself through the FMCSA website: http://www.fmcsa.dot.gov/.

As for your potential liability for cargo loss or damage, a broker (whether licensed or not) can be liable under certain circumstances.

Brokers are generally not liable for loss and damage claims. However, brokers may become liable to the shipper under the following situations:

A) Where the broker holds itself out to be a carrier. Many brokers represent themselves or advertise in such a manner that the customer believes them to be a trucking company. Brokers are often reluctant to let their customers know that they are brokering freight, and are not really carriers.

B) Where the broker is negligent. Even though the broker does not physically handle or transport the goods, its acts or omissions can constitute negligence, giving rise to a cause of

action by the shipper. Examples could include: failing to give proper instructions to the carrier for protective service requirements; failure to ascertain if the carrier has proper operating authority, insurance or a satisfactory safety rating, etc.

C) Where the broker has assumed liability by express or implied contract. Brokers and third party logistics providers often agree, in order to sell their services or retain a good customer, that they will be responsible for claims. Some brokers pay claims directly to their customers, and then seek indemnification from the responsible carrier.

BROKERS – OPERATING AS A DISPATCHER

Question: I am a driver for a local precast concrete company, as the company has only 3 drivers of its own, and the rest of the work is subbed out to owner-operators. It has recently been brought to our attention that our dispatcher, who is a salaried employee of the company, may have obtained a broker's license, and is still acting as dispatcher. The other drivers and myself feel this is a severe conflict of interest and need to know is there any law against such practice, and if so, how may we proceed to improve our situation?

Answer: From your description of the facts is quite possible that this might be a conflict of interest, and it may actually be illegal. Federal Motor Carrier Safety Administration ("FMCSA") regulations governing brokers at 49 CFR Part 371 contain the following language:

Sec. 371.9 Rebating and compensation.

(a) A broker shall not charge or receive compensation from a motor carrier for brokerage service where:

(1) The broker owns or has a material beneficial interest in the shipment or

(2) The broker is able to exercise control over the shipment because the broker owns the shipper, the shipper owns the broker, or there is common ownership of the two.

(b) A broker shall not give or offer to give anything of value to any shipper, consignor or consignee (or their officers or employees) except inexpensive advertising items given for promotional purposes.

BROKERS – PAYING CARRIER WHEN BROKER DISAPPEARS

Question: We are a transportation broker who recently (November 2007) used a carrier who in turn contracted (brokered) out the services to another carrier. The carrier we contracted seems to have gone out of business. We have not received an invoice and there is no answer when we call the carrier.

The carrier that actually did the work has contacted our customer (shipper) looking for payment, and then us after the shipper told them to contact us for payment. I will gladly pay the carrier that performed the service but I do not want to pay the carrier we contracted with as well should they come after us directly or through a bankruptcy attorney. What are my rights and what can I do to protect myself from double payments.

Answer: The best solution would be to get a written authorization and release from the carrier with which you contracted. If you can't find them (and they have not actually filed for bankruptcy), then you can ask the actual carrier to give you an indemnity agreement before you pay them, and to hold harmless and indemnify you against any claims for double payment of the freight charges.

If the first carrier has filed for bankruptcy, I would not advise you to pay the actual carrier unless you get the agreement of the debtor in possession or trustee, and approval of the bankruptcy court.

BROKERS – RECOVERING SURETY BOND

Question: Recently, I changed surety companies for my broker bond for my auto transport company. In the contract that I originally had with the original surety company, it stated:

> 10. Release of collateral: Subject to the foregoing, Trustee will return to Indemnitor any balance of such collateral which may then be in its custody, upon receipt of competent written evidence that the condition of each of the bonds written by Trustee for the Principal has been fully satisfied and that Trustee has been released and discharged from further liability or responsibility thereunder.

After the new surety was in force, I sent a letter informing the company as such and included the following:

> The conditions of your liability for which the bond was issued have been fully satisfied. The surety bond with your company was discontinued on May 18, 2010, and your company has been released from further responsibility or liability there under.
>
> It is sworn that there are and will be no claims on this surety bond from anytime prior to the date of cancellation. (May 18, 2010). This letter confirms your release from any responsibility or liabilities that you were subject to during the time the bond was in force.

Now, regardless of informing them that they are no longer responsible for claims, they refuse to release my $10,000 bond that is being held in a bank with them as the trustee, for 18 months. They are ignoring my statement releasing them from liability.

I never signed anything agreeing with this delay. Is their anything I can do to get my bond money released from the bank? I have never had a claim...nor never will.

Answer: I assume that you must have had some written agreement with the surety company when you first obtained your bond. Without seeing the agreement, or their reasons for not releasing your security, I really can't give you an answer.

The only reason that I can think of is the 18-month statute of limitations for carriers to bring a lawsuit for collection of freight charges (49 USC Section 14705).

Have you sent them a copy of your new bond? What does the Federal Motor Carrier Safety Administration website (http://safersys.org/) show as your compliance with the broker's bond regulations?

BROKERS – REQUIRED LICENSING

Question: Arranging interstate freight moves we know requires an Interstate Brokers license. What about arranging intrastate freight moves? What kind of authority is required, if any, and do you know specifically what the rules are for California and Texas?

Answer: To the best of my knowledge, there are few (if any) states that still require a freight broker to be licensed. However, if you want to be sure, I would suggest that you contact the state department of transportation.

I would note also that, even where a specific movement may appear to be "intrastate", i.e., between two points in the same state, it can be considered "interstate" depending on the prior or

subsequent movement and the intent of the parties. This subject is discussed at length in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 1.0, which is available from the Transportation & Logistics Council.

BROKERS – SHIPPER PAYING CARRIER DIRECTLY AFTER BROKER DEFAULT

Question: A shipper only dealt with a broker on the load in question. Before the shipper paid for the load in question, it learned that the broker was not paying its carriers. The shipper therefore wants to pay the carrier directly. Is there a way to circumvent an unscrupulous broker and pay the carrier? Perhaps with an indemnity agreement between shipper and carrier?

Answer: This is a recurring problem. The best advice would be to get written authorization from the broker to pay the carrier directly. If you can't get this, and really want to pay the carrier, a release and agreement to hold harmless and indemnify you by the carrier will give some protection against double payment liability. However, you can still expect the unpaid broker (or its factor) to try to collect its charges from you.

BROKERS – SURETY BONDS

Question: Our company has experienced difficulties with transportation brokers filing bankruptcy, resulting in our dealing with the resulting legalities of the bankruptcy estate in addition to subcontracted carriers looking for payment. As we continue to grow our business, our percent of managed transportation is growing and we are looking at ways to protect ourselves against financial risk. Part of this surrounds expanding our business with asset only agreements. However, based on our growth, and current system limitations, the need for brokerages will still exist.

In support of this, our CFO has requested that we insert into our transportation agreement the requirement of a "letter of credit" ("LOC"), up to an agreed upon amount (around roughly 30 days agreed upon business - ie. $50K - $100K). I anticipate a less than favorable response to this. However as an alternative, I have had some general conversations with various brokers specific to the concept of requesting them to issue a "performance bond" in our company's name (again, around the amounts listed above)

The feedback has been lukewarm. However, the bond concept seems to provide for more of a negotiating opportunity than the LOC. My questions are - (A) does the concept of a "performance bond" in our company's name seem like a reasonable strategy to protect our company's risk; and (B) are there any other strategies, or contractual language that may accomplish the same?

Answer: As you know, the Federal Motor Carrier Safety Administration ("FMCSA") requires brokers to have on file a surety bond in the amount of $10,000. Unfortunately, this is usually insufficient when a broker goes out of business or otherwise fails to pay the carriers.

We often recommend to our clients that they require in their contracts that the broker obtain a supplementary surety bond - at least $50,000 or $100,000. These are available from various sources including:

Avalon Risk Management, Inc.
84 Wharf Street
Salem, MA 01970
Phone: (978)740-5677
FAX: (978)740-6627
www.avalonrisk.com

Brokers – Who Pays When Broker Defaults

Question: We recently moved two truckload deliveries for a freight broker. They did not pay the bill and at year's end (2008) their surety bond was canceled and their phone were turned off. My question is whether the consignor or the consignee is responsible for the freight charges due us. I contend to the consignee that they are responsible because they were the ones who benefited from our transportation of their product. They contend that they paid the broker for the transportation, which they did. Under Florida construction law if a contractor is paid and the subs don't get paid the owner is still liable for the monies owed to the subs. I know this is apples and oranges but do the same principle ideas apply to transportation?

Answer: Unfortunately, the situation you describe is all too common.

If the shipments were "freight prepaid", as to the liability of the consignor, the courts are divided. Some adopt the theory that the shipper remains liable even if it has paid the broker, since the bill of lading creates a contract between the shipper and the carrier. Others say that the broker is an independent contractor, that there is no privity of contract between the shipper and the carrier, and that the carrier essentially agreed to look solely to the broker for payment.

On a "prepaid" shipment, 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 if the shipment was "freight collect", the consignee cannot assert the estoppel defense. Then the same conflicting theories that I discussed above would be involved and it could depend on what court decides the case.

Carrier Re-Weighing – Reader Response

One of the questions in the TransDigest (#156) was about carriers inspecting and reweighing shipments. When they do that the carrier should provide a copy of the reweigh inspection or reclassification of the product. In the inspection report it will include documentation showing the change in the weight. If they reclassify the product, they produce a detailed inspection that would show the dimensions of the product or the detailed reason why the class is being changed.

Often times we will find the report inaccurate. For example because the carrier says the weight is inaccurate doesn't mean that is true. The carrier's scales can be incorrect. We have many customers who have very accurate scales that they use to weigh the product before shipping the product. They have their scales tested often and so they can challenge these reports. Also, they may know the weight of their product and can refute these charges on that basis. So when you receive this type of notice you should check carefully to make sure these charges are valid.

Thanks to Ron Williams of Williams & Associates, Inc. for the heads up.

Carriers – Air Freight Forwarder vs. Air Freight Broker

Question: What is the difference between an air freight forwarder and an air freight broker?

Answer: An air freight forwarder is a carrier, i.e., it issues a house airway bill ("HAWB") when it receives goods and assumes responsibility for the goods from the origin to the

destination shown on the HAWB, including liability for loss or damage in transit. An air freight forwarder normally consolidates smaller shipments and tenders the consolidated load to an air carrier for air portion of the movement.

There is really no "legal" definition of an "air freight broker". It is just an intermediary that arranges for transportation services with air freight forwarders or air carriers and presumably receives compensation or commissions for its services.

CARRIERS – COMMON OR CONTRACT

Question: What is the difference between contract and common carrier authority and as a 3rd party logistics provider ("3PL") does it matter to us?

Answer: The statutory distinction between "common carriers" and "contract carriers" was eliminated by the ICC Termination Act of 1995. The current statutory language in the Interstate Commerce Act is found at 49 U.S.C. Sections 13102 and 14101. Essentially, any motor carrier can enter into a contract "to provide specified services under specified rates and conditions". The relevant language is as follows:

> Sec. 13102. Definitions
> In this part, the following definitions shall apply:
> (4) CONTRACT CARRIAGE- The term "contract carriage" means--
> (B) for transportation provided on or after such date [January 1, 1996, the effective date of the ICC Termination Act of 1995], service provided under an agreement entered into under section 14101(b).
>
> Sec. 14101. Providing transportation and service
> (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.
> (2) REMEDY FOR BREACH OF CONTRACT- The exclusive remedy for any alleged breach of a contract entered into under this subsection shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree.

I should note that the Federal Motor Carrier Safety Administration ("FMCSA") still allows carriers to register as a "common carrier" or a "contract carrier" -- some 14 years after the distinction was eliminated!

As to your specific question, there are still occasional cases that distinguish between "common" and "contract" carriers and apply different standards of liability. Also, the FMCSA does not require "contract" carriers to have a BMC-32 minimum cargo liability endorsement.

It is always a better practice to have a formal Transportation Agreement with all your carriers that contains both the rates and the rules applicable to the carrier's services.

The FMCSA requirement for public liability (BI/PD) insurance does not depend on "contract" v. "common" authority. The requirements for insurance are set forth in 49 CFR Part 387.

CARRIERS – COMMON VERSUS CONTRACT CARRIER AUTHORITY

Question: We are a small transportation and logistics firm. We are currently trying to answer the question as to what the difference is between common carrier authority and contract carrier authority. One of my partners believes that regardless if we have a signed rate confirmation with a common carrier, the common carrier can come back and request us to pay them their published, common rates. Is it possible for you to shed some light on the difference between these two types of authority? Your help is greatly appreciated.

Answer: The statutory distinction between "common carriers" and "contract carriers" was eliminated by the ICC Termination Act of 1995. The current statutory language in the Interstate Commerce Act is found at 49 U.S.C. §§ 13102 and 14101. Essentially, any motor carrier can enter into a contract "to provide specified services under specified rates and conditions". The relevant language is as follows:

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> (2) REMEDY FOR BREACH OF CONTRACT- The exclusive remedy for any alleged breach of a contract entered into under this subsection shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree.

I should note that the Federal Motor Carrier Safety Administration ("FMCSA") still allows carriers to register as a "common carrier" or a "contract carrier" -- some 12 years after the distinction was eliminated !

As to your specific question, if you have a written and signed rate quotation from a motor carrier, the rates set forth in the document should be binding and enforceable under basic principles of contract law.

I would note that it is always a better practice to have a formal Transportation Agreement with all your carriers, that contains both the rates and the rules applicable to the carrier's services. Otherwise, you may still be bound by other provisions in the carrier's tariffs to the extent they are not covered by the rate quotation (such as liability limitations, late payment penalties, accessorial charges, etc.).

CARRIERS – INFORMATION ON CANADIAN CARRIERS

Question: Do you know of a good source for information regarding Canadian provincial safety ratings? For example, if I wanted to know a Canadian motor carrier's Ontario safety rating, do you know if there's a website analogous to safersys.org that would give me that information? And do you know if that might exist with regard to other provinces also? If not, do you know of a website or other source that would give a good description/summary of what the safety ratings in the various provinces are supposed to signify? And it seems that there is no such thing as a Canadian federal safety rating - do you know if that's correct?

Answer: There is no centralized system to access the safety rating of carriers in Canada. Several Provinces do provide safety ratings of the carriers they rate as follows:
Ontario: https://www.cvor.rus.mto.gov.on.ca/scripts/CSR-Order.asp
Quebec: In French:
https://www.pes.ctq.gouv.qc.ca/ctqsim/faces/dossierclient/rechercheAllege.jsp?MODE_AFFICHAGE=RESTREINT_NIR&langCode=fr
Quebec: In English:
https://www.pes.ctq.gouv.qc.ca/ctqsim/faces/dossierclient/rechercheAllege.jsp;jsessionid=ac1bd2c330db651109d69e4c48e380b2fec4f527b33c.e38MchuSa3mKci0LbNz0?MODE_AFFICHAGE=RESTREINT_NIR&langCode=en
Manitoba: http://www.gov.mb.ca/mit/mcd/mcs/csnapdisclaim.html
In other provinces that information is only available on request to the appropriate provincial office.

CARRIERS – LOADING A MULTIPLE STOP SHIPMENT

Question: Is the driver who is loading a shipment that has multiple stops on it responsible to make sure the shipper is loading according to the driver's scheduled route?

Answer: It is probably a good practice for the driver to let the shipper know his routing, and it would also be reasonable for the shipper to ask about the routing before loading the trailer, however there is no law or regulation that requires this.

CARRIERS – MINIMUM QUANTITY COMMITMENT WITH NVOCC

Question: I would like to check with you from the Federal Maritime Commission ("FMC") filing regulation perspective. Is the minimum quantity commitment ("MQC") a must-have in the service contract with a non-vessel operating common carrier ("NVOCC") - same as the service contract with Carriers? I've heard from one NVOCC that we don't have to worry about MQC when contracting with them. So I would like to make sure if their statement is correct. If yes, then we should take out the MQC verbiage from the NVOCC contract. Thanks.

Answer: For an NVOCC Service Arrangement (similar to a VOCC Service Contract) there is still a requirement for a minimum quantity commitment ("MQC"). 46 CFR Part 531 governs Service Arrangements and 46 CFR 531.3(p) defines a NVOCC Service Arrangement as:

> (p) NVOCC Service Arrangement ("NSA") means a written contract, other than a bill of lading or receipt, between one or more NSA shippers and an individual NVOCC or two or more affiliated NVOCCs, in which the NSA shipper makes a commitment to provide a certain minimum quantity or portion of its cargo or freight revenue over a fixed time period, and the NVOCC commits to a certain rate or rate

schedule and a defined service level. The NSA may also specify provisions in the event of nonperformance on the part of any party.

For NSA's there is still a requirement to publish a tariff and a statement of "essential terms". NSA's can be amended by the parties, provided that any changes to rates must be published in the NVOCC's tariff and any changes to the "essential terms" must be filed with the FMC.

There is a new kind of NVOCC contract called a "Negotiated Rate Arrangement" ("NRA"), effective April 18, 2011. NRA's are governed by 46 CFR Part 532. They are principally used for shorter periods and to lock in rates for specific shipments. There is no requirement for an MQC or filing of a rate tariff, however the NVOCC must make its Rules Tariff available at no cost.

The requirements for an NRA are set forth in 46 CFR 532.5:

§ 532.5 Requirements for NVOCC negotiated rate arrangements.

In order to qualify for the exemptions to the general rate publication requirement as set forth in section 532.2, an NRA must:

(a) Be in writing;

(b) Contain the legal name and address of the parties and any affiliates; and contain the names, title and addresses of the representatives of the parties agreeing to the NRA;

(c) Be agreed to by both NRA shipper and NVOCC, prior to receipt of cargo by the common carrier or its agent (including originating carriers in the case of through transportation);

(d) Clearly specify the rate and the shipment or shipments to which such rate will apply; and

(e) May not be modified after the time the initial shipment is received by the carrier or its agent (including originating carriers in the case of through transportation).

[76 FR 11360, Mar. 2, 2011; 76 FR 19707, Apr. 8, 2011]

CARRIERS – OBTAINING SURFACE OR AIR FREIGHT FORWARDER AUTHORITY

Question: I have been trying to find information on adding surface and air freight forwarder authority to our other capabilities. I have not been able to find an application on the Federal Aviation Administration ("FAA") or Department of Transportation ("DOT") websites. I seem to recall that freight forwarders were deregulated but cannot recall if that only applied to rates or to gaining authority as well. If you cannot apply for authority as a freight forwarder, how do you hold yourself out as one?

Answer: 1. If you want to provide service as a domestic (surface) freight forwarder you need to have operating authority just like a motor carrier or broker. This requires an application to the Federal Motor Carrier Safety Administration ("FMCSA"), which we can handle for you if you wish.

2. If you are talking about becoming a domestic or international air freight forwarder there is no official licensing requirement in the U.S. There are some requirements from U.S. Customs & Border Protection as to air freight shipments (C-TPAT compliance, "known shipper" regulations, etc.) that would be involved, and we can look further into this for you.

3. If you want to act as an agent for an international air carrier, I believe you will need accreditation from the International Air Transport Association ("IATA"). Information is available on this website: http://www.cnsc.net/services/accreditation/Pages/endorsement-fees.aspx

Additionally, if you want to become an international air freight forwarder, although you don't need a license, you will have to adopt and carry out a security program that meets current Transportation Security Administration ("TSA") requirements, which is also outlined in 49 CFR

Part 1548 (view online at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title49/49cfr1548_main_02.tpl).

To become a TSA-approved indirect air carrier, the freight forwarder must apply for approval through the Indirect Air Carrier Management System which is on the TSA website at https://extranet.tsa.dhs.gov/iac/

The TSA also has an Indirect Air Carrier Standard Security Program ("IACSSP"). This is only available to "employees and authorized representatives of the Indirect Air Carrier and other individuals with a need to know. . . .", so I can't provide this to you.

CONTRACTS – BROKER LIABILITY

Question: I am new to freight broker agreements in my position. Our template contains a provision whereby the broker agrees that it shall be considered the "shipper" in its relationship with a Motor Carrier pursuant to principles established in *Dixie Midwest Express* 132 MCC 794. A candidate for one broker for us objects to this and wishes to understand why we include the provision. I cannot find a copy of Dixie on-line, so have been unable to read the case. I have, however, seen template broker-carrier agreements on-line, and they do contain the provision that broker is shipper vis-à-vis carrier per Dixie, so I don't understand why our candidate broker objects. We pay the broker, and if broker does not pay the actual carrier, we don't want to be considered the "shipper" so that actual carrier can come back at us. That much I have learned; don't know if that is what Dixie addresses.

Answer: You must have a very old contract!

The *Dixie Midwest* decision was a 1982 Interstate Commerce Commission ("ICC") ruling that essentially clarified whether a broker could enter into a contract with a "contract carrier". The statutory distinction between "common carriers" and "contract carriers" was eliminated with the passage of the ICC Termination Act of 1995, which also "sunsetted" the ICC. Thus, any reference to Dixie Midwest is obsolete and can be deleted.

You can, and should, have transportation agreements with both brokers and motor carriers that set forth the terms of compensation, liability for freight charges and for cargo loss or damage, requirements for bonds and insurance, indemnification, etc.

CONTRACTS – LIABILITY LIMITATIONS

Question: I have a question on the topic of reconditioned or used freight. We're a third party logistics provider and have contracts with a number of carriers. We arrange to ship used and reconditioned freight for some of our customers. We have our carriers sign a contract that includes our liability limits and accessorial schedule.

One issue is in one carrier's tariff which clearly states that the liability insurance minimum is $10.00 per lb. with a $100,000.00 per shipment maximum. The tariff also states that used and reconditioned freight has a liability limit of $0.10 per pound. If we had a claim, which would take precedence, our signed contract or the carrier's tariff?

The second question is similar. A different carrier's tariff limits liability to a maximum of $25.00 per lb., but then states "additional liability guidelines in carrier's CNWY 199 tariff current on date of shipment will apply." This carrier changes the language in our contract to incorporate this tariff item by reference, which by the way, limits liability on used or reconditioned machinery to $0.10 per lb. In this scenario, the contract includes our terms limiting liability at one level, and also the carrier's liability at a much lower level. Which one would apply?

Answer: I would have to see the complete contract in order to answer your questions about liability limitations, but it would seem that in the first situation the terms and conditions of a properly drafted transportation agreement should govern, and not the carrier's tariff.

In the second situation I assume that you have allowed the carrier to amend the terms of your contract and both parties agreed to the amendment. Although there is some ambiguity, I think that the provisions of the tariff would be incorporated and would govern (the language quoted says that the carrier's tariff "will apply"). By allowing this amendment, you have essentially allowed the carrier to dictate the liability terms. This is one reason that it is important to use a properly drafted transportation agreement, and then stick to it.

DAMAGES – CARRIER DAMAGE TO BUILDING

Question: We are a retailer with over 800 stores across the US. Most stores are located in small shopping centers with no access to a shipping dock. Recently we have had several instances where carriers delivering to our stores have caused damage to the building in which our stores are located. Who is responsible for filing the claim?

I am of the opinion that the landlord who owns the property should be responsible for filing the claim for building repairs. If I file the claim am I accepting responsibility for damages?

Another concern regards what happens if one of our carriers were to injure a customer. Would we hold the same liability?

Answer: The party suffering the damage is the proper party to file a claim against the carrier for damage to the building. This probably would be the landlord or owner of the building. However, it is also possible that there may be some provision in your lease that would shift the responsibility to your company.

As for your second question, I don't think that filing the claim would indicate that you are accepting responsibility, especially if you do so on behalf of the landlord or owner. However, there could be another basis for your liability -- if your employees were in some way negligent (directing the truck, etc.) that caused or contributed to the damage.

Your question about a carrier injuring a customer involves a number of considerations.

Clearly, the primary liability would be that of the operator of the vehicle, i.e., the carrier. Liability is generally determined by state motor vehicle laws. In addition, commercial vehicle operators are required to comply with federal safety regulations and to carry "public liability" (BI/PD) insurance by the Federal Motor Carrier Safety Administration ("FMCSA").

Property owners and tenants also have a duty to the public - customers and other licensees that are on the premises. Again, if there is some negligence on the part of the store employees that could have caused or contributed to the customer's injuries, there could be liability. Many companies do not allow customers in their receiving or warehousing areas for this reason. Landlords and tenants usually have commercial general liability insurance for protection against such situations.

I would note that, though the operator of the vehicle may be responsible for the injury, plaintiff's lawyers in personal injury cases often look for a "deep pocket", and sue anyone that might be even remotely involved. We recommend that our shipper clients enter into formal transportation contracts with their motor carriers, and that such contracts include appropriate provisions for insurance and indemnity in the event of personal injury or property damage claims arising out of the carrier's operations.

FLEET OPERATIONS - CORPORATE FAMILIES

Question: I am investigating the possibility of having trucks leased by one subsidiary (drivers are employees of this subsidiary) hauling shipments for another subsidiary.

The parent corporation does not own the trucks. Both subsidiaries are 100% owned by the parent corporation. The controlling subsidiary would be compensated for the service.

I have not kept abreast of regulatory changes affecting private fleet operation. Would this transportation be legal under current regulations? If not, what steps would have to be taken to make it legal?

Thank you for any advice you can offer in this situation.

Answer: There is a specific exemption in the Interstate Commerce Act for compensated intercorporate hauling. The exemption is found at 49 U.S.C. 13505(b), "Corporate families" - and applies to "a group of corporations consisting of a parent corporation and all subsidiaries in which the parent corporation owns directly or indirectly a 100 percent interest."

In essence, this means that you would not be required to register as a for-hire motor carrier, or be subject to the provisions of the Act (except, of course, for safety, insurance, etc.).

FREIGHT BILLS – WHAT INFORMATION IS REQUIRED

Question: What is the definition of a freight bill?

Answer: There is no official "definition" of a freight bill, and it is basically an invoice for services. However, the Federal Motor Carrier Safety Administration regulations at 49 CFR Part 373 do state what a freight bill must contain:

> §373.103 Expense bills.
>
> (a) Property.
>
> Every motor common carrier shall issue a freight or expense bill for each shipment transported containing the following information:
>
> (a)(1) Names of consignor and consignee (except on a reconsigned shipment, not the name of the original consignor).
>
> (a)(2) Date of shipment.
>
> (a)(3) Origin and destination points (except on a reconsigned shipment, not the original shipping point unless the final consignee pays the charges from that point).
>
> (a)(4) Number of packages.
>
> (a)(5) Description of freight.
>
> (a)(6) Weight, volume, or measurement of freight (if applicable to the rating of the freight).
>
> (a)(7) Exact rate(s) assessed.
>
> (a)(8) Total charges due, including the nature and amount of any charges for special service and the points at which such service was rendered.
>
> (a)(9) Route of movement and name of each carrier participating in the transportation.
>
> (a)(10) Transfer point(s) through which shipment moved.
>
> (a)(11) Address where remittance must be made or address of bill issuer's principal place of business.

The shipper or receiver owing the charges shall be given the original freight or expense bill and the carrier shall keep a copy as prescribed at 49 CFR part 379. If the bill is electronically

transmitted (when agreed to by the carrier and payor), a receipted copy shall be given to the payor upon payment.

FREIGHT BROKERS – WHO CAN GO AFTER BOND

Question: The broker bond was originally established to pay carriers should a broker fail to do so. Who can go after that bond now? Carriers obviously, but could shippers also since they can be held liable even if they paid the broker? 3PL's? Forwarders? Could a class action suit be filed on behalf of several claimants?

Just curious since this industry has changed so much and with no one enforcing the laws like the Interstate Commerce Commission did, it has gotten to the point I don't know what the rules are anymore.

Answer: You raise some good questions. In answering your questions, the first place to start is the statute and regulations.

The statutory provision requiring financial security on the part of brokers states that a broker must have a bond, insurance policy or other type of approved security "to ensure that the transportation for which a broker arranges is provided." 49 USC § 13906(b). The wording of this statute is fairly broad and can possibly mean several different things. Interestingly, the statute does not say that the insurance is required to ensure the transportation is **paid for** by the broker.

The regulations require a broker to maintain a surety bond or trust fund of $10,000. 49 CFR § 387.307(a). The regulations also specifically identify the purpose of the bond is as follows:

> The surety bond or the trust fund shall ensure the financial responsibility of the broker by providing for payments to shippers or motor carriers if the broker fails to carry out its contracts, agreements, or arrangements for the supplying of transportation by authorized motor carriers.

49 CFR § 387.307(b). Therefore, the regulations make it clear that the bond may be used to satisfy the broker's payment obligations if the broker breaches its obligations to make payments. It's worth noting that the broker's duty and obligations to make payments is also mandated by regulation under 49 CFR § 371.10, which provides:

> **Duties and obligations of brokers.** Where the broker acts on behalf of a person bound by law or the FMCSA [Federal Motor Carrier Safety Administration] regulation as to the transmittal of bills or payments, the broker must also abide by the law or regulations, which apply to that person.

Lastly, it's worth noting that there is another statutory provision - 49 USC §14704(a)(2) - that subjects brokers to liability. This statute provides:

> (2) DAMAGES FOR VIOLATIONS.-A carrier or broker providing transportation or service subject to jurisdiction under chapter 135 is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part.

Based on the statutory and regulatory framework, I believe that anyone injured by a broker (i.e., where the broker failed to meet a financial commitment or obligation), including carriers, shipper, 3PLs, etc., could go after the broker's surety bond for non-payment. Also, I do not see any reason why a class action against a broker would be prohibited.

But, here's the rub - the surety bond obtained by the broker is ***not*** like a claims-made insurance policy, which would provide for a maximum of $10,000 ***per claim***. Rather, the surety bond provides for only a finite pool of funds, in this case $10,000. Once the $10,000 fund is exhausted, the surety's obligation is satisfied and there can be no further recourse against the surety company.

In view of the limited value of the surety bond, the better course of action is to go after the broker directly. Obviously, this assumes the broker has not filed bankruptcy, gone of business or otherwise disappeared, and that the broker has the financial wherewithal to satisfy any claims asserted against it. However, if the broker is actively engaged in a practice of withholding funds from multiple carriers, then, more likely than not, the broker is in a state of severe financial distress and recovery against the broker may prove to be quite challenging (to say the least).

Freight Brokers and Shipper's Agents

Question: We are a third party logistics provider and have a couple of questions concerning what one of our client companies has referred to as the "double brokering" of his loads. The situation is:

As a third-party logistics company, we are contracted with this company to manage their truck transportation, both LTL and TL. We do, on some lanes, use freight brokers to move truckload shipments for this client company. The shipping manager at the client company has expressed concerns about his company's financial exposure, in the event of loss or damage to one of these shipments, and the legality/ethics of our utilizing brokers to secure truckload transportation. I believe that this boils down to two basic questions. They are:

Are we, as a third-party logistics company contracted with our client company to manage their truck transportation, acting in the role of a freight broker when we secure carriage of this company's product or are we acting as an extension of that company's transportation/shipping function? and;

What are the legal and/or ethical issues, if any, or our using freight brokers, even if it is determined that we are acting in the role of a broker and what, if anything, more should we be doing to protect the exposure of both our company and our client?

Answer: Question # 1: It would depend on the contract that you have with the client as to whether you are acting as an agent of the shipper or acting as a broker. The answer could, in part, be determined by how you are compensated for your services. The definition of a broker is:

> (2) BROKER- The term 'broker' means 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.

Typically brokers are compensated by a "commission" (usually the markup over what the broker pays the carrier) on each shipment. If your compensation is based on the difference between the freight charges paid to the carrier and billed to the shipper, you would be considered a broker.

If there is a different method of compensation - e.g., a monthly management fee, or a flat per-transaction fee, etc. - you might be considered an agent and not a broker.

Question # 2 -- If your shipper client knows and agrees that you may use other brokers as well as contracting directly with carriers, there should be no legal and/or ethical problem. However, this should be clearly understood and spelled out in a properly drawn agreement.

Whether you contract with a broker or with a carrier, you have an obligation to protect the interests of your shipper client. This can be done in a variety of ways. First, you must exercise due diligence in the selection of the broker or carrier. You should have a written transportation contract with all of the brokers and carriers that you use that spells out terms and conditions of compensation, liability for cargo loss or damage, insurance requirements, etc.

I would suggest that your contract with both brokers and carriers should prohibit "double brokering". You may also want to arrange for shipper-interest (inland marine) insurance coverage.

You would also want to protect your own interests, again with an appropriate contract with the shipper client, and with the proper kinds of broker insurance coverage.

FREIGHT CHARGES – "BUMPING RULE"

Question: How would a properly executed "bump rule" read on a bill of lading? And can you describe this rule in more detail?

Answer: Where commodities are subject to provisions that assign classes based upon density, the "bumping rule" (Item 171 in the National Motor Freight Classification) ("NMFC") allows a shipper to increase the weight to artificially increase the density of the shipment and apply the next lower class in the density scale to that increased weight.

However, NMFC Item 171 states "THIS MAY ONLY BE DONE WHERE THE APPLICABLE PROVISIONS MAKE SPECIFIC REFERNCE TO THIS RULE AND MAY ONLY BE DONE AT THE TIME OF SHIPMENT."

NMFC Item 171 further states that the shipper must show on the bill of lading the following:

(1) actual cube
(2) actual weight
(3) density group (sub) embracing the actual density
(4) declared density, and
(5) resultant weight for billing purposes (declared weight) of the package(s) or piece(s) to which density is being bumped.

It isn't clear from your question whether the commodities that you ship would be subject this rule, but if so, the election would have to be made at the time of shipment.

I would suggest that you also check NMFC Item 595, Maximum Charges - This is a more general provision and provides:

> In no case shall the charge for any shipment from and to the same points, via the same route of movement, be greater than the charge for a greater quantity of the same commodity in the same shipping form and subject to the same packing provisions at the rate and weight applicable to such greater quantity of freight.

If applicable, this provision would entitle you to get the lower rate.

You might get an opinion from one of the classification specialists at National Motor Freight Traffic Association (contacts listed inside the front cover of the NMFC).

FREIGHT CHARGES – "FREE ASTRAY"

Question: Our carrier delivered damaged freight to the consignee. We have been told by the carrier to mark the bill-of-lading "free-astray" for shipping the damaged goods back to our plant. What is the definition of "free-astray" and is it applicable for this situation?

Answer: The term "free astray" generally indicates that the carrier will deliver (or return) goods at its own expense that have been lost or misplaced in transit, and later found in the system. Here it indicates that the carrier has agreed to return the damaged freight to the shipper at its expense, i.e., will not assess additional freight charges on the return movement.

FREIGHT CHARGES – "TARE" WEIGHT

Question: It has been a long time since I have seen it on a bill of lading and cannot remember the significance. The shipper is using a net weight of 2,301.75 lbs. and a tare weight of 1613.91 lbs. for total weight of 3.915.66 lbs. Can you explain why they used this figure and is it applicable and or why?

Answer: Normally the word "tare" refers to the weight of an ocean container, a trailer or a railroad car.

The bills of lading that you sent show a net weight, a tare weight and a gross weight for a less than truckload palletized shipment. My best guess is that the shipper's computer carries the "net" weight of the product (content of package), plus the "tare" weight of the packaging and the pallet, in order to arrive at a "gross" weight for computing the applicable freight charges.

FREIGHT CHARGES – "TRUCK ORDERED BUT NOT USED"

Question: I am an owner operator who used a brokerage company to find a load. The contract was signed and confirmed - at which time I went out to load. Once I reached my destination I was informed that the load was over-booked, the other truck had gotten there first, and therefore I had no cargo. I spoke to the broker who told me to stay there since she had another load for me. The following day - the cargo was loaded, I strapped it down, and came to find out that it was too heavy. I was then forced to take down all the tarps and the cargo was unloaded. I contacted the agent again who said all she could do is maybe get me $100.00 for the three days lost, the manual labor, and the fuel. Is the broker liable for my load since it was their mistake that caused all this in the first place? How can I avoid this happening to me again? It is a significant loss and unfortunately it seems that the driver is the one who is at greatest risk of loss.

Answer: It would appear that you do not have a published tariff that provides for "truck ordered but not used", and that you did not cover this possibility in your rate confirmation with the broker.

Unfortunately, there is probably not much that you can do, other than to try to get some reasonable settlement from the broker for your time and effort.

The only suggestion that I can give you is to make sure in the future that you have worked out things like detention, redelivery, etc. in advance. You might want to include a schedule of accessorial charges with any rate quotation or rate confirmation.

FREIGHT CHARGES – 3PL CONTACTING CONSIGNEE FOR PAYMENT

Question: I work for a logistics provider, "L", that has its own tariffs with carriers and as a service provides and manages all outbound freight for customer "A" under our tariff. L handles all freight issues for customer A directly with carrier to include P/U call in, claims and invoice audit. As per our agreement with customer A, upon completion of each freight delivery L invoices A for freight charges and in turn L pays all freight charges directly to carrier. The bill of lading ("B/L") lists L as third party pre-paid bill to and there is no mention on the B/L as to who is responsible for freight charges in case of default of payment by customer "A".

The problem; customer A has run into financial difficulties and claims it cannot pay its freight charges totaling $18,500 nor can it pay any partial amount. They also claim they may file for bankruptcy any day now, yet they continue to move product with a different carrier. L has notified A that it will now concentrate on contacting consignee for payment in full. Customer A

has threatened to sue L for defamation if consignee is contacted for payment. Customer A signed the original credit application that clearly states "All cost of collection or attempting to collect of any overdue charges, including reasonable attorney fees, shall be the responsibility of the applicant." Does L have the legal right to contact the consignee without facing a lawsuit by customer A?

Answer: Without seeing your contracts, tariffs, application forms, etc. I can only give you a qualified opinion.

You state that the original credit application states "All cost of collection or attempting to collect of any overdue charges, including reasonable attorney fees, shall be the responsibility of the applicant." I don't think that this language prohibits your company from attempting to collect freight charges from the consignee.

However you should be aware of the following:

On a "prepaid" shipment, 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.

Also, if your shipper-customer does file for bankruptcy, your only remedy may be to file a claim as an unsecured creditor. It can be a violation of the "automatic stay" to pursue the consignee under those circumstances.

Freight Charges – 3PL Seeks to Collect For Services

Question: We are a third party logistics provider ("3PL"). We ran three shipments via a carrier for a customer in Colorado. The freight moved from a warehouse in Ft. Lauderdale, FL to a company in Stafford, TX. All shipments delivered clear. We paid the carrier but our customer in Colorado failed to pay us. Now we have determined that our customer has moved to Florida but cannot be located. Do we have the right of reversal to invoice consignee or shipper for the freight charges?

Answer: It isn't clear whether your "customer" was the shipper or the consignee on the bill of lading. However, the right to collect freight charges is generally determined by the "contract of carriage", which is usually the bill of lading.

As a general rule, the shipper on a "prepaid" bill of lading is liable for the freight charges and remains liable unless it has executed the "Section 7" (non-recourse) provision on the Uniform Straight Bill of Lading.

On a "prepaid" shipment, 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.

Freight Charges – Accessorial Charges

Question: We use a freight broker for our truckload shipments. If the carrier used submits an invoice for services rendered through the broker and the invoice is paid in full, can the carrier re-issue the invoice for the same shipment for assessorial fees (lumper or detention)?

Answer: Since you dealt through a broker, all the charges - including the accessorial charges - should have been billed through the broker, because the broker contracted with the carrier.

Technically, any legal obligation to pay the accessorial charges would be governed by the broker's agreement with the carrier. But, even if the broker-carrier contract was silent about accessorial charges, I think the carrier could still argue that it is entitled to collect the reasonable value ("quantum meruit") of any services or any expenses that were necessary to complete delivery under the contract of carriage.

I would note that if the charges billed by the carrier include payment to a "lumper" to unload the trailer, there is a provision in the Interstate Commerce Act that applies:

> Sec. 14103. Loading and unloading motor vehicles
>
> (a) SHIPPER RESPONSIBLE FOR ASSISTING- Whenever a shipper or receiver of property requires that any person who owns or operates a motor vehicle transporting property in interstate commerce (whether or not such transportation is subject to jurisdiction under subchapter I of chapter 135) be assisted in the loading or unloading of such vehicle, the shipper or receiver shall be responsible for providing such assistance or shall compensate the owner or operator for all costs associated with securing and compensating the person or persons providing such assistance.

In any event, I don't see any legal reason why the carrier can't bill the broker (or your company) for the accessorial charges for the destination services that were not previously included in the billing. Note, however, that such additional billing would be subject to the "180-day rule" set forth in 49 U.S.C. 13710 which 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."

I would also note that if you had signed "Section 7" on a Uniform Straight Bill of Lading, you, as the shipper, would not be liable for any further charges and the carrier (or the broker) would have to look to the consignee to collect the accessorial charges.

FREIGHT CHARGES – ADDITION OF FUEL SURCHARGES

Question: Is it legal for vendors to pass on the fuel surcharges to their customers? We have vendors that are prepaying the freight but they are trying to pass on to us for payment the fuel surcharges a carrier charges them.

The freight bill just states "prepaid". Now, we have had a vendor send us a letter saying due to the increases in freight rates & surcharges to basic rates, they are no longer able to absorb those costs. But, when the freight is "prepaid" and states only that, then the vendor cannot charge us for the surcharge, correct?

Answer: It is not "legal" or "illegal". It depends solely on your contract with the vendor, i.e., what price was agreed upon between buyer and seller. Check your purchase order and/or the sales contract with the vendor. If the contract provides for freight "prepay and add", then the vendor is entitled to add its actual out-of-pocket freight charges to the cost of the goods. If the contract is for a fixed delivered price, the vendor can't add anything additional.

You haven't indicated whether your company agreed to pay the freight charges, in addition to the FOB origin cost of the goods.

If the terms of sale are for the freight to be prepaid and added to the cost of the goods on the seller's invoice, then you have to pay whatever the motor carrier actually bills the vendor-shipper, including any applicable surcharges or other accessorial charges.

If you have contracted for a delivered price, that is all you have to pay.

FREIGHT CHARGES – AIR CARGO CLASS ACTION SETTLEMENT

Question: Our company is a current subscriber to the TRANSDIGEST. We have a question concerning the Air Cargo Settlement just recently announced and located http://aircargosettlement.com/en/index.php3?c=United+States. This settlement concerns Lufthansa and a large number of foreign based air carriers. The notice concerning this settlement appears to include all air freight shipments within the U.S. and between the U.S. and Canada. Our question is, would this settlement include United Parcel Service, Inc. ("UPS") and FedEx Corp. air shipments or just be limited to Lufthansa and the other defendants named in the notice? The class appears to be quite large and all-inclusive. Can you help clarify this? Thank you.

Answer: I reviewed the official Lufthansa Class Action Settlement Notice and other information on the Air Cargo Settlement Website.

The Notice says "You are a Class Member if you purchased air cargo shipping services from ANY air cargo carrier, for shipments within, to, or from either the United States or Canada. This includes services purchased through freight forwarders."

The class action lawsuit clearly includes Lufthansa and the 36 other defendants that are listed as named defendants in the lawsuit, mostly all foreign airlines. Neither FedEx nor UPS are named as defendants.

I do note that there is language that states that the Lufthansa Settlement Class includes "persons who purchased from any air cargo carrier, including air cargo carriers who are not named defendants in the Action." While it is not clear from the Notice whether shipments made through FedEx or UPS would be subject to the settlement, there have been some reports that they are included.

The one caveat I have is that the settlement applies to "air freight" shipments. In other words, it would not apply to envelopes or small packages. I would add that since the focus of this class action is fuel surcharges, you should check as to whether your freight bills in question show any fuel surcharges.

Ultimately, you should submit your claim to the claim administrator (website above) to see if it gets paid (or call 1 (800) 749-3518 for more information).

FREIGHT CHARGES – BACK SOLICITING A CARRIER

Question: I was dealing with a freight broker and we did not have a contract. One of the trucking companies gave me a better cost on my shipping needs. This broker went to that trucking company stating I was contracted with them and now this trucking company will only deal with me through this brokerage. I was not included in this decision. Did this brokerage violate some kind of law or can they bully business this way?

Answer: There are no laws or rules and regulations that apply to this situation.

Basically, you have to understand that the broker and carrier probably have a good established business relationship: the broker gets loads for the carrier and pays in a timely manner. If you "back solicit" the carrier, it would interfere with their relationship, and the broker might stop arranging loads with the carrier.

I don't think there is anything illegal about what was done here. If you were in their shoes you probably would have done the same thing.

FREIGHT CHARGES – BILL PAID SHORT FOR NOT FOLLOWING INSTRUCTIONS

Question: I am a broker agent. My customer gave me a load to move. Another one of our branch offices put a carrier on my load. Any carrier in our system has been approved by the corporate office in Medford, Oregon and they sign a contract. In the load confirmation it stated: "Load must be tarped and kept dry. Failure to tarp will result in rate reduction and/or refusal of load. Do not remove tarp until delivery has noted tarp on load. No exceptions." The other branch office also told carrier dispatcher and driver over the phone load must be tarped, no exceptions. On the bill of lading it stated load must be tarped do not remove tarp until delivery point has noted tarp on load. Driver did not tarp. When driver got to the delivery he was told either they would refuse the load or there would be a $500 charge for no tarp. There was no damage to the load and the carrier opted for delivery. The delivery point charged my customer $500 for no tarp, which in turn they passed on to the broker. My customer deducted the $500 from the invoice they paid to the broker.

The broker is now telling me that we cannot charge the carrier. They say we can only charge them what they would have been paid to tarp, $25-$50. As an agent we get 60% of the commission, or 30% if the load was booked by another branch office. According to the broker, because the shipper is my customer and they short paid $500, the broker is going to deduct from my commission pay 60% of $500.

I feel the carrier is responsible and should be charged the $500. Do I have a legal leg to stand on? Can I, as an agent, take anyone to small claims to recoup my loss, which I do not feel I should incur?

Answer: There is no simple answer to your problem, but I can give some general observations.

1. If there was no damage to the load, what gave the consignee the right to chargeback the $500? Was there some provision in the contract between your customer and the buyer that provided for a chargeback for failure to tarp the load? If not, your customer should not have allowed the deduction, and should not have short-paid the freight bill.
2. While it is clear that the instructions to the carrier required that the load be tarped, I do not see anything that spells out the penalty for failure to do so. Even though failure to tarp the load was a breach of the contract of carriage, there is no evidence that the carrier was on notice that the consignee would chargeback $500. You could bring a small claims action against the carrier, but the measure of damages is not clear.
3. It does seem a bit unfair that broker is deducting from your commission, since they did not contest the $500 deduction and you were not at fault. Maybe this can be re-negotiated.

FREIGHT CHARGES – BILLING FOR REDELIVERY

Question: Carrier is billing for redelivery charge because the consignee was closed during normal business hours. Their proof of making the initial attempt for delivery is a screen print of the freight bill delivery record showing only the initial attempt and the actual delivery date and time. The "date and time" on this form was entered manually via the driver hand held unit. The actual delivery receipt doesn't have any notation of the initial delivery. What is the validity of the screen print record? Should the delivery receipt show notation of the initial date and time of the initial attempt of delivery?

Answer: There is no law or regulation that governs situations such as this. It is just a question of fact and credibility. It would seem that if the consignee's facility was closed, it would be normal and reasonable for the driver to make some appropriate notation on the delivery

receipt. If you really question whether the redelivery was required, ask the carrier to give you a written statement to that effect.

FREIGHT CHARGES – BILLING THROUGH 3PL

Question: I recently started as a traffic manager. Our company was utilizing a third party logistics provider ("3PL") for their transportation. In reviewing costs and pricing there were questions which arose concerning what the 3PL was billing. It appears the less-than-truckload ("LTL") tariff pricing with the carrier is under our name with the 3PL listed as the bill to. In a nutshell the 3PL was adding an extreme amount to the invoice from the carrier. For example, on a minimum charge shipment, the LTL carrier was billing $75.00. The 3PL would simply add $200.00 to what the carrier actually invoiced.

My question is this. If the pricing from the LTL carrier is "owned" by our company, can we legally seek restitution from the 3PL? I have access to what the carrier actually invoiced the 3PL for versus what the 3PL then invoiced our company.

Just an FYI, I have already obtained direct pricing with other carriers and kicked the 3PL to the curb!!

Answer: It is not entirely clear what the contractual relationships were. You apparently dealt only with the "3PL" or broker, and the 3PL had some kind of contract or "tariff pricing" with the carrier that applied to your shipments.

If so, I think that whether or not the 3PL overcharged you is governed by your contract with the 3PL, and not its contract with the carrier. In other words, if you had agreed to pay the 3PL a fee of $200 per shipment, it wouldn't make any difference what the carrier actually charged.

FREIGHT CHARGES – BROKER COLLECTING FROM CONSIGNEE

Question: I believe that a motor carrier can go after either a shipper or a consignee for freight charges under the Interstate Commerce Act. Is the same true for a broker? If a shipper hasn't paid, can a broker sue the consignee for freight charges? Can the broker only do so if the contract provides for it? I've already done a few hours of research on this, but I can find no clear answer. Any help would be greatly appreciated. Thanks.

Answer: I assume that the broker dealt only with the shipper and that this was a "prepaid" shipment.

The only direct contractual relationship (privity) is between the broker and its shipper-customer. However, carriers can pursue a consignee, even on a prepaid shipment, on the theory that the consignee has received the benefit of the transportation services. Thus, I see no reason why the broker can't do the same thing.

I do note that the consignee may have a defense if the bill of lading was marked "prepaid", and the consignee, in reliance thereupon, has paid the shipper-seller for the full value of the goods. There is a line of "estoppel" cases reflecting this rule.

FREIGHT CHARGES – BROKER FAILS TO PAY

Question: I have a problem getting a hold of a couple of accounts to get some invoices paid. I would like to know what the laws are about getting the original consigner of the load to pay if that party has already paid the payment to the brokerage company that we got the load from.

Answer: Unfortunately, the situation where the shipper pays the broker, but the broker doesn't pay the carrier, is quite common.

Your "contract" is with the broker, and the broker is the party that has primary liability to pay you the agreed freight charges. Brokers are required by Federal Motor Carrier Safety Administration ("FMCSA") regulations to maintain a surety bond in the amount of $10,000. You can file a claim against the surety bond for your freight charges. The name of the surety bond company can be found on the FMCSA website: http://safersys.org/. I would note that if there are other claims, the bond may not be enough to cover your claim.

You can also try to re-bill the freight charges to the shipper(s). Usually, a shipper will not voluntarily pay the charges if it has already paid the broker ("double payment"). This means that you would need to bring a lawsuit against the shipper(s) if they refuse to pay. Whether a shipper is legally liable is a factual question, and the court decisions are not entirely consistent.

Freight Charges – Broker Obligations

Question: As a licensed, bonded broker, I need to know what our legal financial responsibility is with regards to a customer who doesn't pay their freight bills.

1. Are we obligated to pay the carriers in full if the customer doesn't pay us?
2. Are we obligated to act on behalf of the carriers (i.e. initiate collections or a lawsuit) in pursuing unpaid freight bills?
3. Is the type of freight (regulated vs. non-regulated) an issue?

Morally, I know what our responsibility is. However, practically speaking, our company could go belly-up if we had to absorb the loss of revenue from even one major customer.

Answer: Let me try to answer your questions.

1. Are we obligated to pay the carriers in full if the customer doesn't pay us?

The broker has two separate contractual relationships, one with the shipper and one with the carrier. You are an independent contractor, not merely an "agent" of the shipper.

Unless you have specifically provided in your contract with the carrier that payment is contingent on collecting from the shipper, your obligations with respect to the carrier are not dependent on your agreement with the shipper, i.e., your price, credit terms, etc. Thus, if the carrier provides the agreed services it is entitled to look to you as the broker for payment.

That said, if you have a situation where the shipper has gone bankrupt or out of business, you may be able to negotiate with the carrier and the carrier might agree to share part of the loss, but it does not have to do so.

2. Are we obligated to act on behalf of the carriers (i.e. initiate collections or a lawsuit) in pursuing unpaid freight bills?

Unless you have contractually agreed to do so, or want to "volunteer", the answer is NO. And, I would NOT recommend that you do so.

3. Is the type of freight (regulated vs. non-regulated) an issue?

The obligation to pay freight charges is contractual, and is not governed by any federal or state laws or regulations, so it doesn't matter whether the freight was "regulated" or "exempt".

Freight Charges – Broker Offsetting Claims

Question: We are a freight broker active in both dry, frozen and produce freight. Is produce considered an "exempt" product? If so, can we, as a broker, withhold payment(s) to a carrier for a claim that is definitely their fault; i.e., the load was run with warm temperatures?

We have a claim of $10,000 and have two pending trips, this one and another separate 'clean' load, that totals to the truck $10,500. Can we withhold payment until the claim is settled with their insurance company?

Answer: 1. Most agricultural products (other than manufactured products thereof) -- such as fresh fruits and vegetables are "exempt" under 49 U.S.C. Section 13506(a)(6) and the Federal Motor Carrier Safety Administration (formerly Interstate Commerce Commission) regulations at 49 C.F.R. Part 372. Frozen vegetables are not exempt. I would suggest that you check the regulations if you are in doubt as to a specific commodity.

2. It is not "illegal" to offset freight charges against loss & damage claims (or vice-versa), and it makes no difference whether the shipment is "exempt" or not. The carrier may, of course, sue you for its freight charges, in which case you would want to present a counterclaim for the loss & damage claims. In this regard, I note that you are a broker, not the shipper or consignee, so you would need to obtain an assignment of the claim from the appropriate party.

FREIGHT CHARGES – BROKER TERMS

Question: A brokerage firm with whom I have worked since 1994 has sent me a letter stating that if the original shipping paperwork and carrier bill of lading ("B/L") does not arrive in their office within ten days of the unload date, they will not pay the carrier until they are paid. If the carrier meets the ten-day deadline they will pay in 18 working days. This organization is not transparent, and has always found any excuse to avoid paying even by their own 18-day rule. What I mean is they could claim they never received the bills in time and then hold my money for as long as they please. In the past they have even done this when you have proof of delivery. My carrier B/Ls have "charges due upon receipt" on them.

My question is whether it is legal for a brokerage to apply a penalty without disclosing their agreements with the payee. (Brokerage firm agrees to move X amount freight, bill at the end of month with pre-arranged interest after so many days, carrier bill is delayed, carrier not knowing the broker/payee agreement, is being manipulated purely for the profit of the broker.)

This company has also decided to take a percentage of the fuel surcharge. Is this legal?

Answer: There is nothing "illegal" about the broker establishing credit and payment terms and procedures with carriers (or customers).

I would suggest that you talk to them about their position and attempt to negotiate more fair and reasonable terms. However, the "bottom line" boils down to whether you want to continue to do business with them.

As to your second question, I'm not sure how the billing works between the broker and its customers. As between a motor carrier and an owner-operator, it is clear that fuel surcharges are supposed to go to the owner-operator, not to the motor carrier.

FREIGHT CHARGES – BROKER/CARRIER AGREEMENTS

Question: In a Broker/Carrier Agreement if the carrier agrees to the following language, "CARRIER hereby designates BROKER as agent for the purpose of collecting the agreed to freight charges from the shippers and/or consignees served pursuant to this Agreement," does this in some way or in anyway void the carrier's right to collect freight charges from the broker in the event the broker's customer fails to pay the broker? Keeping in mind also that the agreement stipulates carrier must invoice only the broker and has a non-solicitation clause pertaining to broker's customers.

Answer: Without reading the contract in its entirety, I would think that the intent of the quoted language is to make it clear that the broker is an agent of the carrier, and not an agent of the shipper. Sometimes, when a carrier is not paid by the broker, the carrier's attorney will argue that a broker is the shipper's agent and therefore the carrier can collect its charges from the broker's principal (the shipper).

The language quoted does not say that the broker's obligation to pay the carrier is contingent on its collecting the freight charges from the shipper. In other words, I don't think the language would prevent the carrier from collecting the agreed freight charges from the broker that it has negotiated in its contract with the broker.

FREIGHT CHARGES – BROKERED TRUCKLOAD

Question: We shipped a truckload to a customer on a freight collect basis and did not sign section 7. Customer assigned JBH to pick up, delivery was completed and we got paid for our products.

Three months later, we received a collection agency demand to pay for the freight charges. Apparently JBH assigned the shipment to a broker (ST), who assigned it to another company (JT).

Our customer paid JBH's invoice, JBH paid ST's invoice, but ST folded (out of business) and did not pay JT. ST's phones are disconnected.

Answer: As a general rule, a shipper remains liable for freight charges even if the bill of lading is marked "collect". The only exception is if the bill of lading contains a "non-recourse" clause - often referred to as a "Section 7" clause - and the shipper has executed the non-recourse provision. If so, then the carrier can only look to the consignee for payment of its charges.

Your fact pattern is a little different from the simple shipper-carrier situation since your customer apparently arranged with a carrier to pick up the shipment, the carrier assigned the shipment to a broker, and the broker made arrangements with the actual carrier that transported the shipment.

In the situation where the shipper has paid an intermediary, the courts are divided. Some adopt the theory that the shipper remains liable even if it has paid the intermediary, since the bill of lading creates a contract between the shipper and the carrier. Others say that the intermediary is an independent contractor, that there is no privity of contract between the shipper and the carrier, and that the carrier essentially agreed to look solely to the intermediary for payment.

I realize that in your case, the consignee paid the first carrier, who paid the broker, and the broker failed to pay the actual carrier. It appears that there was no privity of contract whatsoever between your company and the actual carrier.

However, the answer to your specific question could possibly turn on whether the bill of lading shows the name of the actual carrier that transported the shipment. If it does not, I think the carrier would have difficulty in collecting its charges from your company.

FREIGHT CHARGES – BROKERS AND FACTORS

Question: I previously worked for a freight brokerage company that has now gone out of business. The owner has NOT filed bankruptcy for the company at this time. He closed the business in November 2008. The freight bills were billed by a factoring company to the customer, but the freight brokerage paid the charges to the carriers.

My customers are receiving phone calls from carriers demanding payment for the loads the carriers received from the broker. My customers have paid some of the freight invoices to the factoring company, but some of the freight invoices had not been paid when the brokerage closed.

I have two questions:

1. Are my customers liable to pay twice for the same load if they paid the factoring company?
2. Who do my customers pay if they have not paid yet?

Answer: From your description of the facts, I assume that the factor paid the broker and then invoiced the customers, but the broker failed to pay the carriers. Some of the customers have apparently paid the factor for all of their freight bills, and some of the customers have not yet paid the factor for all of their freight bills.

Your first question is: Are my customers liable to pay twice for the same load if they paid the factoring company?

The answer is not entirely clear because there are conflicting court decisions in this area, and the results often turn on the specific facts - such as how the parties are identified on the bill of lading, and whether there was a prior course of dealing.

The cases holding that the shipper should not have to pay twice generally say that since the broker was an independent contractor, there was no contractual relationship (privity) between the shipper and the carrier, and that the carrier essentially agreed to look only to the broker for payment. Cases to the contrary usually rely on a contractual relationship created by the bill of lading.

I would suggest that if your customer has paid the factor, it should tell the carrier that it is not liable and provide proof of payment to the carrier. In most cases the carrier will not pursue collection against the shipper or consignee.

Your second question is: Who do my customers pay if they have not paid yet?

Since the factor has purchased the receivable (the invoice) from the broker, it legally has the right to collect the freight charges from the shipper. It does not have any obligation to pay the carrier, since its contract was with the broker.

If the shipper pays the carrier directly, it may still be liable to the factor, i.e., double payment liability, unless the shipper can get a release (in writing) from the factor authorizing payment to the carrier.

If the shipper wants to pay the carrier and can't get a release from the factor, it should, at the very least, get a release and indemnity agreement from the carrier. In other words, the carrier would have to hold harmless and indemnify the shipper in the event the factor demands payment.

FREIGHT CHARGES – CARRIER BILLS ACCESSORIAL CHARGES TO SHIPPER

Question: We have carriers performing liftgate or inside delivery without prior authorization, then charging us, the shipper, for the service. To avoid this, we've been noting on the bill of lading ("B/L") "Inside Delivery/Liftgate is not available or authorized by the shipper". This has not helped - we are still being charged by the carrier. Any suggestions? Are we liable for the charges? Their tariffs are vague.

Many of our shipments are 3rd party to small sandwich or pizza shops with no dock. The parent company or dealer supposedly works out these details with the owner of the shop beforehand. But, when our product arrives, the shop changes their mind and has the delivery brought inside.

Answer: I assume that you don't have formal written transportation contracts with your carriers (that would be the best way to prevent the situation).

Other than deleting the charges and short-paying the freight bills, there is one other thing that you can do. If you are using a form of the Uniform Straight Bill of Lading there is usually a box on the face of the B/L referred to as "Section 7" or the "non-recourse" provision, which says:

> 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)

In theory, if the shipper signs the non-recourse provision, the carrier cannot look to the shipper for the additional charges at destination such as lift gate, inside delivery, detention, etc. and should be collecting these charges from the consignee.

I suggest that you sign this provision on all your bills of lading (whether they are prepaid or collect), and point this out to the carrier when they bill you for the unauthorized charges.

FREIGHT CHARGES – CARRIER INSPECTIONS & REWEIGHING

Question: Is there any specific documentation that a carrier must provide when it inspects a shipment? What must a carrier do when it re-classifies freight upward to a higher class or when it weighs the shipment and charges higher weight than shown on the bill of lading?

Answer: The only references to inspection, re-classification and re-weighing in the National Motor Freight Classification ("NMFC") are in Item 360:

> BILLS OF LADING, FREIGHT BILLS AND STATEMENTS OF CHARGES:
>
> 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.
>
> Sec. 4. Verification of Shipment Weight. When carrier or its agent believes it is necessary to verify the stated weight of a shipment as tendered, the carrier or agent shall weigh the shipment or cause the shipment to be weighed. If the stated weight is found to be inaccurate, the carrier or agent shall correct the weight accordingly. Freight charges must be assessed on the actual gross weight of the shipment, unless otherwise provided. (See Items 595 and 995.)

Other than for Household Goods, there are no Federal Motor Carrier Safety Administration ("FMCSA") regulations governing inspection and re-weighing.

I would think that if a motor carrier re-classifies a shipment or changes the weight, it would have an obligation to furnish the reasons for doing so. Railroads sometimes use "weighing and inspection bureaus" that do this, and they usually provide weight tickets, etc. if errors were found.

FREIGHT CHARGES - CARRIER NOT PAID BY BROKER

Question: We moved a load through a broker and we paid the broker's invoice for the move. The carrier is now seeking to collect the freight charges from us as the broker has disappeared. The bill of lading only named the broker and did not show the carrier. What are our rights and obligations?

Answer: The question of whether the shipper may be liable when it has paid a broker and the broker fails to pay the motor carrier is subject to conflicting court decisions, and usually turns on the specific facts.

Carriers cite a recent case that did allow a carrier to collect freight charges from a shipper, namely the 9th Circuit Court of Appeals decision in *Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co.*, No. 06-35460 (9th Cir., Jan. 18, 2008). I would observe that the court in the *Oak Harbor* case relied on decisions such as *National Shipping Co. v. Omni Lines, Inc.* that involved shipper liability to an ocean carrier, where the ocean freight forwarder failed to pay the carrier, which is a significantly different trade.

Shippers, on the other hand, usually rely on cases such as *Olson Distributing Systems v. Glasurit America*, 850 F.2d 295 (6th Cir. 1988) and *Jackson Rapid Delivery v. Thomson Consumer Electronics*, 210 F.Supp.2d 949 (N.D.Ill. 2001), which found the shipper not to be liable to the carrier.

A recent case, in the Appellate Court of Illinois, *Marx Transport v. Air Express Intl. Corp.*, No. 1-07-1953 (Ill.App. 2-25-2008), declined to follow the *National Shipping* decision.

In that case, Corning retained Danzas to coordinate the movement of certain overseas shipments. Danzas in turn engaged North American Expediting to arrange for trucking of the shipments from Corning's Kentucky facility to O'Hare International Airport in Chicago and to the Northern Kentucky International Airport in Erlanger, and North American brokered the shipments to the motor carrier Marx Transport. Corning paid Danzas, and Danzas paid North American, but the broker didn't pay the motor carrier.

The court reviewed the shipping documents (bills of lading) and found that they were "ambiguous", thus raising questions about the payment arrangement. It then looked to the course of dealing between the parties and held:

> Neither Corning nor Danzas retained Marx. When Marx completed its shipments, it submitted invoices for payment to North American. Marx never submitted an invoice to either Danzas or Corning, and there was no evidence presented that the defendants were to be guarantors for payment.
>
> Corning paid Danzas for all transportation services that Danzas provided to it. Danzas paid North American for its services.
>
> To summarize, Marx dealt with North American as an independent contractor and permitted balances to build up over approximately 60 deliveries, without any notification to Corning or Danzas. Marx created the risk of loss by its credit practices and, having accepted North American as the obligor, cannot now recast the transaction. Jackson Rapid Delivery Service, 210 F. Supp. 2d at 953.

Now, to address your specific facts, it appears that you dealt only with the broker, Third Party Transportation Solution, Inc. and had no course of dealing with the carrier. You were billed by the broker and paid the broker. The bill of lading that you provided shows only the broker's name where the carrier would normally be shown, and there is no reference anywhere on the bill of lading to the actual carrier. The carrier originally billed the broker, and apparently never billed your company until after the broker "disappeared". These are facts in your favor, and so I would suggest that you decline payment to the carrier. Of course there is no guaranty that the carrier will not continue its efforts to collect its freight charges, and could bring a lawsuit.

FREIGHT CHARGES – CARRIER PAYMENTS GARNISHED

Question: We have been served a “continuous” garnishment from our local sheriff’s office for a company that hauls our fresh packed potatoes for us. What freight laws would or could prevent me from executing such a garnishment. If I don’t pay the freight, the company is not going to haul for us. They are a good company and we need to maintain relationships with good trucking companies. I feel bad they are in bad financial shape and have not paid their broker. Is there any way I can help the broker and the truck company?

Answer: From your description of the facts, it appears that some creditor of the motor carrier has obtained a judgment against the motor carrier and is attempting to collect any monies that may be owed to the motor carrier.

You cannot ignore a valid garnishment notice that has been served by the sheriff. If you do so, you can be held in contempt of court and may be subject to fines or other penalties.

I would suggest that you talk to the carrier and explain that you have been served with a garnishment notice; suggest that the carrier work out something with the judgment creditor so that you will be able to pay them.

FREIGHT CHARGES - CARRIER SEEKING PAYMENT AFTER 20 MONTHS

Question: My company sold material to a supplier that arranged for a trucking company to come to our facility to pickup the steel. The date of the shipment was August 2007. Our customer supplied the carrier with a bill of lading (“B/L”).

We also gave the carrier a B/L showing our customer’s name and “will call” (designating that it was their carrier that picked up the material). Destination was left blank since we did not have that and the freight charges were marked collect.

Now, the carrier is coming back to us after 20 months seeking freight charges. What can I do?

Answer: There is an 18-month statute of limitations that applies to suits by carriers to collect freight charges that is set forth in 49 U.S.C. 14705:

> Sec. 14705. Limitation on actions by and against carriers
>
> (a) IN GENERAL- A carrier providing transportation or service subject to jurisdiction under chapter 135 must begin a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues.

Note that this statutory provision does not prevent a carrier from sending a freight bill (or a balance due bill) but it does give the shipper or consignee a defense if the carrier attempts collection.

FREIGHT CHARGES – CARRIER SEEKING TO COLLECT ON BROKERED LOAD

Question: I am a small fleet owner with 4 tractors. I have run into some trouble with a couple of loads and can’t get any payments on them from the broker or the shipper.

Last November, we booked a load with an agent of RFX, to pick up a load from Vision Express in Los Angeles. After we delivered the load in New Jersey we billed RFX and we were supposed to be paid in 5 days via quick pay. However, prior to us getting paid, the agent of RFX sent us two more loads from Los Angeles to New Jersey, which we took.

In the process of delivering, RFX contacted us and told us that Vision (shipper) is not a client of theirs, and their agent in San Diego give us the load without permission from RFX.

So, we got a hold of the agent, and then the agent told us to bill a company by the name of G.S.S. Logistics, Inc. At this point in time, we have no choice but to do as told by the RFX agent, so we billed G.S.S. We also talked to Vision Express in regards to the situation to make them aware of it, and it turns out that there are other carriers in the same situation as us.

Vision indicated it wanted to pay G.S.S. for these loads, and said it would take some time to get them in the system. G.S.S. promised to pay us as soon as they got the check from Vision. This went on for days, then weeks and now months. At this time, four months later, G.S.S. appears to no longer be an active broker according to the Federal Motor Carrier Safety Administration website. G.S.S.'s bonding company says G.S.S. is no longer a customer and there are many people trying to take a piece of the $10,000 bond.

We contacted RFX and they say it is not their problem, because it was not their load. Vision says they already paid, and not to bother them anymore. G.S.S. has disappeared and we are out of $13,000.

As a carrier, what can I do? Can I go after the shipper even though they say they paid?

Answer: It is not clear from your description of the facts, but I will assume that the actual shipper shown on the bill of lading was Vision Express, and that Vision Express claims that it paid a broker, G.S.S. Logistics, for the freight charges.

If so, based on a recent 9th Circuit Court of Appeals case, *Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co.*, No. 06-35460 (9th Cir., Jan. 18, 2008), you should be able to collect your freight charges from the shipper, Vision Express.

You may, of course, need to hire an attorney in the Los Angeles area and bring a lawsuit if Vision Express refuses to pay.

Freight Charges – Carrier Seeks to Collect on Double Broker Load

Question: Our company, All Florida Transport Services (Trucking Co-B), accepted a load from a freight broker, Central Hub Logistics (Broker-B), for a line-haul amount of $2,100. Driver arrives and discovers that the load is not of legal dimensions to transport on the highway without a "pilot-escort". Additional funds (total line-haul of $2,800) are requested from Broker-B. Broker-B agrees to our terms. The load is transported and delivered safely as requested to the consignee, Colbalt Yachts.

Broker-B is billed for our services. It is discovered, two (2) months after load delivery that Broker-B is broke and going into bankruptcy. Further details reveal that the load was initially assigned to Riley Trucking (Trucking Co-A) by the original freight Broker, Hillard Logistics (Broker-A).

The owner of Trucking Co-A is also the owner of Broker-B.

The consignee pays Broker-A.

Broker-A pays Trucking Co-A.

Trucking Co-B (our company) is the only "carrier" of record listed on the bill of lading signed for by the consignee.

Due to the fact that the consignee contracted with Broker-A, and has dealt only with Broker-A, and paid same, we cannot seek payment for our unpaid services from the consignee. However, is it plausible to seek payment from Broker-A, even if they've paid Broker-B, and are aware of our role in the matter?

Answer: Obviously it would make no sense to go after Central Hub Logistics (Broker-B), as you would only be an unsecured creditor in the bankruptcy proceedings.

However, I see no reason why you can't go "upstream" and pursue Riley Trucking (Trucking Co-A), since it appears that they subcontracted the load through Central Hub Logistics (Broker-B) - as their agent or "alter ego". If they are also out of business or judgment-proof, you should also be able to look to Hillard Logistics (Broker-A), even if they paid Riley Trucking, and argue that they did so at their peril, knowing that Riley Trucking would farm the load out to another carrier.

FREIGHT CHARGES – CARRIER'S LIEN FOR FREIGHT CHARGES

Question: We picked up freight from a shipper that did not have an account with our company. The Bill of Lading was marked prepaid. Is it legal for us (the freight company) to hold the freight until credit information is received by the shipper?

Answer: A motor carrier has what is known as a "carrier's lien" for freight charges. What this means is that the carrier does not have to deliver a shipment without payment (or some appropriate guaranty of payment). But beware that if the shipper or consignee tenders payment of the freight charges you must deliver the shipment, and also that the lien only applies to the current shipment and not any previous shipments for which freight charges may be due.

FREIGHT CHARGES - CARRIER'S LIEN

Question: We are a third party logistics provider ("3PL") that contracted a motor common carrier to haul freight. The carrier picked up the load but now refuses to deliver the load until "undisclosed" detention charges are agreed to by the 3PL.

What rights does a 3PL have?

Can a carrier keep possession and refuse to delivery of freight in order to extort "undisclosed" detention charges from a 3PL?

Answer: A motor carrier does have a lien on goods in its possession for the freight and accessorial charges due for that shipment. However, if the shipper tenders the charges, the carrier must deliver or release the shipment, or it can be held liable for conversion.

If this is a legitimate carrier, and you demand (in writing) a statement as to the amount owed and what it is for, the carrier should provide it to you. Most major carriers have a tariff that specifies their accessorial charges, detention, etc. and you are entitled by law to ask for the tariff authority for any such charges.

If the carrier provides the information, as a practical matter you should probably offer (again, in writing) to pay the charges and get the shipment delivered. If the carrier refuses to release the shipment, then your legal recourse is to sue for conversion.

I would point out that you, as a broker, are neither the shipper, the consignee, nor the owner of the goods. Thus, you technically do not have standing to bring a lawsuit, and it really should be done by one of those parties. If you should undertake to sue the carrier, you should get an assignment of the claim from the owner of the goods.

Lastly, I note that this scenario is typical of some "scams" that have been going on, so check out the carrier carefully if you have any reason to believe there may be a problem.

FREIGHT CHARGES – CLAIM FOR PAYMENT ON BROKERED LOAD

Question: I was recently contacted by a broker to pickup a load from another trucking company that made a delivery in Miami, FL. The truck that delivered the load was unable to return overage that was shipped. The load was transferred to my truck around 10 pm, at a seafood shipping company. The transferring of the load was not arranged between the broker and the delivery company; it was solely decided by the trucking company. Upon my arrival after traveling 12 hours to deliver the load in Atlanta, GA, I was informed that they were disputing the load because of a fish smell and a temperature problem.

The load was frozen dessert cakes that was carried at -10 degrees F as required. My reefer unit was pre-cooled before the load was transferred to my truck down to 32 degrees. I ran the unit on continuous the entire trip. The unit went in defrost cycle minutes before I was given a door to back into. Quality Control informed me that the temperature of trailer box was reading 60 degrees and the product temperature was 20 degrees. They received the load as a 'hold'.

The copy of the paper-work that I received from the other company was signed off by the receiver without any dispute noted. The broker refused to pay me for carrying the load. The broker said the company that signed the bill of lading is responsible, so why am I not getting paid? I transported a frozen load immediately after delivery to Florida without any temperature problem and several loads after. He withheld check taken for fuel to transport the disputed load from the returned load I carried from Atlanta to Florida. Do I have a right to receive payment?

Answer: Obviously there are some factual disputes as to the temperatures and the condition of the product, which might result in a claim for loss or damage.

It is not really clear who contracted with you to handle this load - the broker or the "delivery company". In any event, the dispute is apparently over the freight charges, and not over any claim for loss or damage to the product.

If you had some agreement as to the freight charges and/or a written rate confirmation, you are entitled to collect your charges. Depending on which party contracted for your services, if you aren't paid, you may have to bring a suit in Small Claims court.

FREIGHT CHARGES – CLASS "0" FREIGHT

Question: My company has a product that falls under Class 0. Based on the below, Class 0 is subject to rates and regulations of individual carriers.

Our challenge is that we setup National Motor Freight Classification ("NMFC") and Class by product line, not by carrier. We also use multiple carriers, which could mean multiple class numbers. As a shipper, is my company legally allowed to simply put Class 0 on the BOL for this particular product type and to thus have the responsibility of determining class fall upon the Consignee's carrier of choice. If so, am I obligated to notify the carrier and consignee beforehand? Your advice would be greatly appreciated.

Answer: Item 107837 Jewelry, other than costume or novelty; or Precious or Semiprecious Stones is shown in the Classification as Class 0.

> "Class 0" is discussed in Rule 420:
>
> Item 420 CLASSIFICATION OF ARTICLES-GENERAL
>
> Sec. 1. Numbers 50 to 500, specified in the 'CLASS' column on pages 241 through 582 of this Classification, and as amended, are the classes assigned to the articles described in connection therewith and refer to rates established by carriers for the same respective classes in tariffs governed by this Classification. Classes 77.5 and 92.5 refer also to rates for classes 77 1/2 and 92 1/2, respectively, in

carriers' tariffs governed by this Classification. The progression of classes in this Classification is from 50 (lowest) to 500 (highest).

Sec. 2. When "Exempt' is shown in the 'CLASS' column, it means that the commodity or commodities are not subject to economic regulation, and the tariff user should consult with the individual carrier for the applicable provisions.

Sec. 3. When '0' is shown in the 'CLASS' column, it means that such articles are subject to the rates and regulations of individual carriers.

Sec. 4. Where a carrier's rate tariff governed by this Classification does not provide a rate for a class shown in this Classification and no other provision is made in that carrier's tariff as to the application of such class, apply the rate for the next higher class for which rates are provided.

Sec. 5. In determining the applicable classification provision, a specific description takes precedence over a more general description provided the article or material being classified is actually embraced within the terms of the specific description, including any generic heading, subheading(s) and Note reference(s).

I spoke to George Beck, Senior Classification Specialist at the National Motor Freight Traffic Association ("NMFTA"), who basically said that the reason for "Class 0" is that NMFTA could not establish a class for this commodity and left it up to the individual carriers to establish a rate in their tariff, or as is more common today, in a rate quotation for specific shipments. If a shipper inserts this Item number on its bill of lading, the carrier will either apply its tariff rate (and liability limitation) if it is provided in the carrier's tariff, or the carrier should contact the shipper to negotiate an agreed rate (and liability limitation).

I would strongly advise the shipper to contact its carriers **before** shipping this commodity and get a written rate confirmation that also covers the applicable limitation of liability.

FREIGHT CHARGES – CLASSIFYING RECONDITIONED ITEMS

Question: I have looked through *Freight Claims in Plain English* (4th ed. 2009) but can't find any reference to application of National Motor Freight Classification ("NMFC") Item 425. I'm sure you covered it but don't see it. What page(s)is it covered in?

Carrier wants to limit his liability to $0.10 on a remanufactured item and I know this item of the NMFC is relevant, I just want to read what you've written on it. Can a carrier's tariff provision override Item 425?

Answer: I'm embarrassed to admit that I didn't include anything specific about Item 425 in the Fourth Edition, even though questions come up from time to time.

NMFC Item 425, Classification of Reconditioned Articles, reads as follows:

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.

Most major less-than-truckload ("LTL") carriers have a liability limitation for used machinery, etc. in their rules tariffs, typically $0.10 per pound. However, there is no such limitation or released rate provision in the Classification itself.

In addition, quite a few of the carriers have tariff provisions that are contrary to Item 425 -- they limit their liability on ANY "used" item to very low values (such as $0.10 per pound) regardless of whether the item has been "rebuilt, refurbished, remanufactured or reconditioned in any". For example, Item 25 of CNWY 199 [Conway Tariff], Liability Statement, states in relevant part:

Carrier liability with shipment originating within the United States:

> Unless the Spot Quote provisions apply, and unless the Shipper declares excess value on the Bill of Lading, requests excess liability coverage and pays an additional charge, Carrier's maximum liability is $25.00 per pound per individual lost or damaged piece within the shipment, subject to $150,000.00 maximum total liability per shipment, and **provided further that Carrier's liability on articles other than new articles, such as including but not limited to used, remanufactured, or refurbished articles, shall not exceed ($0.10) ten cents per pound per individual lost or damaged piece within the shipment**. Total declared value may not exceed $650,000.00 per shipment.

Whether or not a carrier's tariff can override Item 425 depends on the carrier's rules tariff.

In the example that I used from a ConWay tariff, Item 1 of CNWY 199 is "Governing Publications" and among the publications listed is the National Motor Freight Classification. However, there is a note that provides:

> ** Governs to the extent provided in Tariff CNWY 199 Item 8.

Item 8 of CNWY 199 is "National Motor Freight Classification (NMFC)" and it contains this language:

> The ratings, rules and regulations, estimated and minimum weights, shipping and packing requirements, allowances and privileges, or other provisions or conditions published in this Tariff, abrogate and supersede those in the NMFC, which conflict.

You can see that this particular tariff (if applicable) would clearly override Item 425.

Some further observations:

1. The applicability of the NMFC depends on (and requires) the carrier's participation in the NMFC, see 49 USC 13703(g). If the carrier is not a participant, the provisions of the NMFC do not apply.
2. The bill of lading would have to contain language that incorporates the classification and tariffs by reference - as does the Uniform Straight Bill of Lading in the NMFC. If not, they are not part of the "contract of carriage".
3. For any liability limitation to be enforceable, the court decisions say that there must be a "choice of rates". In order for there to be a meaningful opportunity to choose between two or more levels of liability, there must be some mechanism in the carrier's tariff to determine what it would cost for alternate levels of liability. In the example that I used, I could not find the amount of the carrier's valuation charge anywhere in the CNWY 199 rules tariff. In other words, there is no "choice of rates" provided in the tariff.

Freight Charges – Collect Shipment with Section 7 Signed

Question: We tendered a shipment to a less-than-truckload ("LTL") carrier with freight terms "collect". Section 7 was signed. The consignee did not pay the carrier, and went out of business (filed bankruptcy). The carrier is now saying the freight bill is our responsibility as their tariff states that unless released, the shipper and consignee remain liable for freight charges until the carrier is paid.

The consignee was responsible for arranging transportation for this shipment. Are we now responsible for paying the carrier? It is a small amount and I am going to pay, but wanted to see if we need to have a statement added to our bill of lading to prevent other carriers from following suit.

Answer: Assuming that you used some form of the Uniform Straight Bill of Lading, and that the carrier is a participant in the National Motor Freight Classification, the bill of lading would have contained a "Non-Recourse" provision 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 Uniform Straight Bill of Lading either contains on the reverse side, or incorporates, "Terms and Conditions" which state:

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.

It would seem to me that the provisions in the bill of lading would supersede any contrary provisions that might be buried somewhere in the carrier's rules tariff, and that the shipper would be protected against a claim for freight charges if the consignee fails to pay.

I would not pay this freight bill, and would tell the carrier to file its claim in the bankruptcy court.

FREIGHT CHARGES – COLLECTING FROM BROKER BOND

Question: I hauled a load for a broker in March for the sum of $2,900.00. The broker has yet to pay and has since gone out of business. I contacted the bond company and filed a claim against the bond. The bond company stated that the broker had several claims against them.

What other actions can I take if any to get my money? Can I fall back on the shipper or the receiver for payment on this matter if the bond company does not pay? Thank you for your time.

Answer: Unfortunately, the broker's bond is only $10,000 and if there are a lot of claims it won't be sufficient to pay all of the carriers. And, if the broker really is out of business, it probably would not make any sense to take them to court.

You can re-bill the shippers and/or consignees, but they probably won't pay you if they have already paid the broker. The liability of a shipper or consignee is not entirely clear from the court decisions, and usually depends on the specific facts of the transactions, the bills of lading, etc. A shipper generally has no liability if it has signed "Section 7" (the non-recourse section on the bill of lading), and a consignee has a defense if it has paid the shipper-seller for the goods, including the freight charges.

FREIGHT CHARGES – COLLECTING FROM BROKER WHEN SHIPPER DEFAULTS

Question: We provide trucking during the off-season. A broker/sometimes carrier/sometimes third party logistics provider ("3PL") convinced a shipper to use our trucking services (since we were both cheap and dependable). In the beginning the shipper used our services, and usually called us (not the broker) to arrange pickups. We sent our bills directly to the broker and broker paid the bills. Now with $40,000 of trucking charges outstanding, the shipper files for Chapter 11 and what we thought was the broker tells us that it was not a broker but just a paying agent and therefore it will not pay unless it gets paid. This broker/3PLP says

that the bill of lading ("B/L") acts as the only contract and since it is not listed our only recourse is against the shipper (now in Chapter 11) or maybe the consignee. We have no written contract with broker. But we do have a history of working with the broker in a broker/carrier capacity. Two questions:

1. Is he a broker (i.e., negotiates a price on behalf of shipper and pays the trucking charges)?
2. If broker is not listed on B/L and if we don't have written contract with broker is it true that the B/L is our contract?

Answer: It is possible that the intermediary you refer to is a broker or a freight payment agent, depending on the facts surrounding the arrangements and how it is holding itself out to the public.

In any event, the shipper's liability for freight charges is usually based on the "contract of carriage" (the bill of lading), and the shipper is primarily liable for freight charges.

The relationship between a broker and the carrier is a separate contractual relationship and brokers can be liable to the carrier even if they are not paid by their shipper-customer. This relationship does not need to be reflected in a formal written contract -- rate confirmations or a course of dealing, etc. can be sufficient to establish a contract.

It is possible to determine from the Federal Motor Carrier Safety Administration website if the intermediary holds operating authority as a broker.

Freight Charges – Collecting on Lufthansa Class Action

Question: We are an international freight forwarder. We have provided air services to our client utilizing Lufthansa Airlines. Recently, Lufthansa agreed to make available to the shipping public $85,000,000 in damages to be dispersed in a class action suit. The suit stated that the shipping public could participate even though they utilized the services of a freight forwarder. Our client has requested that we make available copies of air waybills to them for those shipments that we utilized the services of Lufthansa Airlines in order that their legal department may participate in the class action suit. We would like to know the following. How long do regulations require that we keep air waybills on file for our client's shipments? It is our understanding that under the Federal Register/Dept. of Commerce that these records must be kept for 5 years.

We would also like to know if we can submit unrated air waybills to our client. The rated air waybill will reveal to our client the difference between our cost from Lufthansa and our charges to them. It seems a violation of our business privacy to reveal our profit margins to our clients.

Answer: 1. I am not aware of any federal regulations governing record retention for air waybills except 14 C.F.R. Section 249.20. This regulation applies to certificated air carriers and specifies that air waybills must be retained for one (1) year. The regulation does not mention airfreight forwarders, but I think the one-year period would be a good guideline as to a reasonable period.

2. As to submitting "unrated" air waybills to your customers, you should first check whether this would prevent their recovery in the class action. If not, then you can probably redact (black out) the freight charges.

Freight Charges - Consignee Fails to Pay Freight on Air Waybill

Question: I have been a member of Transportation and Logistics Council for a few years now and have found your monthly TRANSDIGEST publication very valuable. Fortunately, in the

past I have not had the need to reach out to you with a question related to an existing problem, but now I do.

We are a third party logistics provider ("3PL") and upon instructions from our client we properly filled out an air waybill with instructions directing bill to the consignee and the proper consignee account number. If the consignee fails to pay, who has the responsibility to pay?

Answer: Assuming that this is an international airfreight shipment, I believe the terms and conditions on the reverse side of the usual IATA (International Air Transport Association) air waybill would apply. The latest version that I have contains the following language:

> 10./10.1 Except when the carrier has extended credit to the consignee without the written consent of the shipper, the shipper guarantees payment of all charges for carriage due in accordance with carrier's tariffs, conditions of carriage and related regulations, applicable laws (including national laws implementing the Convention), government regulations, orders and requirements.

I suggest that you check the terms and conditions on the air waybill to which you referred, and see if the language is the same.

FREIGHT CHARGES – CONSIGNEE LIABILITY ON FREIGHT PREPAID SHIPMENT

Question: We ordered product from a vendor in Canada. We received the product and were invoiced for both the product and for the freight to ship it to us. We paid the vendor in full. The vendor went bankrupt in October and has cashed all of our payment checks. The bankrupt vendor had not paid their carriers. The carriers are now contacting us and stating that we have to pay the invoices for the shipments we received-- even though we have already paid the vendor for the shipping costs. Are we liable to pay a second time for the freight costs since the carrier wasn't paid by the bankrupt company? They are telling us that the law dictates that we are liable and that they will be turning the case over to a lawyer if we do not pay.

Answer: On a "prepaid" shipment, 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 cases specifically turn on the bill of lading - whether it actually says "prepaid" or the appropriate box has been checked, so I would probably want to see your bill of lading before giving a firm opinion.

I would also note that there is an 18-month statute of limitations (49 U.S.C. Section 14705) for a carrier to bring a suit to collect its charges.

FREIGHT CHARGES – CONSIGNEE LIABILITY ON PREPAID SHIPMENT

Question: Thank you for your time and consideration of my question. I am currently in a situation where I purchased a product from a company in NY (I'm in GA), and paid him the full amount plus shipping fees for the product. When the trucking company attempted to deliver the product to me, the original terms they had were "collect". I contacted the shipper and told him that I would refuse the shipment because I had already paid the shipping fees to him and would essentially be paying twice if the shipping company tried to collect the charges from me. He called the shipping company and had them change the terms to "prepaid" because he stated he

was responsible for payment to them, because I had already paid him. So they changed the paperwork; they released the shipment to me, and the original receipt that I signed at delivery and the original freight bill states “Prepaid” under the section charges due.

The shipper is disputing the charges with the freight company and has been for almost 10 months. Needless to say, the freight bill has not been paid. The freight company has now sent the debt to a collection agency, and I received a very rude email from an agent stating that under US Code title 49, Section 13706 the consignee is jointly responsible for freight charges and that they are going to come after my company for payment. How do I dispute this charge? I paid my debt in full for the product and the shipping fees, signed documents stating that the charges were prepaid, etc. What else do I need to do? Is there any specific case law that I could reference in my response to them? Any help would be greatly appreciated.

Answer: From your description of the facts, the freight charges had been corrected to show “prepaid”, and you paid the vendor for the goods, including the cost of delivering them.

On a “prepaid” shipment, 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. You do not have to pay the charges twice.

FREIGHT CHARGES – CONSIGNEE’S LIABILITIES WHEN SHIPMENT DAMAGED

Question: Our company is a processor of vegetables. We ordered a truckload of perishable vegetables from a farmer in California for delivery to our processing plant in Florida. We contracted with a truck broker to provide for pick up of the vegetables and delivery to our processing plant. The bill of lading stated that the refrigeration unit on the truck was to run continuously at 34° F. for the duration of the trip to Florida.

When the product arrived it was hot and wilted and was not useable. A temperature recording device included in the shipment indicated that the temperature inside the trailer had been much higher than 34° F. The refrigeration unit shows that it was run at the agreed upon temperature for the entire trip. However, the unit continued to defrost during the trip. The load was rejected and we have not paid the farmer for the produce.

It was determined that the chute that conveys cold air to the back of the truck had been damaged. It is believed that this damage occurred during the loading of the truck. However, no one knows this for sure. The truck was loaded by a third party cold storage unit that held the harvested vegetables until they could be picked up. Because the chute was damaged, cold air never got to the majority of the product on the truck causing it to heat up and deteriorate to the point that it could not be processed and sold. It should also be noted that the driver had the opportunity to observe the loading of the truck, but it is our understanding that he did not do so.

It is our understanding that the farmer has engaged an insurance adjuster to get reimbursed for the loss of the product and to pay the freight charge to the broker. It has now been about 100 days since this happened and the broker is asking us to pay the freight bill.

Our contention is that we rejected that product because it was not delivered and kept cold for the trip and that we had nothing to do with the damage to the truck or the product. We also contend that the driver should have observed the loading of the truck and, had he done so, would have known that there was damage to the chute. He also should have known there was a problem since his refrigeration unit continued to defrost during the trip.

The truck broker contends that we hired him, we were responsible for the company that loaded the truck and that we should pay his bill and then go to the third party that loaded the truck and get reimbursement from them or their insurance carrier.

Should we pay the broker the freight charge and hopefully get reimbursement from the third party or is the broker the one that should look to the third party that loaded the truck for payment?

Answer: First, you have to realize that there are two separate contractual relationships: a contract for the sale of the produce between the seller and the buyer, and a contract of carriage for the transportation. In your case, the contract of carriage was made through the truck broker who arranged for the actual transportation with the motor carrier.

As between buyer and seller, there is a question as to the terms of sale, which would usually govern which party had risk of loss in transit. Under the Uniform Commercial Code ("UCC"), if the terms of sale are "FOB Origin" the buyer would normally have risk of loss; if the terms are "FOB Destination" the seller would have risk of loss. In any event, you have already decided that you would not pay the seller, so this issue is moot.

Regarding the contract of carriage, it is clear from your description of the facts that the motor carrier is liable for the loss since its driver was present and apparently had opportunity to witness the loading and to see that there was a cooling problem.

You indicate that the seller has filed a claim with its insurance company; if so, the insurer will most likely pay the claim and proceed by subrogation against the motor carrier. Here it is very important to make sure that the insurer is instructed to recover both the value of the produce and the freight charges that were paid to the motor carrier. Then the insurer can pay the seller for the value of the produce and reimburse the broker for the freight charges it paid to the motor carrier.

I suggest that you try to stay out of the middle on this, particularly the dispute as to whether the loss was the fault of the shipper that loaded the truck or the carrier, and leave it in the hands of the insurer to protect the interests of the broker.

Freight Charges – Danger of Double Brokered Loads

Question: I have a carrier who we contracted to haul 5 loads for us at a set price. After the carrier picked up the first load, they called us and asked if we would advance them a partial payment on the load. They asked for 40% at first and the next day they called in and said no, we need 90%.

This made us a little leery, so I put them off to do some checking. Then luckily a phone call came in about one of the loads we had posted on a load board. The carrier asked about the load and proceeded to tell us they had picked up a load for another brokerage from the same place going to the same place for a different amount. To be exact they were being paid $300.00 more than what I was paying the carrier who was now brokering the freight.

Now before you ask, yes we are the only ones moving the freight from this warehouse. They are closing it down and have contracted us to move all the loads. I have a rate agreement from the carrier who called me showing the load being brokered to them. Also, on the bill of ladings the carrier's name is not the one I gave the load to originally. I have an idea of what they are doing but can't prove it except from past experiences when I was working as a carrier.

Would you be able to advise me as to where I can find information on how to proceed? My contract does state if a carrier double brokers the freight to another carrier I am not responsible for paying them.

Answer: From your description of the facts, it appears that Carrier A "double-brokered" the load to Carrier B, which actually carried the shipment. It also appears that your rate agreement with Carrier A was some $300 less than it agreed to pay Carrier B. Obviously, no legitimate business would do this.

This sounds like a scam. We have heard of similar scenarios where Carrier A (or a broker) books a shipment at a very low price in order to get the work, double brokers the load to Carrier B at a higher price, and then collects from its customer and doesn't pay Carrier B.

Be VERY careful! If you pay the wrong party, you could be liable for a double payment. If there is any question as to which carrier should be paid, get all the paperwork (bill of lading, delivery receipt, etc.) and verify which carrier actually handled the load. Get a written authorization from the carrier that double-brokered the load to pay the actual carrier; if they are not willing to do this, hold payment until it is clear that you won't end up with liability for a double payment.

FREIGHT CHARGES – DEDUCTING CLAIMS FROM BROKER FEES

Question: I have been brokering several loads a week for a customer, but recently had to have an entire load dumped due to liability issues. The cost of the load was $25,000. The customer deducted the entire amount from pending payments, even though I still haven't received a freight claim. Can a customer deduct a freight claim from previous loads hauled for them.

Answer: I assume you are licensed by the FMCSA as broker.

Brokers normally do not have any liability for loss or damage in transit, and the shipper should have been advised to file a claim directly with the carrier. Unfortunately, you appear to have allowed your company to get caught in the middle, and your customer is now looking to you to pay its claim. You should try to get the customer to file a formal claim with the responsible carrier and offer to assist the customer in filing and collecting its claim.

If the customer continues to offset freight charges that it owes to your company, your only recourse may be to bring a lawsuit against the customer for the freight charges it owes. Be warned, however, that the customer will then probably counterclaim for its loss & damage claim, at which point you will need to bring the responsible carrier into the lawsuit.

I would advise you, in the future, to make it very clear to your customers that you are a broker and do not assume any liability for loss & damage claims. You should have a written agreement with both your customers and your carriers that makes this clear, or at least establish a set of terms and conditions that are incorporated into your rate quotations.

FREIGHT CHARGES – DEFAULTING BROKER

Question: We are a carrier and recently transported a load of freight through a broker, but the broker went out of business before they paid us. We filed a claim against their bond and the Trustee decided to pay "first-to-move" payout rather than pro-rate, therefore, we were left with nothing. The bond company sent me a letter informing me of this. They mentioned in this letter that "at least you can go after the shipper or shippers involved. Our analysis of the documentation you've submitted indicates that you're entitled to collect the full amount of the claim you've asserted from the shipper or shippers ultimately responsible for paying the freight charges for the physical transportation services you've conducted." Is this statement true, and if so what law or regulations apply to this and can we go after the shipper for the charges?

Answer: I assume that your company is the actual carrier that transported the load and is shown on the bill of lading as the carrier. If so, there is no reason why you can't bill either the shipper or the consignee. Obviously, if the shipper or consignee has paid the broker, they probably will object to paying the freight charges twice, and they may have a legal defense.

I would note that there is some conflict in the court decisions as to the liability of the shipper or consignee for a "double payment".

FREIGHT CHARGES – DEMURRAGE FEES WHEN SHIP SAILS EARLY

Question: A shipper contacts an NVOCC to ship a container overseas to its customer. The non-vessel operating common carrier ("NVOCC") checks the steamship lines sailing dates for the destination country and finds a ship listed with a preset sailing date. The shipper arranges to have the container moved to the port of origin for loading on the proposed vessel, however, the steamship line has loaded the vessel early and departed for the destination port. As a result, the container must wait at the port until the next vessel bound for that port of destination sails, which is over the "free time" period a container may be "spotted" at the port. The port assesses demurrage as a result. The NVOCC pays the demurrage and looks to the shipper, as the beneficial title holder of the goods, for the demurrage fees paid to the port. The shipper refuses to pay the NVOCC citing that it is "not at fault", blaming the NVOCC for the early departure of the steamship, claiming it was the NVOCC's "job" to be aware of the revised sailing date. Which entity is responsible for the demurrage fees?

Answer: I'm not sure I can answer your question.

If the shipper has a Service Arrangement contract with the NVOCC, it is possible that there may be some provision in the contract that would govern. Typically, Service Arrangements with NVOCC's have disclaimers and do not guarantee sailing on a particular vessel.

Even if there is a contract, many of them incorporate the terms and conditions of the NVOCC's house bill of lading and the rules tariff, which may provide the answer.

FREIGHT CHARGES – DENSITY AND CUBES

Question: We purchase a low-density product for one of our manufacturing processes, which frequently ships less than truckload. In our contract, we have a density minimum rule that states that any shipment occupying more than 750 cubic feet and a density less than 4 pounds per cubic foot ("pcf") will be rated as a higher class than our freight all kinds ("FAK"), with a weight figured by using the cubic feet of the shipment multiplied by 6 pcf, and at a reduced discount. The problem is that one particular carrier wants to arrive at the cube by measuring to the ceiling of the trailer. We've always defended our position by saying that floor loaded freight has to be measured piece by piece to arrive at cube. Is there a ruling or NMFC item that covers how to measure cube? If the carrier adds skids to the shipment for their convenience at the first break, then measures the shipment for cube, is that an accurate measurement? My solution is to force our vendor to only ship in truckload quantities for this commodity, but I haven't been able to make that happen yet.

Answer: I believe the answer to your question may be found in Item 110 of the National Motor Freight Classification which provides in relevant part:

Item 110
DEFINITIONS AND EXPLANATION OF TERMS, PUNCTUATION AND REFERENCES

The following definitions will apply when such terms are used in this Classification or in tariffs governed by this Classification. When different definitions are provided for the same terms in connection with rates, classes, rules or other provisions, such definitions will take precedence.

* * * * * * * * *

Sec. 8. 'Density.' Where classes are applicable according to the density of articles as tendered for shipment, the word 'density' means 'pounds per cubic foot.'

Sec. 8. (a) To determine the density of an article, first determine the cubage by multiplying the greatest straight-line dimensions of length, width and height (depth) in inches, including all projections, of the article as tendered to the carrier for shipment, and dividing the total by 1,728 cubic inches (one cubic foot). The density is the result of the division of the weight of the article as tendered for shipment by the cubic feet. For instance, the density of a box measuring 12" x 12" x 30" and weighing 10 pounds is determined as follows: 12" x 12" x 30" = 4,320 cubic inches; 4.320 ÷ 1728 = 2.50 cubic feet; 10 lbs. ÷ 2.50 = 4.00 pounds per cubic foot (pcf).

Sec. 8. (b) To determine the density of a cylindrical-shaped article, square the greatest dimension on the cylindrical plane by multiplying the dimension by itself in inches and then multiplying that result by the height or length. Divide the result by 1,728 cubic inches. The density is the result of the division of the weight of the article by the cubic feet.

Sec. 8. (c) Where articles are unitized on lift truck pallets, platforms, racks or skids, the pallet, platform, rack or skid constitutes the shipping package, or a part thereof, and except as provided in Item 640, Sec. 3 (b), must be included in the computation of density.

My reading of this section is that the "cube" is based on the dimensions and weight of "the article as tendered for shipment", i.e., the dimensions and weight of the carton or box. The skid or pallet would also be included IF it was included by the shipper at the time of tender of the freight (but not if it was added later by the carrier for its own convenience). It does not include a measurement to the ceiling of the trailer.

Freight Charges – Detention Fees

Question: My company does not have a current contract with a particular carrier; however, they are charging us outrageous detention fees. They are requesting that we pay all invoices in full, even if there is any type of typo error, pallet charge error, handling charge error, or detention fee. We then have to file a claim to each of their departments for whichever claim it may apply-even if it is the same load number. I have told the carrier that because we do not have a contract with them, we are not required to pay their detention fees. We have requested and received their rules tariff. I would like to know if we HAVE to pay the detention fees or not? And what is our back up if we do not?

Answer: If you are using a motor common carrier and do not have a transportation contract, then your "contract of carriage" is the bill of lading, which usually incorporates the carrier's tariffs by reference.

Thus, in the absence of some other agreement, the rates and charges in the carrier's tariffs become applicable and are usually enforceable.

You are entitled by law to request a copy of any applicable tariffs from the carrier, and you are also entitled to appropriate backup or documentation that supports the carrier's accessorial charges such as detention.

The best advice I can give you is to contact a qualified transportation attorney and to have written transportation contracts with the carriers that you use, so that these issues can be negotiated in advance without "surprises" and disputes.

FREIGHT CHARGES – DISAPPEARING BROKER

Question: We did business with a company, Third Party Transportation Solutions, Inc. of Garden Grove, California that now appears to have "disappeared."

We made a shipment with them on 4-29-08, which they in turn gave to Dads Transport, of Tallahassee, Florida to transport for us. Third Party invoiced us $2,000.00, which we have paid them.

However they appear never to have paid Dads Transport the $1,400.00 due them for this shipment and now Dads is coming back to us demanding payment.

Are we required to pay Dads Transport for this bill since we have already paid Third Party?

Answer: Your company as the shipper may be liable -- the case law is not entirely clear in this area and the decisions often turn on the specific facts.

It is also possible that the carrier may be able to recover against the broker's surety bond or trust fund, unless it has already been canceled or depleted by other claims.

The question of whether the shipper may be liable when it has paid a broker and the broker fails to pay the motor carrier is subject to conflicting court decisions, and usually turns on the specific facts.

Carriers cite a recent case that did allow a carrier to collect freight charges from a shipper, namely the 9th Circuit Court of Appeals decision in *Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co.*, No. 06-35460 (9th Cir., Jan. 18, 2008). I would observe that the court in the *Oak Harbor* case relied on decisions such as *National Shipping Co. v. Omni Lines, Inc.* that involved shipper liability to an ocean carrier, where the ocean freight forwarder failed to pay the carrier, which is a significantly different trade.

Shippers, on the other hand, usually rely on cases such as *Olson Distributing Systems v. Glasurit America*, 850 F.2d 295 (6th Cir. 1988) and *Jackson Rapid Delivery v. Thomson Consumer Electronics*, 210 F.Supp.2d 949 (N.D.Ill. 2001), which found the shipper not to be liable to the carrier.

A very recent case, in the Appellate Court of Illinois, *Marx Transport v. Air Express Intl. Corp.*, No. 1-07-1953 (Ill. App. 2-25-2008), declined to follow the *National Shipping* decision.

In that case, Corning retained Danzas to coordinate the movement of certain overseas shipments. Danzas in turn engaged North American Expediting to arrange for trucking of the shipments from Corning's Kentucky facility to O'Hare International Airport in Chicago and to the Northern Kentucky International Airport in Erlanger, and North American brokered the shipments to the motor carrier Marx Transport. Corning paid Danzas, and Danzas paid North American, but the broker didn't pay the motor carrier.

The court reviewed the shipping documents (bills of lading) and found that they were "ambiguous", thus raising questions about the payment arrangement. It then looked to the course of dealing between the parties and held:

> Neither Corning nor Danzas retained Marx. When Marx completed its shipments, it submitted invoices for payment to North American. Marx never submitted an

> invoice to either Danzas or Corning, and there was no evidence presented that the defendants were to be guarantors for payment.
>
> Corning paid Danzas for all transportation services that Danzas provided to it. Danzas paid North American for its services.
>
> To summarize, Marx dealt with North American as an independent contractor and permitted balances to build up over approximately 60 deliveries, without any notification to Corning or Danzas. Marx created the risk of loss by its credit practices and, having accepted North American as the obligor, cannot now recast the transaction. *Jackson Rapid Delivery Service*, 210 F. Supp. 2d at 953.

Now, to address your specific facts, it appears that you dealt only with the broker, Third Party Transportation Solutions, Inc. and had no course of dealing with the carrier. You were billed by the broker and paid the broker. The bill of lading that you provided shows only the broker's name where the carrier would normally be shown, and there is no reference anywhere on the B/L to the actual carrier, Dads Transport. The carrier originally billed the broker, and apparently never billed your company until after the broker "disappeared". These are facts in your favor, and so I would suggest that you decline payment to the carrier. Of course there is no guaranty that the carrier will not continue its efforts to collect its freight charges, and could bring a lawsuit.

Freight Charges – Discounting Rates to Shippers

Question: We are a transportation intermediary (third party logistics provider or 3PL) and we operate in international air and ocean shipments. We are considering extending our services to the U.S. domestic trucking market and we are interested in learning in more depth how U.S. trucking transportation it is regulated by the law in the U.S., particularly after the demise of the Interstate Commerce Commission ("ICC") in 1996.

I did have the chance to read an article about the issue of passing the "discounted rates from shipper to the customer vs. not".

The article reads in part:

> However, discounting of truck rates is now the general rule, and some shippers negotiate "volume incentive" discounts that are dependent on the total volume of freight tendered to the carrier during a specified period of time. Sales agreements based on "Freight Prepaid and Added to Invoice" thus raise a question of whether the shipper may lawfully pass on to its customers the full non-discounted rate or whether they must pass on the discounted charges.

Is there a clear ruling about this issue? Is the shipper operating within the law passing the FULL non-discounted rate to his customers?

If not:

What will be the liability and the possible penalties that the shipper will be subjected to with this practice?

Will be the 3PL (the broker) in this case be liable for any misconduct considering that no additional financial benefit will result from this practice?

As I stated we are new and we are trying to understand how U.S. domestic trucking is regulated to be able to be up to speed with the rest of the competition.

Answer: This is a common question and there is no hard and fast answer. It is not "illegal" to charge more (or less) than the actual freight charges to deliver goods to a customer. However, if you represent to the customer that you are adding the actual freight charges to the invoice, you may be guilty of misrepresentation or commercial fraud.

The situation 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 your customer could reasonably claim commercial fraud or misrepresentation if you (the seller) add an amount higher than the actual freight charge to your invoices. We have not seen any court decisions dealing with this issue, but it would appear that a customer might have grounds for legal action if its vendor is misrepresenting the freight charges in its 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".

FREIGHT CHARGES – DOCUMENT RETENTION WHEN BUSINESS IS TAKEN OVER

Question: Celadon Trucking bought Continental Express in early December. Celadon is claiming they cannot provide proof of deliveries ("PODs") prior to the sale and Continental is no longer in business. Since there is 9 months from the date of delivery for filing claims in our contract how can we protect ourselves not only in this instance but also in the future? What obligations does Continental have?

If we cannot obtain a POD, customers can claim non-delivery and take advantage of these situations. This can get expensive quickly and we need some type of protection.

I tried to get a POD for two bills of lading. I contacted Continental Express and they are no longer in business. Celadon Trucking took Continental Express over however for the shipments before Dec. 4, 2008 Celadon Trucking can't provide us with PODs. I spoke to a person at Celadon and they said the computers that held all of the information from those shipments were taken apart and sent back as they were rentals. They also said there is no way to get these PODs or any information on these shipments. What do I do from here?

Answer: The federal requirements governing record retention are found in the Federal Motor Carrier Safety Administration ("FMCSA") regulations at 49 CFR Part 379 - Preservation of Records, and applies to all motor carriers and brokers. The regulations specify various time periods depending on the type of record - as a general rule, records relating to claims, delivery receipts, etc. must be retained for one year.

As relevant to your question, 379.9 states:

> §379.9 Companies going out of business.
>
> The records referred to in the regulations in this part may be destroyed after business is discontinued and the company is completely liquidated. The records may not be destroyed until dissolution is final and all pending transactions and

claims are completed. When a company is merged with another company under jurisdiction of the Secretary, the successor company shall preserve records of the merged company in accordance with the regulations in this part.

Assuming that Continental Express was merged with Celadon Trucking, the successor would be obligated to preserve these records for at least one year.

While this may give you some basis for arguing with Celadon, I must point out that the FMCSA will probably be of no help in enforcing the regulations or imposing any fines or penalties for failure to observe the regulations.

My best suggestion is to put Celadon Trucking on notice that you will hold them responsible for any customer claims based on shortages or non-deliveries where they cannot produce a delivery receipt to rebut the claim.

FREIGHT CHARGES – DOUBLE BROKERED LOAD

Question: I brokered a load under our brokerage division to carrier "A". The load was picked up and delivered, and the carrier submitted the bill. The invoice was processed and carrier was paid within our 30 day terms. Approximately two months after paying carrier, I received a call from another carrier who actually hauled the load. Carrier A was double brokering without my knowledge. Carrier A went out of business without paying the carrier they brokered the load to. I have a contract signed with carrier A and also have a signed rate confirmation from carrier A. The carrier who actually hauled the load is now coming to me for payment. I feel as though our obligation has been fulfilled as we did pay the carrier we had an agreement with.

Can the 2nd carrier legally come after us for this payment?

Answer: The second carrier can, of course, try to collect from you, but I think you would have a valid defense since there is no contractual basis for their claim. The only question I would ask is whether carrier #2 is shown or named on the bill of lading or the delivery receipt, which might possibly affect the result.

FREIGHT CHARGES – DOUBLE BROKERED LOADS

Question: I have a question concerning the matter of double brokering. Could you please see if anyone could help me with this matter?

We have been in business 15 years and have an outstanding record and are members of the TIA (Transportation Intermediaries Association). It seems there is an increase in the unauthorized situations of double brokering. If we have a contract with a carrier, safety record and authority packet on file and can prove that we paid said carrier - and if that carrier then brokers the load to 2nd carrier that we do not have a contract with, are we obligated to pay that 2nd carrier? Also, can the 2nd carrier bring litigation against my customer (bonds and trusts have been exhausted)?

Answer: This is not the usual broker fails to pay carrier situation, however, the analysis is similar. I assume that your customer is the shipper/consignor, although you do not specify. I also assume that they paid you, before you paid the first carrier.

Whether a shipper or consignee is liable in the event a broker doesn't pay the delivering carrier is the subject of conflicting court decisions.

If the shipments were "freight prepaid", as to the liability of the consignor, the courts are divided. Some adopt the theory that the shipper remains liable even if it has paid the broker,

since the bill of lading creates a contract between the shipper and the carrier. Others say that the broker is an independent contractor, that there is no privity of contract between the shipper and the carrier, and that the carrier essentially agreed to look solely to the broker for payment.

On a "prepaid" shipment, 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 if the shipment was "freight collect", the consignee cannot assert the estoppel defense. Then the same conflicting theories that I discussed above would be involved and it could depend on what court decides the case.

That being said, a review of all the actual paperwork involved in the transaction might help clarify the situation: Which parties are named on the bill of lading and in what capacity? What were the terms of sale for the goods?

You also mention that you had a contract with the first carrier. It is possible that there may be some provision in that contract that would be applicable. Unfortunately, as the second carrier was not a party to the contract, it would not be bound by its terms.

FREIGHT CHARGES – DUPLICATE PAYMENTS AND BROKER RECORDS

Question: I have two questions I hope you can answer.

1. One of our clients believes it may have paid a parcel carrier's weekly bill twice, multiple times since 2006. The bills came in for a slightly different amount the 2nd time, and zeroes were added to the invoice number, so it was not caught as a duplicate. Are we able to go back that far, to 2006, for that type of overpayment?

2. Are we correct that when a shipper uses a third party to gain lower rates, and the third party bills the shipper more than it pays the carrier, presumably as a broker, that shipper has the right to see the carrier's tariff and to know how much is being paid to the carrier by the third party? There is no dispute that shipper has lower transport costs and enjoys the services of the third party, he's just trying to get a handle on the third party's income on his business.

Answer: 1. Time limits to recover duplicate payments:

The so-called "180-day rule" set forth in 49 U.S.C. 13710 provides:

> (3) BILLING DISPUTES-
>
> (B) INITIATED BY SHIPPERS- If a shipper seeks to contest the charges originally billed or additional charges subsequently billed, the shipper may request that the Board determine whether the charges billed must be paid. A shipper must contest the original bill or subsequent bill within 180 days of receipt of the bill in order to have the right to contest such charges.

The "180 day rule" would not appear to be applicable to a claim for duplicate payments since it only applies when the shipper seeks to contest the amount of "charges originally billed" (overcharges) or "additional charges subsequently billed" (balance due bills).

There is also an 18-month statute of limitations that applies to suits by shippers for overcharges that is set forth in 49 U.S.C. 14705:

> Sec. 14705. Limitation on actions by and against carriers
>
> (b) OVERCHARGES- A person must begin a civil action to recover overcharges within 18 months after the claim accrues.... [the claim accrues on delivery or tender of delivery by the carrier]

However, there is a distinction between an "overcharge" and a "duplicate payment".

There is no time limit specified for filing a duplicate payment claim in the Federal Motor Carrier Safety Administration ("FMCSA") (formerly Interstate Commerce Commission ("ICC")) regulations at 49 CFR Part 378 - Procedures Governing the Processing, Investigation, and Disposition of Overcharge, Duplicate Payment, or Overcollection Claims.

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

If there is no applicable federal statute of limitations, it would be logical that the State statute of limitations for that type of action would apply. We researched this some time ago and found that in New York, a duplicate payment claim would probably fall into the category of "Money Paid by Mistake", which has a six (6) year statute of limitations. As the court observed in *National Bank of Canada v. Artex Industries, Inc.*, 627 F.Supp. 610 (S.D.N.Y. 1986):

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

Thus, at least in New York, you would have six years to bring a court action to recover on a duplicate payment claim.

2. Shipper's right to broker records.

The FMCSA regulations at 49 CFR Part 371.3 provide as follows:

> (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.

Since, under subsection (c), the shipper is a "party to the transaction", it is entitled to the information specified in the regulations.

FREIGHT CHARGES – EXPEDITED SERVICE ON REPLACEMENT SHIPMENT

Question: Question 1 - FedEx National picked up goods at our dock and the driver noted that there were freeze tags on some of the boxes. Driver left with our time sensitive shipment but returned four days later indicating that they do not handle freezable goods. FedEx National advised that the bill of lading ("B/L") must indicate that the shipment included freezable goods. Who is liable for the cost incurred to get the shipment to our customer on time?

Question 2 - FedEx customer service advised that the only service they offer that would get the shipment to the customer the next day was FedEx Custom critical. Our warehouse assumed that the charges would be waived given the four day delay was caused by FedEx National. Who owes the charges for the FedEx Custom Critical service?

Answer: I understand why you feel that FedEx National should have some responsibility for the delay and the extra charges for expedited delivery -- and they might agree if you explain the situation to them.

However, most likely FedEx has provisions in its tariff or service guide that deal with protective services such as refrigeration or protection from freezing. Unfortunately, the law only requires carriers to provide copies of tariffs, service guides, etc. "on request of the shipper", so the burden of knowing what is in the tariff or service guide generally falls on the shipper.

FREIGHT CHARGES – FAILING TO PAY FACTOR AND CARRIER NOW BANKRUPT

Question: We are a freight broker. We recently used a carrier who is under contract with a factoring company. We do not sign factoring company notifications but do honor their requests to send payments to them. We recently used a carrier on two shipments but paid the carrier direct instead of their factoring company. The invoices were stamped with the remit to address for the factoring company. Our employee made the remitting error.

The carrier is now in bankruptcy. The factoring company initially contacted us to collect the payment. We explained to them that we paid the carrier direct. I suspect the factoring company also purchased the receivable. The factoring company sent us a collection letter demanding payment to them.

Recently, they sent us a letter canceling their demand for payment. Now they are once again demanding payment. They tell us by law we have to pay them regardless if we signed their assignment notice or not. They advise that the stamp on the invoice is all that is needed to force payment from us. Do we have to pay the factoring company even though we've already paid the carrier?

Answer: Obviously you should have paid the factor, not the carrier, since the invoices apparently indicated that the receivables had been assigned to the factor.

I'm not sure whether you have exposure for "double payment" -- this would require some research into the court decisions interpreting the provisions of the Uniform Commercial Code in your state. It's also complicated by the fact that the carrier is in bankruptcy, and the factor could be in violation of the automatic stay. You might contact the attorney for the debtor in possession and ask him for an opinion.

FREIGHT CHARGES – FREIGHT HELD HOSTAGE

Question: We are a broker and we broker freight to other carriers. We hire a carrier to do trailer moves and the customer gives permission to use the trailer to haul cargo from pick up to delivery. This is in the rate confirmation. This is usually within a ten day delivery period.

If the carrier fails to deliver within the ten day period and drops the trailer somewhere other than the customer and refuses to deliver unless he is paid more money, what recourse does the broker have but to pay the additional money to try and get delivery? What do you do if the trailer is not delivered at all?

Answer: From what you indicate, the carrier contracted in writing (the rate confirmation) to an agreed rate for the move, and is now holding the freight "hostage" for additional money.

You could hire an attorney and bring a suit for "conversion", asking for injunctive relief (immediate delivery of the shipment) and also for any damages that are the consequence of the carrier's tortious actions. However, as a practical matter, this would take some time. In the meantime, the delay might ruin your relationship with your customer.

I hate to say it, but probably the quickest and most cost-effective solution is to pay the carrier's demands and get the shipment delivered.

I would also note that problems like this can usually be prevented with a properly drafted Broker-Carrier Agreement, and by exercising due diligence in selecting carriers.

FREIGHT CHARGES – FREIGHT PREPAID WHEN SHIPPER FAILS TO PAY

Question: We had a shipment from a manufacturer over a year ago that has now filed bankruptcy. The freight charges for the shipment were to be prepaid under the terms of our purchase agreement. The shipper did not pay the freight bill and now the carrier wants to collect from us.

Our order was full freight allowed under stated terms by the manufacturer. We paid them for the product and were not supposed to pay the freight.

Am I required by law to pay this freight bill?

Answer: This is a recurring issue. On a "prepaid" shipment, 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 cases specifically turn on the bill of lading - whether it actually says "prepaid" or the appropriate box has been checked, so I would probably want to see your bill of lading before giving a firm opinion.

I would also note that there is an 18-month statute of limitations (49 U.S.C. Section 14705) for a carrier to bring a suit to collect its charges.

FREIGHT CHARGES – GENERAL RATE INCREASE

Question: Can someone tell me what the general freight rate increase is nationwide for 2009?

Answer: There really are no collectively-made "general freight rate increases" any more for motor carriers since the rate bureaus lost their anti-trust immunity. Each of the major less-than-truckload carriers does publish its own rate increases from time to time and these are usually reflected in the carrier's individually-published class rate tariff.

FREIGHT CHARGES – HOW TO PROTECT AGAINST BROKER DEFAULT

Question: How do we release ourselves of liability if a broker does not pay the freight company they use?

Scenario: A truck was booked through a broker, the truck hauled the product and delivered as required. A bill was received by my company from the broker and the broker was paid. My company is being sued because we did not pay the truck company. No bill was received from the truck company. The paperwork did have the truck company name on the bill of lading ("B/L").

Answer: Unfortunately, this is an all too common experience, and there are a number of collection outfits that represent smaller carriers and go after shippers and consignees for the freight charges when the broker doesn't pay the carrier.

The court decisions in this area are not in agreement and often depend on the specific facts in each case. Without more details about the underlying transactions I can only give you some general observations regarding the shipper's liability for the freight charges.

As to the liability of the shipper, the courts are divided. Some adopt the theory that the shipper remains liable even if it has paid the broker, since the bill of lading creates a contract between the shipper and the carrier. Others say that the broker is an independent contractor, that there is no privity of contract between the shipper and the carrier, and that the carrier essentially agreed to look solely to the broker for payment.

I would note that if you are using a form of the Uniform Straight Bill of Lading there is usually a box on the face of the B/L referred to as "Section 7" or the "non-recourse" provision, which says:

> 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)

In theory, if the shipper signs the non-recourse provision, the carrier cannot look to the shipper and can only collect its charges from the consignee.

As for the future, here are some suggestions:

1. Always check out the broker before using it. Check the Federal Motor Carrier Safety Administration ("FMCSA") website - www.fmcsa.dot.gov - and go to the Licensing and Insurance section to make sure the broker has an active license and a surety bond on file. See when their operating authority was first granted and whether it has been revoked and reinstated. Ask for references and financial information.
2. Sign the "Section 7" box on the bill of lading (whether it is "prepaid" or "collect").
3. Include a statement on your bill of lading (a rubber stamp will do) that says:

> Notice: If this shipment is arranged through a broker, the carrier agrees that it will look solely to the broker for payment of its charges, and waives any right to recover payment of its charges from any party except the broker.

FREIGHT CHARGES – INCLUDING PALLET CHARGES AND UNLOADING CHARGES

Question: We are a broker for produce and have a couple customers that will deduct pallet charges or unloading charges on their payments to us even though pallets or unloading are not indicated on the bill of lading. Can they do this? I thought the bill of lading was a legal document yet the bill of lading does not indicate any notations of pallet exchange required or

that there is an unloading charge involved in the delivery. Shouldn't there be something on the bill of lading or other paperwork that addresses these charges?

Answer: You are correct is saying that the bill of lading is a "legal document" - a contract of carriage. But it is a contract between the shipper and the carrier.

I assume that you negotiate rates and terms of service with the carriers that you engage. Your rate confirmation document should set out not only the linehaul rates, but any other accessorial charges, delivery instructions, etc. in order to avoid problems such as this.

It also appears that most of your problem is with your customer, the consignee. Here again, your rate confirmation with the customer should spell out the details as to any pallet exchange, unloading charges, etc.

The statutes regarding unloading or "lumping" charges, located at 49 USC §14103, says:

> Sec. 14103. Loading and unloading motor vehicles
>
> (a) SHIPPER RESPONSIBLE FOR ASSISTING- Whenever a shipper or receiver of property requires that any person who owns or operates a motor vehicle transporting property in interstate commerce (whether or not such transportation is subject to jurisdiction under subchapter I of chapter 135) be assisted in the loading or unloading of such vehicle, the shipper or receiver shall be responsible for providing such assistance or shall compensate the owner or operator for all costs associated with securing and compensating the person or persons providing such assistance.
>
> (b) COERCION PROHIBITED- It shall be unlawful to coerce or attempt to coerce any person providing transportation of property by motor vehicle for compensation in interstate commerce (whether or not such transportation is subject to jurisdiction under subchapter I of chapter 135) to load or unload any part of such property onto or from such vehicle or to employ or pay one or more persons to load or unload any part of such property onto or from such vehicle; except that this subsection shall not be construed as making unlawful any activity which is not unlawful under the National Labor Relations Act or the Act of March 23, 1932 (47 Stat. 70; 29 U.S.C. 101 et seq.), commonly known as the Norris-LaGuardia Act.

As for the consignee deducting for "pallets", you haven't made it clear why this would be done. Was the carrier expected to pick up pallets and return them? If so, it should have been included in the rate that was negotiated with the carrier.

FREIGHT CHARGES – INTERNATIONAL FREIGHT FORWARDER

Question: I have a freight forwarder trying to collect payment on several shipments sent to Nicaragua on behalf of our customer. Apparently the customer in Nicaragua has not paid the forwarder for the shipments. The freight forwarder is under the impression that since we were a party to the shipment they can pursue payment from us. We did not contract with the forwarder for the shipment to Nicaragua. The forwarder is listed as the consignee on our bill of lading. The freight terms on our invoice indicated "FOB Destination", which in this case is the freight forwarder in Miami. My argument with the forwarder is simply we did not contract with them and therefore are not responsible for any charges. Do they have any legal right to collect payment from us? Thanks.

Answer: Let me first observe that there are two separate contractual relationships involved -- one is your contract of sale with the customer in Nicaragua, and the other is a contract with the freight forwarder for transportation services.

From your description of the facts, it would appear that the customer in Nicaragua probably made arrangements with the forwarder in Miami to act as its forwarding agent. If so, then your position would be correct in that you had no contract or agreement with the forwarder, and the forwarder can't look to your company for payment of its charges.

FREIGHT CHARGES – INTERPRETING THE NMFC WHEN NO VALUE SHOWN

Question: A bill of lading shows National Motor Freight Classification ("NMFC") item 61045-01 but does not show an actual value as called for in item 61047. Is the shipment to be rated using 61045-01 class 85, or is it to be rated using sub 4 class 300 because no value is shown?

Answer: I would think that most carriers would look at the item number on the face of the bill of lading (Item 61045 Sub 1) and rate the shipment at class 85, ignoring the Note in Item 61047 that requires a certification of the actual value per pound.

In any event, if the carrier does rate the shipment at class 300 because the value was not shown, the shipper can still provide proof of a lower actual value and the freight charges "will be adjusted accordingly".

FREIGHT CHARGES – IS AN E-MAIL QUOTE FROM A CARRIER BINDING?

Question: If a carrier is given all information for a shipment and they give us a price via email to move the load which is why my company chose them over others - Isn't the price they gave as good as a contract?

Answer: From the limited information you provided, I would think that the price that was given to you by email would be a binding contract, since you relied on the quote and used the carrier to transport your shipment. There may be other factors involved, so I don't know if the shipment may have been misdescribed (weight, size, number of packages, etc.) or whether there were additional accessorial services (inside delivery, detention, etc.)

FREIGHT CHARGES – IS CONSIGNEE LIABLE IF BROKER FAILS TO PAY CARRIER?

Question: Our company hired a freight broker to haul merchandise to one of our customers. We paid the freight broker in full for this service. The freight broker then hired and arranged for a motor carrier/sub-hauler to deliver the merchandise to our customer.

The motor carrier/sub-hauler did not get paid by the freight broker, and apparently the freight broker is no longer in business (or going out of business) and did not pay the motor carrier for their service. Subsequently, the motor carrier has hired an attorney to contact our company to pay the carrier's unpaid bill in the amount of $8,050.00.

My question is, can a motor carrier legally pursue a freight claim against the end user (consignee and/or the consignor - who hired and paid a freight broker to arrange for the delivery of merchandise to the consignee) if the consignee/consignor did not enter into any contract or arrangement directly with the motor carrier?

Discussion:

· Bill of Lading. The Bill of Lading has language on the BOL between the customer and freight broker that states:

"Special Instructions: Attn. Driver: Carrier/Sub-Hauler engaged by Freight Brokers has no Payment Rights or any other recourse against shipper, consignor or consignee if freight broker fails to pay carrier/sub-hauler."

- Rate Confirmation contract. This contract is only between the freight broker and the motor carrier, and notes the customer as the final destination.

Answer: Unfortunately, this is an all too common experience, and there are a number of collection outfits that represent smaller carriers and go after shippers and consignees for the freight charges when the broker doesn't pay the carrier.

The court decisions in this area are not in agreement and often depend on the specific facts in each case.

You apparently have one good defense: the non-recourse language on the bill of lading. However you say the bill of lading is "between the customer and freight broker" which is confusing, since a broker is not a carrier and a bill of lading legally is "issued" by the carrier to the shipper.

In order to give you a better answer, I would need to see the relevant documents - the bills of lading, freight bills, rate confirmations, any shipper-carrier or broker contracts, the carrier's demand letter, etc.

FREIGHT CHARGES – LATE BILLING OF RAILROAD DEMURRAGE CHARGES

Question: I have a question about railroad demurrage bills

The Norfolk Southern just sent me 12 months of demurrage invoices. They claim that there was a "glitch" in their system and it caused demurrage bills for one of our plants to be missed.

The bills date back to September 2008.

We asked the Norfolk Southern twice this year that we thought it odd that we had not seen any demurrage bills, but they claimed that there were none.

Is there any statute of limitations on the railroad sending us demurrage bills when it is their fault that they were not issued?

Answer: The statute of limitations applicable to railroads is found in 49 USC Section 11705 (a), which provides:

> (a) A rail carrier providing transportation or service subject to the jurisdiction of the Board [the STB] 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.

The claim "accrues" on delivery or tender of delivery by the rail carrier.

Unless you have some defense as to the validity of the demurrage bills, I don't think this statute of limitations is going to help you.

I should note that the corresponding statute of limitations for motor carriers is only 18 months and is found in 49 USC Section 14705 (a). This time limit was shortened in the ICC Termination Act of 1995 as a result of the "freight undercharge" claims that plagued the industry.

FREIGHT CHARGES – LATE SUBMISSION OF SUPPORTING DOCUMENTS

Question: We are a freight forwarder. A carrier hauled a load for us in October of 2008; the customer that we had the load hauled for requires that all invoicing to them be done within 180 days of delivery. Once the 180 days is up, we forfeit all rights to collect any freight charges from them.

When the carrier sent us their invoice, they did not include any of the supporting documentation required for us to make payment (bill of lading, proof of delivery, accessorial charges, etc). We advised the carrier that in order for payment to be made, we must have these documents and we even tried calling the receiving facility to no avail.

Because we had no supporting docs, we could not invoice our customer and after 180 days, we had to write off the charges; we never heard from the carrier again...until now...

They contacted us today requesting (demanding) payment for the services rendered in October of 2008. They sent in the paperwork today, a year and a half later, but of course, we cannot bill our customer because of the 180 day agreement.

Is there a statute of limitations on when a carrier submits the paperwork and payment is expected?

What if there is no signed rate confirmation between the freight forwarder and the motor carrier? Are we still obligated to pay?

Answer: There are actually two separate federal statutes that could be applicable to the carrier's claims for freight charges.

The so-called "180-day rule" set forth in 49 U.S.C. §13710 would apply to claims for undercharges:

> (3) BILLING DISPUTES-
> (A) INITIATED BY MOTOR CARRIERS- In those cases where a motor carrier (other than a motor carrier providing transportation of household goods or in noncontiguous domestic trade) seeks to collect charges in addition to those billed and collected which are contested by the payor, the carrier may request that the Board determine whether any additional charges over those billed and collected must be paid. 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.

There is also an 18-month statute of limitations that applies to suits by carriers to collect freight charges that is set forth in 49 U.S.C. §14705:

> Sec. 14705. Limitation on actions by and against carriers
> (a) IN GENERAL- A carrier providing transportation or service subject to jurisdiction under chapter 135 must begin a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues.

Note that these statutory provisions do not prevent a carrier from sending a freight bill (or a balance due bill) but they do provide a statutory defense if the carrier attempts collection.

If the shipment was delivered more than 18 months ago the limitation in Section 14705 would apply and the claim would be time-barred. I don't think it makes any difference. The statutory language is quite clear.

FREIGHT CHARGES – LIABILITY FOR OVERWEIGHT

Question: We are a broker and we hired a trucking company to haul a load for one of our customers. Our customer told us that the load was about 34 thousand pounds. When the driver received the bill of lading it said 44 thousand pounds. The driver left the origin and headed toward destination and ended up getting a ticket for being overweight. The driver states

we are responsible for the ticket. We are wondering who is truly liable to pay the ticket? Whose responsibility is it to determine whether the load is actually a legal weight?

Answer: The motor carrier has primary responsibility and liability for the overweight. If there was any doubt about the actual weight of the load, the carrier should have had it weighed or should have refused it.

On the other hand, if the shipper loaded the trailer, the shipper should have known the weight of the cargo and would also seem to have responsibility.

I would suggest that you explain the facts to the shipper and ask them to pay the overweight.

In any event, I don't see how your company (the broker) would be liable for the overweight under the circumstances that you have described.

FREIGHT CHARGES – LIABILITY WHEN BROKER PROVIDES WRONG INFO

Question: We are a carrier and the broker's confirmation states to pick up a Volvo Wheel Loader at shipper's address. The driver calls the contact number, arrives at the gravel pit where contact person says he was expecting us. He loads THE ONLY Volvo Wheel Loader there. The driver then delivers the loader to a port in Florida and receives a signed bill of lading for the loader. Days later the broker tells us that we had the wrong Volvo Wheel Loader; he had sent us to the wrong place for pick up. The broker then short pays freight invoice for the warehouse charges and a freight bill to move the loader 20 miles to another location. For a $4500 load (permitted) he pays us $654. Can the broker do this?

Answer: I assume that you had some kind of written (or faxed) rate confirmation from the broker for the first movement, so that is not an issue.

You apparently did not have such an agreement as to the charges for the subsequent reconsignment of the Volvo Wheel Loader. Even if this is true, you should still be able to collect the reasonable value of your services.

Unfortunately, if the broker doesn't pay your freight bill your only recourse may be to bring a lawsuit. Most likely you can do this in your local small claims court. Note that you can get the name and address of the broker's agent for service of process in your state on the Federal Motor Carrier Safety Administration's website: http://www.fmcsa.dot.gov/. Look under the "Registration & Licensing" section, go to "Licensing & Insurance", select "Carrier Search" and look up the broker's information. You will see the name of the "Blanket Company" (for the broker's registered agents). Go back to the main menu and select "Blanket Companies", find that Blanket Company and you will see the name of the agent for process in your state.

FREIGHT CHARGES – LISTING OF BILL OF LADING

Question: We are concerned about a situation we believe may be either bad business practice or possibly illegal. We are hoping you can help clear this up for us. We have recently placed orders through a company who has then ordered said product from a third company. This third company then ships the ordered product to our customer using our freight account. However, we are not being listed as either the shipper or the payer of the freight on the bill of lading. Is this legal practice? In order to use our account and receive our discounts shouldn't this third company be required to list us as either party?

Answer: I can see at least two possible problems with this procedure.

First, the carrier may not apply your contract rates if you are not shown on the bill of lading.

Second, in the event of loss or damage to the goods, you might have a difficult time proving that you are the proper claimant.

It would be better if your company was shown as the shipper -- one way would be "Lifetime Products by ABC (vendor)" that would indicate the vendor is shipping as your agent.

FREIGHT CHARGES – MASTER BILL OF LADING

Question: I recall some time back an Interstate Commerce Commission ("ICC") decision that stated a shipper did not have to issue a formal master bill of lading as long as the back up bills were cross referenced to allow the carrier to identify and combine the less than truckload ("LTL") shipments (to the same consignee at the same location and all picked up at the same time in the same vehicle). The carrier states that there MUST be a master bill of lading and they were not given one even though the carrier cross-referenced the various bills on their own billing. The carrier, however, billed all shipments as separate LTL shipments. Who is correct?

Answer: I don't believe that there is any specific provision in the National Motor Freight Classification that governs the situation you described. However, it is possible that the carrier may have some provision in its rules tariff that governs multiple shipments.

I would suggest that you ask the carrier for a copy of its rules tariff, and to identify the authority for its position on billing.

In any event, it does seem to me that the carrier is being unreasonable, since it obviously knew that these were multiple shipments from the same shipper to the same consignee, at the same time.

I would note that such problems can often be avoided by a properly-drafted transportation contract.

FREIGHT CHARGES – MISDELIVERY OF BLIND SHIPMENT

Question: Our carrier picked up a "blind" shipment. The carrier was advised at time of booking the load of the actual destination (we have a signed rate confirmation showing the correct delivery address). The driver delivered the shipment to the receiver listed on the bill of lading ("B/L") (my guess is the driver was probably never advised by the dispatcher of the actual destination). As a result, we have had to arrange transportation of the shipment to the proper destination. Is this just a risk of doing "blind" shipments or is there liability on the carrier's part?

Answer: As you know, the bill of lading is often referred to as the "contract of carriage". What you had in this situation was essentially a reconsignment - a change in the named consignee as shown on the bill of lading. In the absence of an instruction to reconsign the shipment, the driver could reasonably assume that he was bound to deliver the shipment to the consignee named on the bill of lading. To do otherwise would constitute a breach of the contract of carriage (misdelivery) for which the carrier could become liable.

Here, the carrier apparently did know of the reconsignment, but failed to communicate this information to its driver. Since the mistake was on the part of the carrier, it should be responsible for any additional charges to re-deliver the reconsigned shipment to the new consignee.

FREIGHT CHARGES – NAFTA SHIPMENT

Question: I had a freight collect shipment picked up in Mexico and delivered in the U.S. The consignee paid with a check that was returned for insufficient funds. My argument with the

shipper is he is equally responsible for the charges under U.S. rules. The shipper claims transportation rules are different in Mexico. This exportation was made under the North America Free Trade Agreement ("NAFTA"). I am told that the agreement has an article that covers transportation disputes. Can you help me find this article?

Answer: I am not aware of any provision in the NAFTA treaty that would govern the liability of a shipper vs. a consignee for payment of freight charges.

There is a new NAFTA bill of lading, the "INTER-AMERICAN UNIFORM THROUGH BILL OF LADING FOR THE INTERNATIONAL CARRIAGE OF GOODS BY ROAD" which contains the following language:

> 1. Shipper or Consignee shall be liable for the freight and all other lawful charges, except that collect shipments may move without recourse to Shipper when Shipper so stipulates, by signature or endorsement in the space provided for that purpose on the face of this Bill of Lading. Nevertheless, Shipper 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 Shipper.

I do not believe that the NAFTA bill of lading is yet in widespread use, so the liability for freight charges would probably be governed by the terms and conditions of the Mexican carrier's bill of lading ("talon") or the carrier's tariff. You should review the talon and you may need to consult a Mexican attorney for an answer to this question.

FREIGHT CHARGES – NEED TO PROVE SERVICE PERFORMED

Question: The company I work for has a manufacturing location in Sonora, Mexico and a distribution center ("DC") on the border in Arizona. Our primary operations are located in the Midwest. My question is this. I have received invoices from a domestic air freight forwarder for shipments from our Arizona DC to one of our manufacturing locations in the Midwest. Upon receipt of these invoices we asked the forwarder to provide us with a copy of the shipping documentation corresponding to the invoices, including our company issued bill of lading ("B/L") and the signed proof of delivery ("POD").

The forwarder was unable to provide a copy of any of the B/L's issued by our company covering the shipments and very few of the PODs. This made us question the validity of the invoices that we were receiving, as the forwarder could not produce shipping documents initiated by our company, nor any carrier shipping documentation signed by our company personnel.

We were able to reconcile, with internal data and documents, most of the invoices to actual shipments that were made, thus considering them valid. However, there are still some invoices remaining unpaid that we simply cannot validate as "real". In other words, we believe the carrier may be submitting invoices for movements that did not occur, based on the fact that we paid other invoices without them submitting our shipper initiated B/L, etc.

The forwarder is threatening legal action against us for the unpaid invoices that we cannot validate. What legal recourse does the forwarder have if they cannot produce documentation of any kind substantiating the shipments occurred nor showing any liability for the freight charges of the supposed shipments? I do not want to pay for a service if we did not receive it. (No, we have no formal contract with this transportation company. They were used by an employee in error prior to that being detected.) Please advise.

Answer: You ask, "What legal recourse does the forwarder have if they cannot produce documentation of any kind substantiating the shipments occurred nor showing any liability for the freight charges of the supposed shipments?"

As with any lawsuit, the plaintiff has the burden of going forward and establishing a prima facie case of liability. Liability for freight charges is based on contract, and the plaintiff must show that there was some agreement between the parties, and that the services were actually performed. It would seem from your description of the facts that the forwarder would have difficulty doing this.

Unfortunately, if you are sued, you will probably need to retain counsel and incur legal expenses.

About the only thing I can recommend at this point is to document your position clearly in writing, giving reasons why the invoices are not paid, and what documentation (bills of lading, delivery receipts, etc.) you would need in order to pay the invoices.

FREIGHT CHARGES – OBLIGATION FOR DEMURRAGE CHARGES

Question: We are owed invoices for intermodal transportation services provided prior to the incident below and not having anything to do with it.

The customer incurred "demurrage" at an intermodal depot and is blaming our company for the service failure. The issue was due to the customer and his broker failing to pay the "ocean" charges to a third party.

We refused to pay these demurrage charges so the customer contracted another carrier to move the units for them and now is refusing to pay open invoices to our firm claiming the cost of "demurrage" and the transportation costs of the other trucker which is 3 times the amount of our standard charges to this customer for over 2 years.

Answer: I don't think there is any simple answer to your problem. It would seem that you earned the freight charges for the services you provided, and that the expenses incurred by your customer were not due to any fault on your part.

Depending on the amount in controversy, your only remedy may be to file a suit in small claims court for the amount due. Before you do this, however, make sure to file a clear written demand for the charges due.

FREIGHT CHARGES – OBLIGATION TO PAY

Question: My client was consignee of goods for which the consignor did not pay freight charges. The carrier is seeking to collect unpaid freight charges from my client. The invoices were originally billed to consignor who refused to pay them. Apparently the bill of lading ("B/L") is marked "Freight Collect".

The carrier told my client that the consignee is jointly and severally responsible for the shipping charges of any received freight commodity even if the B/L is marked "Freight Collect."

Is counsel for the carrier correct?

Answer: Normally, the carrier will invoice the shipper on a "prepaid" shipment, and the consignee on a "collect" shipment.

The shipper is primarily liable for freight charges if the bill of lading shows "freight prepaid". The shipper may still remain liable for freight charges even if the B/L shows "freight collect". The only exception recognized in the court decisions is where the shipper has executed "Section 7", the "non-recourse" provision of the Uniform Straight Bill of Lading, see e.g.,

Southern Pacific Transportation Co. v. Commercial Metals, 456 U.S. 336, 102 S.Ct. 1815 (1982).

The consignee would be primarily liable for freight charges if the B/L shows "freight collect". The consignee can also be liable on a "freight prepaid" B/L, 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" B/L, 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 it is included in the invoice price.

FREIGHT CHARGES – OBLIGATION TO PAY WHEN SHIPMENT STOLEN

Question: I am trying to find the definitive rule on claims. We had a load stolen and the insurance company paid all but the deductible and the carrier paid the rest. The carrier is now saying we owe for the line haul and fuel even though the load was never delivered. We require a signed bill of lading from the receiver prior to making payment, which of course is not now possible. Can you give me some insight into why we would be paying the freight?

Answer: The contract of carriage (the Uniform Straight Bill of Lading) states that the carrier "agrees to carry to destination". Obviously, since the shipment was never delivered, the carrier did not do this and is in breach of the contract of carriage. Accordingly, the carrier is not entitled to collect its freight charges.

The rule is different where a portion of the shipment is delivered without damage. There, the carrier is entitled to be paid for the pro-rata freight charge (usually based on weight) for the portion that was delivered, but not for the lost or damaged portion.

FREIGHT CHARGES – OBLIGATIONS OF CONSIGNEE

Question: I was told that when the shipper goes out of business, the consignee has "statutory" liability to pay the freight charges to the trucking companies even if the consignee had already paid the shipper for the freight charges. Where exactly is that written in 49 U.S.C?

Answer: First, there is no "statutory" provision in the Interstate Commerce Act (Title 49) that says a consignee is liable even if it has paid the shipper for the freight charges.

On a "prepaid" shipment, 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.

FREIGHT CHARGES – OBLIGATIONS WHEN BROKER GOES BANKRUPT

Question: My customer used a broker in the past that filed bankruptcy and failed to pay the carriers on many loads. Now the customer who is the consignee is being harassed by collection companies for the carrier demanding payment. What are my customer's options and obligations?

Answer: Without more details about the underlying transactions (bills of lading, freight bills, etc.) I can only give you some general observations regarding the consignee's liability for the freight charges.

First, if the shipments to the consignee were "prepaid", and the consignee-buyer has paid the shipper-seller for the goods (which includes the cost of delivery), there is an established body of case law that protects the consignee against "double payment", based on the principle of estoppel. In other words, the carrier cannot collect the freight charges from the consignee.

Second, if the shipments to the consignee were "collect", and the consignee has not paid the freight charges, it could be a violation of the automatic stay in the bankruptcy proceedings for the carrier to try to collect from the consignee, see e.g., *In re Chateaugay Corp. (LTV Steel Co. v. David Graham Co.)*, 78 B.R. 713 (S.D. NY 1987).

Third, even if the shipments were "collect", the case law on whether a carrier can collect from a shipper or consignee when the broker has not paid the carrier is not settled, and there are decisions that go both ways. The cases are very fact-dependent, and in many situations the carrier cannot collect on the grounds that it extended credit only to the broker and has no privity of contract with the shipper or consignee.

Freight Charges – Offsetting Overcharges Against Past Due Invoices

Question: I have received claims for duplicate payments made on invoices for one of our customers from a freight audit company. It is my understanding (based on your response to a similar question) that it may be in our best interest to come to an agreement with the customer to use the claim proceeds to offset significantly past due invoices if possible.

My question is to the statute of limitations on the claim(s). How far back can they go? We've received claims in 2007 for overpayments dating back to 2004. Is there any legal objection based on the date of service or payment?

Answer: The so-called "180-day rule" set forth in 49 U.S.C. 13710 would apply to claims for overcharges or disputes over balance due bills by a shipper (undercharges):

> (3) BILLING DISPUTES-
>
> (B) INITIATED BY SHIPPERS- If a shipper seeks to contest the charges originally billed or additional charges subsequently billed, the shipper may request that the Board determine whether the charges billed must be paid. A shipper must contest the original bill or subsequent bill within 180 days of receipt of the bill in order to have the right to contest such charges.

There is also an 18-month statute of limitations that applies to suits by shippers for overcharges that is set forth in 49 U.S.C. 14705:

> Sec. 14705. Limitation on actions by and against carriers
>
> (b) OVERCHARGES- A person must begin a civil action to recover overcharges within 18 months after the claim accrues.... [the claim accrues on delivery or tender of delivery by the carrier]

So, the time limit for you to initiate an action to collect an unpaid original past due invoice is 18 months (the 180 day rule only applies to revised bills) so if your "significantly past due invoices" are over 18 months old, the statute of limitations has run. However, if a legal action was commenced by the shipper against you, the running of the time limit does not prevent you from raising these past dues as an offset to the plaintiff's claim and the court may look at the relationship between the dates of the past dues and the dates of the duplicate payment in its determination.

With regard to the time limits the shipper is bound by, note that there is a distinction between an "overcharge" and a "duplicate payment". The 18-month limit would apply to overcharges, however, if these claims are for an inadvertent duplicate payment, I don't think that the sections cited above would apply. Instead, an applicable state-law statute of limitations would govern. In New York the applicable statute of limitations would be six years (CPLR 213 Sub. 6 - an action based upon mistake).

All that being said, it makes sense to try to use these past dues to negotiate a favorable/acceptable settlement rather than undergoing the cost and aggravation of litigation.

FREIGHT CHARGES – OLD FREIGHT BILLS

Question: We closed a plant in South Carolina two years ago and now one of the small local carriers we used for that plant has suddenly come up with dozens of old invoices they claim were never paid, some dating back to 2004. We show no record of these invoices with our freight payment/audit company. Are we still obligated to pay these invoices even though they have exceeded the 18-month statute of limitations?

Answer: The federal statute of limitations that applies to suits by carriers to collect freight charges is set forth in 49 U.S.C. 14705:

> Sec. 14705. Limitation on actions by and against carriers
>
> (a) IN GENERAL - A carrier providing transportation or service subject to jurisdiction under chapter 135 must begin a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues.

Note that this statutory provision does not prevent a carrier from sending a freight bill (or a balance due bill) but it does give the shipper or consignee a defense if the carrier attempts collection.

I would note that there are a number of collection agencies that have been sending out all sorts of obnoxious dunning letters for old freight bills, and ignoring the statute of limitations. Please let us know who has been trying to collect these invoices so we can alert our members.

FREIGHT CHARGES – OWNER DISAPPEARS

Question: We are a third party logistics ("3PL") company with warehousing in New York, we have an account that we placed their product in a warehouse out of State (Utah). The customer appears to have gone out of business.

They do not answer their phone, a message comes on and now you can not leave a message because the mail box is full. The owner's cell number does not work and he does not answer his home number.

This customer owes us for storage and shipping in excess of $11,000.00 and the storage is monthly at about $800.00 a month. We now have 129 pallets in stock that we would like to place a lien on the product so we can auction/sell the product.

Please advise how we would go about putting a lien on the product out of state, and are there any complications to place a lien when it is not in our warehouse in New York. The product should have some worth to offset the bills open.

Do we have to auction the product and if it does not sell at the auction, then we can sell it ourselves?

Answer: If you are acting as a "warehouseman" you have a lien for warehouse storage charges. I think this would be true even if you subcontracted the storage to another warehouse.

On the other hand, as a "3PL" (I assume you acted as a broker for the transportation), you are not a "carrier" and therefore you do not have a carrier's lien for the freight charges.

As a practical matter, you might start with sending an "on hand" notice to the customer (certified mail) stating the amount due for freight and storage charges, the monthly storage charge, etc. and threatening that the goods will be sold at public auction, unless payment is made. You should state dates that give them enough time - at least 30 days. If they do not respond, send another notice.

As indicated above, you only have a lien for warehouse charges. Thus, the proper course of action if you want to collect both the freight charges and the warehouse charges is to bring suit against the customer, and get a judgment.

Procedures vary as to enforcement of a judgment lien. In New York, you usually need to get an warrant of execution, and give it to a sheriff or marshal who will levy on the goods, sell them at public sale and remit the net proceeds to the judgment creditor.

Note that if you try to sell the goods for both the freight charges and the warehouse charges, you could be exposing your company to an action for conversion.

Freight Charges – Paying Carrier Rather Than Factor

Question: We are a broker and we have an issue with a factoring company that some of our carriers deal with.

As a standard procedure when we receive a letter of assignment from a factoring company stating a carrier of ours is a client of theirs and all payments are to go directly to the factoring company, we comply with their request. We change the remit address for the carrier's payments on all loads. This stays in place until we receive a release letter from the factoring company, which allows us to send payments directly to the carrier.

Recently I was made aware of an issue with a factoring company that we have on file for three of our carriers.

On November 6, we received a letter from one of the carriers advising us that they would no longer be using the factoring company and wanted us to send all payments directly to them. They also sent documentation showing they were currently involved in a lawsuit with the factoring company; the charges are mail & wire fraud. The front page of the court document shows the owner of the factoring company, and I was able to confirm via public records the owner was arrested and currently in custody on these charges.

We have also received a letter from one of the other carriers stating they would no longer be using that factoring company. They stated the lawsuit as the reason for wanting to end their business relationship with the factoring company but did not provide any documentation showing they were part of the lawsuit or that they were victimized directly or indirectly in any way by the actions of the factoring company or the owner of the factoring company.

Neither carrier has been able to give us a release letter from the factoring company.

In our efforts to assist these carriers in resolving the assignment, on our end we have asked both carriers to supply us with a letter from their individual lawyers stating we can send payments directly to them due to the on-going lawsuit and that our company would not be liable for any payments made to them instead of directly to the factoring company.

We have also tried contacting the factoring company. The numbers we have on file have all been disconnected. I "Googled" them and could not find any contact information that was still valid. The factoring company still has a website that is up and running, no new contact info available on it. I also tried checking the California court records to find any update on the case. I could not locate any information. I've run out of all the options I can think of to resolve this issue and still protect our company.

Can we legally refuse to pay the factoring company and pay the carriers directly and could the factoring company come back and hold our company accountable for additional payment to them?

Answer: Unfortunately, the situation you describe is all too common.

Obviously, you do not want to be in the position of having to pay the invoices twice. If the factor has actually gone out of business (and hasn't filed for Bankruptcy), you probably can't get a release from the factor that would authorize you to pay the carriers directly.

From your description of the facts, if you want to pay the carriers, I would strongly recommend that you obtain a release and indemnity agreement from the carriers providing that they will defend, hold harmless and indemnify your company in the event there are any other claims for the freight charges. You should consult a qualified transportation attorney to ensure that your interests are adequately protected.

FREIGHT CHARGES – PAYMENT OF FREIGHT CHARGES ON DAMAGED SHIPMENT

Question: We had a shipment that was delivered with substantial damage. We have now received a freight bill from the carrier. Do we have to pay this bill?

Answer: Here are my thoughts - there are two options:

1. Send a letter to the carrier stating that you have received the freight bill, but don't think they are entitled to their freight charges, since a carrier has an obligation under the contract of carriage to deliver the shipment in good order and condition and they did not, i.e., there was substantial damage. Ask them to cancel the freight bill.

2. Pay the freight charges and add them to your claim. Some carriers have tariff provisions that require payment of the freight charges before they will pay your claim. Note that, technically, in the event of a partial loss, the carrier is not entitled to the portion of the freight charges for the items that were damaged, but may be able to collect the portion for the items that were delivered without damage. This is usually handled by pro-rating the freight charges based on weight of the damaged portion divided by the total weight of the shipment.

FREIGHT CHARGES – PROPER FEES WHEN TRUCK RE-ROUTED

Question: We hired a truck to haul a load from Florida to New Jersey, but our buyer fell through, so we re-routed the truck (about an hour after it left our dock) to North Carolina. Although the truck only went to NC and not NJ, the carrier wants to be paid the full freight rate to NJ. In our opinion we should only pay for freight to NC. How should a dispute of this nature be resolved? The goods moved under contract and did not provide for rates to anywhere other than NJ.

Answer: I assume your contract has a list of flat rates between specified origins and destinations in a rate appendix or schedule.

First, check your contract. Many transportation agreements have a default provision (usually a mileage rate) if there is no agreed flat rate in the rate appendix for the movement.

If not, then you could figure out the equivalent mileage rate for your Florida to New Jersey movement, and offer an amount based on the mileage from Florida to North Carolina.

In any event, since your contract apparently failed to anticipate this situation, a negotiated settlement would seem to be in order.

FREIGHT CHARGES – QUESTION OF 'EXCLUSIVE USE'

Question: Is it illegal for a carrier to consolidate multiple shipments in one trailer when he is being paid and asked for a full truck on one of those shipments?

Answer: It is not "illegal", although it may be a breach of contract. Certainly, the carrier is not entitled to be paid for the exclusive use of the vehicle.

FREIGHT CHARGES – QUOTE BASED UPON ERRONEOUS INFORMATION

Question: I received a quote of $1,200 to haul some equipment. I provided detailed weight and dimensions to the freight company; however, they apparently did not quote the correct weight and size of the equipment. Upon arrival of the equipment, we were presented with a bill for $2,100. The increase was based on the incorrect weight and size, thus the hauler had higher costs. The problem is that my bookkeeper paid the bill without obtaining authorization, so what recourse do we have to recover the increased cost, which was nearly double what was quoted?

Answer: I really can't tell who was responsible for the mis-communication about the weights, etc. Did you get a rate confirmation in writing? If you gave the carrier the proper weight and dimensions, and they confirmed in writing, you might have a chance to recover the overcharge.

If so, send a written claim for the overcharge, with supporting documents, to the carrier. If that fails, your only recourse would appear to be filing a claim in small claims court.

FREIGHT CHARGES – REBILLING FROM PREPAID TO COLLECT

Question: I have a shipper whose Bill of Lading ("B/L") clearly states that the freight charges were to be Prepaid. We billed the shipper and sent them an invoice and a copy of the original B/L. They returned the invoice unpaid along with a note indicating that the B/L was incorrectly done at the time of shipment and should have been Collect. They modified the B/L copy that we sent them and returned both the original invoice and the modified B/L copy to our office. Are we allowed by law to change how this load is billed, i.e. bill the consignee instead of the shipper based on the corrected information supplied by the shipper?

Answer: There is no law or regulation that says you can't rebill this shipment to the consignee. However, even if you provide a full explanation of the circumstances, it is possible that the consignee may refuse to pay the freight bill, particularly if it has paid the shipper's invoice in full and the invoice included the delivery charges.

In any event, I would think that the shipper would ultimately remain liable if you are unable to collect from the consignee.

FREIGHT CHARGES – RECOVERING DUPLICATE PAYMENTS

Question: We recently completed a payment analysis for a client, and identified several duplicate payments from 2008 and 2009. Is there a statue-of-limitations applicable for requesting refunds of duplicate payments?

Answer: This is a question that comes up periodically and involves an analysis of several different laws, both federal and state, with the ultimate conclusion that state law applies as duplicate payments are not addressed in the Interstate Commerce Act.

The so-called "180-day rule" set forth in 49 U.S.C. 13710 provides:

> (3) BILLING DISPUTES-
>
> (B) INITIATED BY SHIPPERS- If a shipper seeks to contest the charges originally billed or additional charges subsequently billed, the shipper may request that the Board determine whether the charges billed must be paid. A shipper must contest the original bill or subsequent bill within 180 days of receipt of the bill in order to have the right to contest such charges.

The "180 day rule" would not appear to be applicable to a claim for duplicate payments since it only applies when the shipper seeks to contest the amount of "charges originally billed" (overcharges) or "additional charges subsequently billed" (balance due bills).

There is also an 18-month statute of limitations that applies to suits by shippers for overcharges that is set forth in 49 U.S.C. 14705:

> Sec. 14705. Limitation on actions by and against carriers
>
> (b) OVERCHARGES- A person must begin a civil action to recover overcharges within 18 months after the claim accrues.... [the claim accrues on delivery or tender of delivery by the carrier]

However, there is a distinction between an "overcharge" and a "duplicate payment".

There is no time limit specified for filing a duplicate payment claim in the Federal Motor Carrier Safety Administration ("FMCSA") (formerly Interstate Commerce Commission ("I.C.C.")) regulations at 49 CFR Part 378 - Procedures Governing the Processing, Investigation, and Disposition of Overcharge, Duplicate Payment, or Overcollection Claims.

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

If there is no applicable federal statute of limitations, it would be logical that the state statute of limitations for that type of action would apply. We researched this some time ago and found that in New York, a duplicate payment claim would probably fall into the category of "Money Paid by Mistake", which has a six (6) year statute of limitations. As the court observed in *National Bank of Canada v. Artex Industries, Inc.*, 627 F.Supp. 610 (S.D.N.Y. 1986):

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

Thus, at least in New York, you would have six years to bring a court action to recover on a duplicate payment claim.

FREIGHT CHARGES – RECOVERING DUPLICATE PAYMENTS

Question: A duplicate payment was made to a carrier in error. When we asked for a refund it has requested to know what law states they need to refund.

Answer: The obligation to refund duplicate payments is covered in the regulations of the Federal Motor Carrier Safety Administration (formerly the I.C.C.), namely 49 C.F.R. PART 378, PROCEDURES GOVERNING THE PROCESSING, INVESTIGATION, AND DISPOSITION OF OVERCHARGE, DUPLICATE PAYMENT, OR OVERCOLLECTION CLAIMS. This section of the CFR is available online at http://www.access.gpo.gov/nara/cfr/waisidx_04/49cfr378_04.html

FREIGHT CHARGES – REFRIGERATED LOAD NOT KEPT COLD ENOUGH

Question: We are a refrigerated shipper. We have been doing business with this Carrier/Broker for 4 years. Our contract and our bill of lading states “Maintain trailer setting at 35 degrees”. We know our products are good till 45 degrees, however we have several customers that will refuse our products if the temperature is 40 degrees or higher.

We had one of these customers refuse our load due to product temp was 40.3 degrees nose, 40.7 degrees middle and 41.0 degrees in the tail. We had the load returned to inspect for quality. The product was still good. I do not believe we owe the carrier for the freight out and back since the contract or the bill of lading language was not followed. Please let me know your take.

Answer: While there was no damage to the product, there was a breach of the contract - both your transportation agreement and the bill of lading instructions. This is not a breach that would be subject to the Carmack Amendment; it would be governed by ordinary contract law.

Under the circumstances that you have described, I think that the carrier would not be entitled to collect its freight charges.

FREIGHT CHARGES – REFUSED COLLECT SHIPMENT

Question: The shipper sent us a collect shipment via common carrier. The carrier called to say that they expected a check upon delivery, at which time we informed the carrier that we do not accept collect shipments. The freight never made it to our dock. The carrier now wants us to pay the freight charges. Are we responsible for the charges from the shipper and or back to the shipper?

Answer: Since you did not accept or receive the shipment, you did not receive any benefit from the carrier’s services. I think the carrier would have to look to the shipper named on the bill of lading for payment of its freight charges.

FREIGHT CHARGES – RETURNED SHIPMENT

Question: We had an entire load refused by the customer because it was over temp (our product is frozen). The carrier transported it back to a warehouse where it could be inspected. It was found to be fit for sale and has been sold. At the time of the claim I told the carrier we would not pay their freight bills for the carriage to the customer and for returning the refused load back to the warehouse. They are now threatening a lawsuit for payment of the freight bill. How should we proceed?

Answer: Based on the information provided, it would appear that the carrier was in breach of the contract of carriage (assuming that the bill of lading specified a particular temperature for transit). However, the carrier did perform the transportation services that were requested. I would think that the carrier should at least be entitled to its freight charges for the original outbound movement. Naturally, if the goods were sold for less than the invoice price to the customer, you would be able to claim for that loss.

FREIGHT CHARGES – SECTION 7 AND COLLECTION

Question: We shipped for a customer of ours a couple shipments that were not paid. First they claimed a check was mailed and they gave a check number. They promised to check with their bank if the bank cleared their check. Now they are completely ignoring letters and are not returning phone calls. The freight was picked up from a warehousing/distribution company that stocks the product for our customer. In other words, our customer is not the shipper. They import products and a warehouse holds it for them, prepares the shipments, etc.

We prepared all the bills of lading for the customer. Shipper never signed "Section 7". My question is do we have the option to demand payment from the shipper (shipper ultimately responsible…) or from the receiver of the freight (our customer's customer) as the owner of the goods?

Answer: Unless "Section 7" (the non-recourse section on the bill of lading) is signed by the shipper, both the shipper and the consignee named on the bill of lading are liable for freight charges. On a "prepaid" shipment, the shipper is primarily liable; on a "collect" shipment, the consignee is primarily liable.

There is an exception to consignee liability. If the bill of lading is "prepaid" and the consignee-purchaser pays the shipper-seller for the goods (including the cost of transportation), the consignee will have a defense against "double payment" of the freight charges that were included in the price of the goods.

FREIGHT CHARGES – SECTION 7 NON-RECOURSE PROVISION

Question: I understand that if a shipper executes Section 7 of the Uniform Straight Bill of Lading, a motor carrier can collect freight charges from the consignee only. What about a situation in which the motor carrier prepares the bill of lading without including the Section 7 non-recourse language? Does the motor carrier waive its right to collect freight charges from the shipper where its bill of lading did not include the non-recourse option that would have permitted the shipper to require the motor carrier to collect freight charges from the consignee? I appreciate your assistance.

Answer: The non-recourse box on the face of the current Uniform Straight Bill of Lading as published in the National Motor Freight Classification ("NMFC") no longer contains the previous language "Subject to Section 7 of conditions . . .", which formerly referred to Section 7 on the reverse side of the long form bill of lading.

However, Section 7(a) of the Terms and Conditions on the reverse side of current long form bill of lading in the NMFC does say 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 . . ."

Clearly, this requires some affirmative act by the consignor - a signature or endorsement. In theory, your shipper could have inserted some non-recourse language on the face of the bill of lading, which might be binding on the carrier, but apparently this was not done.

Since the shipper is primarily liable for payment of freight charges in the absence of some contractual agreement to the contrary, I can't see how a carrier would be considered to have "waived" anything by issuing a bill of lading without the non-recourse provision. If anything, it could be construed as the carrier's intention not to accept shipments on a non-recourse basis.

FREIGHT CHARGES – SHIPPER LIABILITY IF CONSIGNEE FAILS TO PAY

Question: If a receiver arranges and contracts for shipping on their own and refuses to pay for the shipping after the goods are delivered, does the shipper have any responsibility for payment of the shipping charges, even though all the shipper did was have the goods available for the shipping company to pick up?

Answer: I'm assuming that the carrier can't collect from the consignee, and is looking to you (the shipper) for payment of the freight charges.

Without seeing the bill of lading that was used for the shipment, I can only give you the general rule that the carrier is entitled to collect its charges from the shipper, even if the bill of lading shows the charges as "freight collect". The only exception recognized in the court decisions is where the shipper has executed "Section 7", the "non-recourse" provision of the Uniform Straight Bill of Lading, see e.g., *Southern Pacific Transportation Co. v. Commercial Metals*, 456 U.S. 336, 102 S.Ct. 1815 (1982).

FREIGHT CHARGES – STATUTE OF LIMITATIONS

Question: We are a small brokerage operation and in February we posted a load online. A carrier we had used previously contacted us. Their performance had not been good in the past and they had hurt our relationship with our customers.

Nevertheless, they begged us for the load and we told them that this load has to deliver by February 27th. The pick up date was February 21st for a shipment from NJ to Groveland, FL. They said "no problem" and foolishly we gave them another chance. We did book it as a guaranteed load and added this line the rate confirmation:

> EXPEDITED SHIPMENT. GUARANTEED TO BE DELIVERED ON OR BEFORE MONDAY, FEBRUARY 27, 2006 OR FREIGHT CHARGES ARE FREE!!!! GUARANTEED EXPEDITED SHIPMENT!!!

The carrier signed in the bottom of the rate confirmation and also next to this notation.

The carrier did not deliver on 2/27 and in fact did not deliver until 3/1, two days later.

We do lots of expedited shipments. Most of the time when a carrier is late, we try to settle on something just to keep a relationship with a carrier. However, this carrier already gave us untold grief and loses in the past. This was one too many. We were nice enough and told the carrier that we will bill our customer and pay the FULL AMOUNT if our customer will pay us. However, if they refuse to pay us, we will not pay you. Our customer refused to pay, they were mad like hell because of previous shipments with this carrier. We already settled previous bills with this customer and took large reductions on other bills because of this carrier.

The factor company for this carrier sends us a bill, we faxed them the rate contract and right away they bumped this freight bill back to the carrier.

We faxed to the carrier a nice letter why we can't pay this bill and for a few months all was quiet. Then in September a new guy came to work for the company and called us for money.

We nicely told him to please not open an old can of worms. Again, for months everything was quiet.

It is worth to mention, that this carrier still accepted loads from us all the time and we still gave them loads that we knew were not time sensitive, like product returns, etc.

Now all of a sudden we are being sued by a lawyer for this company asking for the freight amount, plus 1.5% interest per month "as per the contract lease agreement". (Note: we NEVER signed any contract with this carrier. It was on a load by load basis, each load agreeing on the amount, dates, etc). They are also requesting money for their services (paying the lawyers fees, court filing fees, etc.).

Now we are being sued in small claims court for two shipments that happened about 2 years ago. We did not pay them because the carrier failed to comply with the clause in the contract/rate that specifically stated that freight charges will be free if delivery was not timely.

Who is right and what should we do? The carrier agreed to those terms and knew what it was getting into. Is there a statute of limitations?

Answer: Without getting into all of the details you have recited, you may be lucky. Besides the terms of the contract/rate agreement you referred to there is a federal statute of limitations [49 U.S.C. §14705 (a)], that says "A carrier ... must begin a civil action to recover charges for transportation of service provided by the carrier within 18 months after the claim accrues."

Tell the attorney that his client's claim is time-barred.

Here are some recent court decisions that involve the 18-month statute of limitations for a carrier to collect its freight charges:

CGH Transp. Inc. v. Quebecor World Logistics, Inc., 2006 U.S. Dist. LEXIS 222657 (E.D.Ky. Apr. 24, 2006)

Transport Factoring Assoc. v. Textron Fin. Corp., No. CV 05-0505-PHX-NVW (D.Az. Dec. 20, 2005)

Arctic Express, Inc. v. Del Monte Fresh Produce NA, No. C2-06-435 (S.D.Oh. Mar. 30, 2007)

FREIGHT CHARGES – STATUTE OF LIMITATIONS

Question: I have a collection agency trying to collect on a freight invoice which is beyond the 18 month statute of limitations. The bill of lading referenced a 3rd party bill not related to our company. The collection agency is claiming this is a "right of reversal" and the statute of limitations is different. Am I correct in denying to pay based on the 18 month statute of limitations?

Answer: There is no federal law or regulation that mentions a "right of reversal". The obligation of a shipper or consignee to pay freight charges is contractual and governed by basic principles of contract law. There are court decisions interpreting the provisions of the Uniform Straight Bill of Lading and Section 7 (the non-recourse provision), and there are statutory time limits (the 180 day rule and the 18 month statute of limitations).

The 18-month statute of limitations applies to suits by carriers to collect freight charges and is set forth in 49 U.S.C. 14705:

> Sec. 14705. Limitation on actions by and against carriers
>
> (a) IN GENERAL- A carrier providing transportation or service subject to jurisdiction under chapter 135 must begin a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues.

If more than 18 months has elapsed since the delivery of the shipment, the claim is time-barred.

FREIGHT CHARGES – STORAGE FEES ON ABANDONED SHIPMENT

Question: I sent a shipment to a colleague in Asia and on the bill of lading ("B/L") indicated that it should be abandoned if it could not be delivered. My colleague decided that he did not want to pay the fees to get the goods through customs and declined contact attempts from the receiving agent. The agent has held the goods in storage for six months and has advised that they will be auctioned, but that there is some $450 in storage fees accumulated during the six months. Am I responsible, as the shipper, to pay those fees?

Answer: You don't indicate whether this was an air freight or ocean shipment, but the answer would normally be governed by the air waybill or ocean bill of lading, and the carrier's tariffs.

These usually provide that refused or abandoned goods can be sold at a public sale or auction, and the proceeds applied to the freight charges, storage, expenses of sale, etc. If there is any surplus from the sale, it should be turned over to the owner.

FREIGHT CHARGES - STORAGE LIENS

Question: We have a customer for whom we moved truckloads of freight over a six-month period. On one load, there was a cancellation and the freight had to go into storage. The freight has been in storage for over a year now and we have received no payment for the year's storage.

I sent the customer a letter explaining that unless I receive payment in full in 30 days that I would arrange to sell the freight to cover the cost of the storage.

1) Is this Legal?

2) What else should I do?

Answer: As a carrier (or a warehouseman) you have a lien for storage charges, and in theory, you should be able to sell goods if the owner hasn't paid the storage charges or has abandoned the goods. However, there may be some contractual requirements (notice, publication, etc.) in your bill of lading, tariffs or warehouse receipt that must be observed, and there are usually state laws, including provisions of the Uniform Commercial Code, that apply to liens and sales.

At the very least, you should send formal written notice to the shipper, consignee and beneficial owner of the goods of the fact that the goods are in storage, what the charges are, and that you intend to sell them at a public sale. In some states, you may also have to post a notice in a newspaper. And, if you do sell the goods, any surplus funds must be sent to the owner.

It would be advisable to contact a local attorney for advice.

FREIGHT CHARGES – SUIT ON PENALTY FOR LATE DELIVERY

Question: This question concerns fines for late deliveries. We recently had a shipment deliver 7 days late. The carrier was claiming their truck broke down. We feel it was because they were trying to consolidate with other shipments. Regardless, our Rate Confirmation Agreement plainly states "$50.00 will be deducted per day if delivered late." We only enforce this if our customer demands a deduction for late deliveries.

Our customer demanded a deduction so we enforced our late delivery rule and deducted $350 from the carrier invoice. Our carrier was aware of the deduction and also requested a “Quick Pay” for this invoice. We deduct 4% for all “Quick Pay” loads. Recently, I received a “Writ of Summons” from a district court in Maryland for the $350. I have about 45 days to reply. We are based in Missouri and our “Broker/Carrier Contract” states, “This contract shall be governed by the laws of the state of Missouri, both as to interpretation and performance.” The district court in Maryland advised me that we must appear to defend ourselves, otherwise judgment will be awarded to the carrier and we will be ordered to pay the $350.

It seems crazy for me to spend $2000 in travel expenses to defend an unjustified suit for $350. My Question: Why should I appear? Should I allow the $350 judgment against us in Maryland and force the carrier to transfer the judgment to Missouri where I will defend my company. What are my options?

Answer: It obviously wouldn’t be cost-effective for you to spend $2000 to defend a $350 small claims lawsuit in another state. If you don’t appear or defend the case, the court will most likely enter a “default judgment” against your company. Whether that is collectible is another question.

In order to collect the judgment, it is most likely that the plaintiff will have to docket or record the judgment in Missouri. Although states are required by the “full faith and credit” provisions in the Constitution to recognize judgments from sister states, most states treat default judgments differently and require a proceeding to enforce the judgment. If so, this could give you a “second bite at the apple” if enforcement proceedings are brought in Missouri.

There is one other “glitch” - the carrier may try to collect from your broker’s surety bond. If the bonding company pays the judgment, they will look to you for indemnification. This would be more difficult to prevent if there is a judgment.

FREIGHT CHARGES - TARIFFS

Question: Can you tell me what the purpose of a published tariff would be and after spending the money to have a tariff drawn up, would/could it be copyrighted? In addition, what is the difference between a written tariff and a published tariff? I need to know as I am looking into a potential contract with the State of Texas.

Answer: First of all, brokers don’t have tariffs -- only motor carriers have tariffs.

At one time all motor common carriers were required to publish their rates and rules in a tariff and to file the tariff with the Interstate Commerce Commission. That requirement was eliminated back in 1994 (except for household goods and non-contiguous U.S., i.e., Alaska & Hawaii).

Motor carriers may still publish tariffs and most less-than-truckload carriers do so. The tariffs are usually maintained in the carrier’s offices, and are made available to shippers upon request. Published tariffs are written tariffs.

If your customer wants a “tariff”, you may need to prepare a schedule of rates, and also include any relevant rules (accessorial charges, credit terms, time limits, liability for loss/damage, etc.). It is possible to copyright a tariff and in fact many carriers do.

FREIGHT CHARGES – TERMS COVERING LOADING AND UNLOADING

Question: I have a question regarding our shipping terms, we ship FOB DEST PPD, and we pay the freight. Who is responsible to unload freight at customer’s dock? Our customer has

advised it is our responsibility to unload. Is that correct? And where can I find information regarding this topic?

Answer: The fact that you ship “FOB DEST PPD” does not determine the responsibility for loading or unloading.

The contract between the shipper and the carrier, and the rates that have been agreed upon for the carrier’s services determine whether the shipper or the carrier is responsible for loading the truck, and whether the consignee or the carrier is responsible for unloading the truck.

If you do not have a formal transportation agreement with your carrier, this would probably be governed by the rules contained in the carrier’s tariff or classification, which is incorporated by reference through the bill of lading.

Most less-than-truckload shipments are governed by Item 568 of the National Motor Freight Classification, which sets forth rules based on the weight of the shipment. For example, this item provides that where the freight “(per package or piece) in a single container, or secured to pallets, platforms or lift truck skids...” exceeds 500 pounds, the consignor will perform the loading and the consignee will perform the unloading.

FREIGHT CHARGES – TERMS OF CREDIT

Question: Can freight bills be paid at any term of days? Interstate Commerce Commission (“ICC”) regulations used to require that they be paid in 15 days. Some shippers now state that they pay freight bills to a carrier at 90 days. Can this be done?

Answer: As you know, the ICC was “sunsetted” effective December 31, 1995. However, some of the old ICC regulations were transferred to the FMCSA’s jurisdiction and still exist. 49 CFR Part 377 governs the extension of credit to shippers by motor carriers and provides:

(a) Authorization to extend credit.

(1) A carrier that meets the requirements in paragraph (a)(2) of this section may

(i) Relinquish possession of freight in advance of the payment of the tariff charges, and

(ii) Extend credit in the amount of such charges to those who undertake to pay them (such persons are called "shippers" in this part).

(2) For such authorization, the carrier shall take reasonable actions to assure payment of the tariff charges within the credit periods specified

(i) In this part, or

(ii) In tariff provisions published pursuant to the regulations in paragraph (d) of this section.

(b) When the credit period begins. The credit period shall begin on the day following presentation of the freight bill.

(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.

It should be noted that this regulation only governs CARRIERS. It doesn’t apply to SHIPPERS. Also, under 49 USC 14101(B), carriers and shippers are free to enter into contracts that contain other provisions for freight payment.

FREIGHT CHARGES – TERMS OF SALE AND RISK OF LOSS

Question: Read with interest an article in the June issue of *Parcel* written by a member of the Transportation & Logistics Council, Brent Wm. Primus. In the article Mr. Primus states. "This means the term "F.O.B. Origin" or "F.O.B. Destination" in a Purchase or Sales Order will determine, unless otherwise agreed, the responsibility for the shipment of the goods, payment of freight charges, risk of loss and passage of title." A graphic accompanying the article states FOB Origin - Freight charges paid by Buyer; FOB Destination - Freight charges paid by Seller.

Spending over 40 years involved with transportation it has always been my understanding that there is a difference between the term of sale (FOB Origin/Destination) and the freight term (Prepaid, Collect, Prepaid and Add, etc.) In *Freight Claims In Plain English* (1995) it states. "A common misconception is that the party who pays the freight is the one who has risk of loss in transit. This is not true; always refer to the "term of sale" in the contract to determine who has risk of loss."

I'm no attorney, and perhaps I do not understand the nuances of Mr. Primus' article, but did something change concerning terms of purchase and freight terms that would change who bears the risk of loss and who pays the freight charges? Is it no longer possible to have an FOB Destination shipment Freight Collect?

Answer: I haven't read Brent's article, but you are right.

The terms of sale in the Uniform Commercial Code ("U.C.C.") govern the transaction between the seller and the buyer and establish a presumption as to which party bears the risk of loss in transit. Usually the "FOB" terms are set forth in a purchase order, invoice, or other contractual document between the seller and buyer.

The designation of "prepaid" or "collect" on a bill of lading determines whether the shipper or the consignee has primary responsibility for paying the freight charges, and which party would normally get the freight bill from the carrier.

In most cases, an "FOB Destination" shipment would also be a "freight prepaid" shipment. However, risk of loss and responsibility for freight charges are separate and independent of one another, so you definitely can have an "FOB Destination shipment Freight Collect" (or any other combination of the terms).

FREIGHT CHARGES - TIME LIMITS

Question: We have been receiving accessorial bills from a particular vendor of ours for charges that they claim incurred up to 6 months ago. The charges were on the original invoice and were denied due to lack of backup (mostly detention times not noted on the proof of delivery). The vendor accepted the short pays at the time, but are now coming back with the documents supposedly substantiating their charges. Do we have a leg to stand on to deny these charges based on the time it took to re-invoice? Also, we've already invoiced our customer and it will not be possible to re-invoice them at this time.

Answer: The only relevant statute or regulation is the so-called "180-day rule" set forth in a federal statute (49 U.S.C. 13710) that applies to "charges in addition to those originally billed":

> (3) BILLING DISPUTES-
>
> (A) INITIATED BY MOTOR CARRIERS- In those cases where a motor carrier (other than a motor carrier providing transportation of household goods or in noncontiguous domestic trade) seeks to collect charges in addition to those billed and collected which are contested by the payor, the carrier may request that the Board determine whether any additional charges over those billed and collected

must be paid. 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.

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

So long as the carrier submits a bill for its accessorial charges within 180 days, you don't have a legal right to refuse payment.

I would note that you can provide for a shorter time limit if you have a transportation agreement with the carrier (which is recommended).

FREIGHT CHARGES – TIME LIMITS

Question: What length of time does a carrier have to collect freight charges? (Almost 2 years have passed since the ship dates and no previous past dues statements were received. Upon a preliminary investigation, it appears the partial past due amounts are due to the carrier's billing errors in regards to class, rate discounts, accessorial charges, etc.)

Answer: There are actually two separate federal statutes that could be applicable to the carrier's claims for freight charges.

The so-called "180-day rule" set forth in 49 U.S.C. §13710 would apply to claims for undercharges:

(3) BILLING DISPUTES-

(A) INITIATED BY MOTOR CARRIERS- In those cases where a motor carrier (other than a motor carrier providing transportation of household goods or in noncontiguous domestic trade) seeks to collect charges in addition to those billed and collected which are contested by the payor, the carrier may request that the Board determine whether any additional charges over those billed and collected must be paid. 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.

There is also an 18-month statute of limitations that applies to suits by carriers to collect freight charges that is set forth in 49 U.S.C. §14705:

Sec. 14705. Limitation on actions by and against carriers

(a) IN GENERAL- A carrier providing transportation or service subject to jurisdiction under chapter 135 must begin a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues.

If more than 18 months has elapsed since the delivery of the shipment, the claim is time-barred.

FREIGHT CHARGES – TIME LIMITS

Question: I have an unusual situation with a client who has consistently been ignoring overcharge claims and has now been threatened with possible litigation. My client is in possession of tens of claims, some dating back to 2000. I'm not sure what has happened, but not only have they failed to acknowledge the claims within 30 days pursuant to their contract; I

can find no record of any response at all to the claimant, e.g., denial, pay or settle. A concise history is not possible due to losses and changes in personnel.

From what I can see, the claims were filed within the time frame negotiated with the claimant. However, the contract does state that the claim must be accompanied by proper documentation, but only the client's invoice and the claim form were included, no other documents were provided, i.e., rate schedule, accessorial sheets, etc., or any other documentation to support the overcharge claim.

It appears that the last contact from either my client to the claimant or vice versa, relative to this matter, may have been back in 2006. Is it possible that because they did not pursue a response until now that the statute of limitations may be a factor? What obligation does my client have to respond to the claims so long after the fact, even though they were clearly at fault for not acknowledging as required? How may the Surface Transportation Board regulations be used against my client? I'm wondering if it may be best just to admit to the failure and negotiate a settlement.

Answer: Assuming there were no limitations expressed in the contract that would control, it appears that the claimant's overcharge claims are probably time-barred. There are two federal statutory provisions that establish time limits for filing overcharge claims and for bringing a lawsuit to recover overcharge claims:

The so-called "180-day rule" set forth in 49 U.S.C. §13710 provides:

> (3) BILLING DISPUTES-
>
> (B) INITIATED BY SHIPPERS- If a shipper seeks to contest the charges originally billed or additional charges subsequently billed, the shipper may request that the Board determine whether the charges billed must be paid. A shipper must contest the original bill or subsequent bill within 180 days of receipt of the bill in order to have the right to contest such charges.

The "180 day rule" applies when the shipper seeks to contest the amount of "charges originally billed" (overcharges).

There is also an 18-month statute of limitations that applies to suits by shippers for overcharges that is set forth in 49 U.S.C. §14705:

> Sec. 14705. Limitation on actions by and against carriers
>
> (b) OVERCHARGES- A person must begin a civil action to recover overcharges within 18 months after the claim accrues.... [the claim accrues on delivery or tender of delivery by the carrier]

You refer to the regulations of the Federal Motor Carrier Safety Administration (formerly the I.C.C.), namely 49 C.F.R. Part 378, Procedures Governing the Processing, Investigation, and Disposition of Overcharge, Duplicate Payment, or Overcollection Claims.

Even if the carrier was in violation of the regulations, I don't see how the claimant could get around the clear wording of the statutes governing time limits.

FREIGHT CHARGES – TIME LIMITS FOR FREIGHT CLAIMS VS. OVERCHARGES

Question: We receive a monthly News Letter from ICC Logistics Services, Inc. An article in the October 2011 issue was titled *Freight Bill Post Audits-An Offer You Shouldn't Refuse.* Can you clarify if this statement below is backed up by a government statute and if it means we have only 180 days to file freight claims?

Answer: Mr. Nuzio in his ICC Logistics Services newsletter is referring to audits for freight charges and the time limits for filing overcharge claims.

49 U.S.C. 13710 provides:

> (3) BILLING DISPUTES-
>
> (B) INITIATED BY SHIPPERS- If a shipper seeks to contest the charges originally billed or additional charges subsequently billed, the shipper may request that the Board determine whether the charges billed must be paid. A shipper must contest the original bill or subsequent bill within 180 days of receipt of the bill in order to have the right to contest such charges.

There is also an 18-month statute of limitations that applies to suits by shippers for overcharges that is set forth in 49 U.S.C. 14705:

> Sec. 14705. Limitation on actions by and against carriers
>
> (b) OVERCHARGES- A person must begin a civil action to recover overcharges within 18 months after the claim accrues.... [the claim accrues on delivery or tender of delivery by the carrier]

Neither of these time limits apply to claims or suits for freight loss or damage. There is generally a nine month time limit to file a freight loss or damage claim with a motor carrier and then a two year time limit, from the date the claim is declined, to initiate a lawsuit.

Freight Charges – Time-Barred Claims

Question: We are a freight broker and we recently received a letter from a carrier's attorney claiming we owe them over $7,000 in freight charges. The letter came by itself and no invoices were included. It's been over 2½ yrs since they last took loads for us. Our conclusion is that they never invoiced us for some loads, and there were discrepancies on others. Are we obligated to pay this carrier? Aren't there time limits on freight charges?

Answer: Any claim for freight charges on shipments that were delivered more than 18 months ago is time-barred by the applicable federal statute of limitations, 49 USC 14705, which provides:

> Sec. 14705. Limitation on actions by and against carriers
>
> (a) IN GENERAL- A carrier providing transportation or service subject to jurisdiction under chapter 135 must begin a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues.
>
> * * * * * *
>
> (g) ACCRUAL DATE- A claim related to a shipment of property accrues under this section on delivery or tender of delivery by the carrier.

Freight Charges – To What Shipments Can Payments be Applied?

Question: Is it legal for a carrier to apply payments to PROs other than what is on the check remit?

Answer: I don't think it is "illegal", but it is not a good accounting practice, and will surely cause problems if there is a dispute over freight charges or loss/damage claims.

FREIGHT CHARGES – TRYING TO COLLECT OLD FREIGHT BILLS

Question: A vendor, who was supposed to absorb the shipping costs filed bankruptcy in October 2006. The attorney for the carrier is now, in January 2008, trying to collect the freight charges from the consignee. The consignee had no privity of contract with the carrier.

The carrier is listed on the vendor's schedule of creditors in the bankruptcy case.

The attorney sent copies of invoices to prove the claim. The invoice contains no evidence that the goods where delivered to the consignee or the date of delivery. The invoices are dated February 9, 2006. The attorney for the carrier claims the consignee is liable under the bill of lading but refused to give the consignee's lawyer a copy of same, stating it would get it once litigation started and there was discovery.

Based on the Q&A is your website, it appears the statue of limitations may bar this claim. What do you think?

Answer: There is an 18-month statute of limitations that applies to suits by carriers to collect freight charges that is set forth in 49 U.S.C. 14705:

> Sec. 14705. Limitation on actions by and against carriers
>
> (a) IN GENERAL- A carrier providing transportation or service subject to jurisdiction under chapter 135 must begin a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues.

If more than 18 months has elapsed since the delivery of the shipment, the claim is time-barred.

I would also note that if the bills of lading were "prepaid", the consignee may have a defense against double-payment. 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.

FREIGHT CHARGES – USE OF INCENTIVES TO GENERATE BUSINESS

Question: I would like to know if it is legal to offer a yearly or monthly incentive for freight movers to use us a broker. A contest would be to give a prize for the shipper who uses the most. Is this considered OK?

Answer: At one time, any payments to a shipper in order to solicit business could have been considered an unlawful rebate or concession under the "Elkins Act" which was part of the Interstate Commerce Act. However those provisions were essentially eliminated by passage of the ICC Termination Act of 1995.

The real question is whether accepting gifts (or bribes) from motor carriers or brokers by a shipper's traffic manager would violate his fiduciary duties and responsibilities to his employer.

FREIGHT CHARGES – WHO BEARS COST OF HAZMAT CLEANUP?

Question: We are a freight forwarder. One of our customers (a broker) tendered a load to us that we shipped intermodal. The load turned out to be cowhides, and the brine solution that was used on the product began leaking out of the container once loaded. The customer rate confirmation did not specify what the commodity of the shipment was.

The rail carrier has animal hides on their "restricted commodity" list. The rail carrier treated the commodity as hazmat and had a team come in to dispose of the material and escort the product to a dump site. The rail carrier has passed the full amount of the clean-up back to us ($3164.13). We attempted to bill our customer back for these charges. They are stating they will not pay for any of it. We do have an e-mail where our customer (the broker) says they will just pass the charges back to their shipper. As a freight forwarder, what can we do in this situation?

Answer: As a freight forwarder, your relationship to the rail carrier is that of shipper-carrier. I would assume that this was an "exempt" TOFC/COFC (trailer-on-flatcar/container-on-flatcar) movement and that your contract with the railroad incorporated the carrier's exempt circulars (tariffs). Most likely, there is some provision in the exempt circular that authorizes the carrier to take the actions that it did and to bill the shipper, but even in the absence of a specific provision, I think the carrier probably had the right to bill you for the clean-up and disposal of the cow hides.

The only question is whether the leakage from the container may have been due to rough handling by the carrier, or was due to the fault of the actual shipper, i.e., improper packaging, blocking, bracing, etc., see *Freight Claims in Plain English* (4th Ed. 2009) at Section 6.5.1. If it was the shipper's fault, you have a right to be indemnified by the shipper.

FREIGHT CHARGES – WHO IS LIABLE?

Question: We are a freight broker and were contacted by a lumber broker (a previous customer) who had been contacted by another lumber broker to pick up 2 loads of used weathered wood. We were told that this would be a collect shipment and that a check for the freight would be waiting for us upon delivery. This did not happen and the freight was delivered without collecting the freight charges. Both of these loads were delivered to a job site. The building contractor was supposed to have the checks there for the driver to pick-up in payment for the freight.

The contractor claims that the weathered wood that they had purchased and paid for (from the lumber broker who was not our customer) and who had paid for the lumber to the broker that was our customer was falling apart and not usable. Everyone has been paid: the consignor where the lumber was picked up; both lumber brokers and the trucks that hauled the freight. The trucks and drivers were paid by us, the freight broker. But now, who can we legally collect from? #1 the Consignor where the freight was picked? #2 The contractor for the job site where the lumber delivered to? #3 The lumber broker that hired our customer? #4 The lumber broker that hired us?

Answer: From your description of the facts, I would assume that the second "lumber broker" (your customer) was a party that actually purchased the wood for resale, and was probably shown as the shipper on the bill of lading.

If so, I think that your primary recourse is against the second "lumber broker" that contracted with you to arrange the transportation.

You may also have recourse against the consignee shown on the bill of lading, but the consignee may have a defense if the bill of lading was marked "prepaid" and the consignee has paid for the wood, including the freight charges for the delivery.

FREIGHT CHARGES – WHO PAYS FOR RANDOM BORDER INSPECTIONS?

Question: Had a question from regarding unanticipated fees. We are seeing more and more random inspections at the border in both the U.S. and Canada. Crossing into Canada, Border Services is sending the “lucky truck” to a secure facility where an independent contractor unloads the truck to make it accessible for the Customs Officer. The truck has to pay for the loading and unloading ($300 to $1,000) before he is released. The check is entirely random. In the absence of any contractual provision between the carrier and the receiver that hired the truck, is the carrier entitled to be reimbursed for these fees by the receiver?

Answer: Obviously it would be wise for carriers to include provisions in the transportation contracts with their shipper-customers to cover situations such as this. In the absence of a contract, an alternative would be to include provisions in the carrier’s bill of lading or rules tariff to cover expenses such as you have described, as well as the new surcharges and fees by ports, etc.

In any event, unless there is some actual fault or action on the part of the carrier that caused the inspection by Canadian Customs (or U.S. Customs and Border Protection), it would only seem fair that the cost should be born by the importer of the goods.

I would note that the Customs Trade Partnership Against Terrorism (C-TPAT) program is intended to reduce border inspections and minimize delays. The program is open to importers, carriers, consolidators, licensed customs brokers, manufacturers, etc. and you may want to look into this.

FREIGHT CHARGES – WHO PAYS WHEN SHIPPER CAUSED DAMAGE AND CONSIGNEE REJECTS

Question: We are a broker and our customer contacted us for an inbound shipment. It was bags of sand that required tarping, so obviously needed to be kept out of the elements. At the loading facility, the shipper did not provide protection from the rain, and although the driver tarped each pallet as soon as it was placed on his trailer, the load was still compromised. The shipper has acknowledged that he loaded the product in the rain and even marked this on the bill of lading. Our customer refused the load.

Ultimately, the shipper made the determination to dispose of the load. Our customer is refusing to pay for the freight charges. Are we able to collect from the shipper considering their actions led to the shipment being refused?

Answer: From your description of the facts it appears that the carrier was not responsible for the damage to the shipment, and that the carrier was entitled to be paid for its services (although I would question whether the driver should have accepted the shipment knowing that there may have been water damage).

As a general rule, a shipper remains liable for freight charges even if the bill of lading is marked “collect”. The only exception is if the bill of lading contains a “non-recourse” clause - often referred to as a “Section 7” clause - and the shipper has executed the non-recourse provision. If so, then the carrier can only look to the consignee for payment of its charges.

Thus, unless there is an enforceable non-recourse provision in the bill of lading, the carrier (or the broker) should be able to collect the freight charges from the shipper.

Freight Claims – Declination Due To Improper Securement

Question: Recently we received a claim for damage to a truckload of used copy machines with a value of over $50,000 (limited liability $9,675.00). Eighty-three copy machines were shrink-wrapped and floor loaded in a trailer with the wheels still on. The driver was present during the loading and even applied one strap to secure the load. He never suggested anything else was necessary and he locked the trailer and left.

At some point in time something happened that caused the load to shift and all the copy machines were damaged. I read 49 CFR 392.9 where it states that a motor carrier may not require or permit a driver to operate a commercial motor vehicle unless the load is secured. Even if I agree that the trailer was not loaded properly, the carrier should have refused to accept the load and in accepting it as is, he assumed liability in the event of damage. We don't know what happened to cause the units to shift but we do know that the strap that the driver provided broke and all the machines crashed in to each other.

What can we do, the carrier refuses to pay the claim?

Answer: You are correct in saying that federal regulations place the responsibility for properly bracing and securing the cargo with the motor carrier, e.g., 49 CFR 392.9 and 393.100, see also *Freight Claims in Plain English* (4th Ed. 2009) at Section 4.8.3.

I'm not sure why the carrier is refusing to pay your claim, but it would certainly seem that it should be liable. Unfortunately, if the carrier continues to decline the claim, you may need to retain a qualified transportation attorney and bring a suit in order to collect.

Freight Claims – "Full and Final Payment" Short 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.

Follow up Question: Does "...and the laws of the state, which vary among the states." apply to the state the freight was damaged, the state the claimant is located, or the state where the carrier is located?

Follow up Answer: You ask "Does '...and the laws of the state, which vary among the states' apply to the state the freight was damaged, the state the claimant is located, or the state where the carrier is located?"

This is an interesting question and involves an area known as "conflict of laws". Without researching the issue, I would think that the laws of the place where the payment was received (and deposited) would apply.

FREIGHT CLAIMS – "SUBJECT TO COUNT" NOTATION

Question: There was a shipper load & count shipment ("SL&C") in a sealed trailer. There was a shortage, but it was not noted at delivery. The delivery receipt was noted "subject to count". I am not holding the carrier liable, but the shipper did a cycle count and says product shipped. How valid is "subject to count" and does the shipper have any recourse? Receiver short paid their invoice.

Answer: Apparently the carrier dropped the trailer, received a delivery receipt or notation on the bill of lading that said "subject to count" and left, with the trailer only opened afterwards. A notation "subject to count" is really meaningless from an evidentiary standpoint; it proves only that there was no actual count with the driver present during unloading.

Shortages from sealed trailers are always a problem and you may need to be somewhat of a detective to investigate the facts and to determine responsibility.

Obviously there are three possible ways the shortage could occur: that the shipper didn't load the goods into the trailer, that the carrier somehow stole the goods without breaking the seal, or the consignee or its employees either miscounted at destination or stole the goods.

You seem to be confident that the shipper did in fact load the goods into the trailer, which leaves only two other possibilities.

Remember that to establish carrier liability, the claimant has the burden of proving the condition and quantity of the goods tendered to the carrier and the condition and quantity of the goods actually delivered at the destination.

When you have an SL&C shipment that is sealed by the shipper and is delivered with the original seal intact (and there is no evidence of tampering with the locks, hinges, seal, etc.), there is a strong presumption that the shortage did not occur in transit, i.e., the carrier would not be liable. You should investigate whether this was true.

If there is a question whether the goods were actually delivered by the carrier, as noted above, some detective work may be needed - question a representative of the consignee that has actual knowledge of the facts as to whether the seal was intact and what was actually received and, get copies of the consignee's OS&D (over, short & damaged) or receiving reports, and an explanation of how and when the shortage was discovered. If you are unable to obtain satisfactory information as to the actual count upon delivery, you should contest the deduction from your invoice.

FREIGHT CLAIMS – "TIP AND TELL DEVICE" ACTIVATED

Question: If a "Tip and Tell Device" is activated on a shipment, and the delivery receipt indicates tip and tell activated, would this be considered possible concealed damage or apparent damage? There would be no other notations on the delivery receipt and the outer package does not indicate any damage.

Answer: The purpose of a "Tip & Tell" is to indicate that the package has been tipped or turned over during transit, in violation of the shipper's instructions or markings (such as "this side up" or arrows on the package).

If the device is triggered, it means that there MAY have been some damage to the contents of the package, and is a warning to the consignee that the contents should be promptly inspected for possible damage.

If there is no other visible indication of external damage to the package at the time of delivery, and the contents are later found to be damaged when the package is opened, this would be considered "concealed damage".

FREIGHT CLAIMS – A QUESTION OF TEMPERATURE AND CONCEALED DAMAGE

Question: A customer of mine shipped out two pallets of candy from Nashville, TN going to New Jersey. They hired a refrigerated carrier and the bill of lading ("B/L") reads the temperature must be kept between 55 to 60 degrees Fahrenheit. The candy was fresh (new product) when it shipped. It picked up on 6/25 but didn't deliver until 7/6, eleven days from date of pick up. The shipment was signed clear by the consignee and the cartons did not get opened right away in fact it was some 14 days after delivery that the cartons were opened and it was found that the chocolate had gone bad.

We filed a claim with the carrier, it was disallowed because of concealed damage. The carrier did not have inspection performed. The carrier refuses to turn over their records regarding the temperature of the trailer for the 11 days and could not explain why the shipment did not deliver for 11 days.

We can prove that the shipment was kept at a safe temperature at the shippers and we can prove that the temperature at the consignee's was safe as well. The carrier refuses to answer questions and or return phone call. What are our options?

Answer: What you have is a typical "concealed damage" situation.

Carriers ARE liable for concealed damage, but the thing to remember is the claimant's burden of proof: (1) that the shipment was in good order and condition when tendered to the carrier at origin and (2) that it was damaged at the time of delivery, see *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 337 U.S. 134 (1964), reh. den., 377 U.S. 948. Once the claimant has established these two elements, the burden then shifts to the carrier to prove that the loss was caused by one of the recognized exceptions to liability such as act of God, act or default of the shipper, etc. AND that the carrier was not negligent. These are factual questions that depend on the specific situations of each shipment.

I would suggest the following:

1. Obtain a written statement from someone in your shipping department that has personal knowledge of the facts, describing how the shipment was prepared, packaged, etc. and establishing that the goods were at the proper temperature and in good order and condition when tendered to the carrier at origin.

2. Obtain a similar written statement from the consignee that describes when and how the goods were received, how they were handled and stored up until the damage was discovered. In addition, the statement should include facts to establish that the damage existed at the time of delivery, and could not have occurred after delivery (while the merchandise was in the hands of the consignee).

Resubmit your claim with the written statements and make a demand for payment. Unfortunately, if the carrier still refuses to pay the claim, you only remedy is to bring a lawsuit.

Note that the subject of concealed damage is discussed in *Freight Claims in Plain English* (4th ed. 2009), which is available through the Council.

I see also that you mention that "the carrier did not have inspection performed". For future reference you should be aware that the National Motor Freight Classification contains the following provisions about inspection of damaged goods:

Item 300140 INSPECTION BY CARRIER

> Inspection by carrier will be made as promptly as possible and practicable after receipt of request by consignee. Inspection will be made within five normal work days after receipt of request from consignee, excluding Saturdays, Sundays and holidays. A day will be considered as the passing of twenty four (24) hours from 9 A.M., local time from the date of receipt of request for inspection. Inspection of carrier will include examination of the damaged merchandise, the shipping

container, and any other action necessary to establish all facts. If a shortage is involved, inspector will check contents of package with invoice, weigh the shipping container and contents, or conduct any other type of investigation necessary to establish that a loss has occurred. In either case inspection will be limited to factual report. Consignee must cooperate with carrier in every way possible to assist in the inspection. A written record of carrier's findings will be made at least in duplicate. The original of the report will be given the consignee for claim support. Any inspection report issued must be incorporated in claim file.

Item 300145 FAILURE TO INSPECT

In the event carrier does not make an inspection the consignee must make the inspection and record all information to the best of his ability pertinent to the cause. Consignee's inspection, in such case, will be considered as the carrier's inspection and will not jeopardize any recovery the consignee is due based on the facts contained in the report.

FREIGHT CLAIMS – ACCEPTING SHIPMENTS AND MITIGATING DAMAGES

Question: We deal with a warehouse that claims they can refuse one case of damaged and keep the rest of the shipment. We tell them they have to accept the entire shipment or refuse the entire shipment. Can you please tell me exactly what code or title states that if damaged is found a consignee has to refuse or accept the entire shipment? I need to be able to find the code on the Internet, print the code and show it to the warehouse receiving. Thank you.

Answer: It is not entirely clear from your email as to whether you are a vendor/shipper, a motor carrier, or what your position is with respect to this problem.

In any event, it is important to distinguish between shipments that are "non-conforming" and goods that have been damaged in transit.

Non-conforming goods typically involve the wrong color, size, quantity or otherwise are not what the purchaser ordered from the vendor.

The legal relationship between the vendor and purchaser is generally governed by the Uniform Commercial Code. Sections 2-601 *et. seq.* specify the rights and duties of the parties where the goods or tender of delivery fail to conform to the contract. For example, section 2-601 states that the buyer may (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest.

The legal relationship between the shipper, consignee and the motor carrier is governed by the contract of carriage - a different contract from the contract of sale between seller and buyer. If a portion of the shipment is so damaged as to be "substantially worthless", the consignee has the right to reject the damaged goods to the carrier. Otherwise, there may be a duty to "mitigate the damage" and the consignee should normally accept the goods and make a reasonable attempt to salvage them (inspect, segregate, repackage, repair, etc.) This subject is discussed in Section 7.1.4 of *Freight Claims in Plain English* (4th Ed. 2009).

FREIGHT CLAIMS – ADJUSTING FOR ADMINISTRATIVE COSTS AND SALVAGE

Question: When we file claims against the carrier most often they will ask the shipper to amend the claim to reflect shipper's cost. And while I don't agree with it, we do leave that decision up to the claimant. Mine is a double question.

(1) We just had this type of situation and the shipper lowered the claim to reflect their invoice cost as requested. They added an extra $100.00 for administrative costs, i.e., rent, wages, insurance, utilities, inbound freight, etc. The carrier turned around and insisted that they send

documentation for the administrative costs, the shipper would have to go back and send them copies of all their payments during that time. How is a claimant going to collect that type of out of pocket expense? The analyst says they don't pay for anything unless they have documentation.

(2) When a carrier pays a claim based on either limited liability or shipper's cost my understanding has always been that they are not entitled to any salvage.

Our claimant has lost their profit along with all the expenses associated with the shipment and now the carrier wants salvage as well?

Answer: The first question is whether a claimant can add "administrative costs" to its claim for loss or damage. While it may seem reasonable and foreseeable that there would be some expenses associated with filing and processing a loss & damage claim, unless you have this in your shipper-carrier contract, most carriers will not pay these expenses.

On the other hand, the court decisions do support a claim for damages in cases involving repairs to damaged equipment that include overhead on labor and materials used for the repairs, etc., see *Freight Claims in Plain English*, 4th ed. 2009, at Section 7.3.3. (the *Vacco* case).

Your second question is more difficult, since I don't think there are any court decisions discussing this particular issue. I would think that if the carrier has not paid for the full value of the goods that were lost or damaged, it does not have a right to take the goods for salvage.

FREIGHT CLAIMS – ALLOCATION OF COVERAGE BETWEEN SHIPPERS

Question: I have the following question regarding insurance carrier cargo insurance, which is typically $100,000.00.

Here is the issue. If there are shipments from multiple shippers on one truck, each with a different product, number of pallets and value with a total value for all products of $150,000, would each individual shipper/bill of lading/shipment be covered up to $100,000 in liability?

Or is the $100,000.00 liability a TOTAL for the entire truck and therefore if entire cargo is destroyed a "proportional" disbursement of liability would be established? IF this is the case, what is the policy to determine percent of liability per shipment?

I have been advised that it is based on the actual wording of the carriers insurance policy, is that true?

I have been advised that it could be broken down by SPACE used in truck-for example, I have utilized 26 feet of a 53ft trailer, therefore the carrier has 50% or $50,000.00 of liability towards my shipment.

I have been advised that it is based on value of product in truck. For example:

				Carrier liability
Shipper A	Product value	$20,000.00	($20k / $130 k = 15.4%)	15.4%
Shipper B	Product value	$50,000.00	($50k / $130 k = 38.5 %)	38.5%
Shipper C	Product value	$60,000.00	($60K / $130 k = 46.1%)	46.1%
		$130,000.00		100%

Can you please shed some light on this for me.

Answer: The answer is in the actual wording of the insurance policy. For example, the policy may have coverage up to $100,000 "per trailer or container" or "per occurrence". ("Per occurrence" would apply in the event of a flood, fire, etc. that destroyed goods in a terminal or in more than one vehicle.)

In any event, the $100,000 is the maximum amount the insurer is obligated to reimburse the carrier for its legal liability -- for losses in one trailer/container (or resulting from one occurrence).

As to the allocation of the insurance proceeds, if the proceeds are paid to the carrier, the carrier could allocate the money as it wishes. If the proceeds are paid directly by the insurer to the claimants, my best guess is that the money would be pro-rated based on the amounts of the respective claims. (This is what is usually done with broker surety bonds.)

FREIGHT CLAIMS – AMENDING A CLAIM AFTER PAYMENT

Question: A claim for damaged/refused product was filed and paid. Subsequently, within nine months, it was determined that a shortage noted on the delivery receipt was overlooked when the claim was filed. What are the limitations on filing or amending a claim after it has been paid?

Answer: The minimum time limit for filing a claim - or for amending a claim - is nine months under the Carmack Amendment, 49 U.S.C. Section 14706, so you can amend a claim at any time within that period.

However, there is another problem. You indicate that you were paid on this claim. If you have been paid, and have accepted and deposited the carrier's check in payment of the claim, under the laws in most states, this would be an "accord and satisfaction" that would bar any further claims arising out of the same transaction.

FREIGHT CLAIMS – AMENDMENTS

Question: On behalf of our insured, we were about to pay a cargo damage claim in full, as originally filed. However, now 9 months after the date of refusal of the shipment, the claimant has amended his claim to include transportation charges. The claimant is entitled to the charges and we would ordinarily pay them, but because they have amended their claim to include these transportation charges almost a year later, we believe they are time barred from adding these charges to their original timely filed claim. Would we be correct in denying these charges?

Answer: The following is from the new edition of *Freight Claims in Plain English* (4th Ed. 2009):

> 10.4 AMENDMENTS
>
> Once duly filed, a claim may be amended in writing at any time, either upwards or downwards. *Reider v. Thompson*, 116 F.Supp. 279 (E.D. La. 1953); Ex Parte No. 263, Order served April 18, 1972, Answer to Question 16, Appendix 84. A suit may be instituted for an amount different from the amount originally claimed in the claim stage. However, once a check is accepted in full settlement of the claim, the deposit and clearance of that payment usually will effectively foreclose any later attempts to recover additional damages from the carrier. See Section 10.12.
>
> In *Vista Scientific Corp. v. Southern Pacific Transp. Co.*, 1992 WL 13074 (E.D. Pa. 1992), the shipper had filed a timely claim for damage to mobile air conditioning units in the amount of $96,000. After the 9-month period elapsed, and repairs to the units had been completed, it amended its claim to $174,000. The railroad moved for partial summary judgment to limit the claim to the amount originally claimed. The court denied the motion, stating:

> The fact that Vista discovered, after filing its written claim and after the expiration of the filing period, that its damages exceeded its original submission to Southern Pacific does not preclude Vista from recovering the full amount of its damages. Where a shipper is unable to ascertain the full value of its claim during the filing period, despite its exercise of reasonable diligence, the filing of a written claim specifying an amount of damages will not, per se, bar the shipper from recovering the full amount needed to cover its damages. *Nedlloyd Lines B.V. Corp. v. Harris Transport Co.*, 922 F.2d 905 at 909 (1st Cir. 1991); *Pathway Bellows, Inc. v. Blanchette*, 630 F.2d 900 at 905 (2d Cir. 1980), cert. den. 450 U.S. 915 (1981); see generally *Morgan v. Norfolk & Western R. Co.*, 473 F.2d 1278 (7th Cir. 1973); *Reider v. Thompson,* 116 F.Supp. 279 (E.D. La. 1953).

FREIGHT CLAIMS – ASSIGNMENT OF CLAIM TO BROKER

Question: We have to sign a broker contract with our big box client but they will refuse to give us a letter of assignment if a claim does occur. If they take a deduction from us on our invoice can we legally pursue the contract carrier?

They will give us a 30 day notice before the deduction occurs, but they will not give us a letter of assignment. Can we still pursue a legal action against the carrier based on these facts?

Answer: I assume that even though you are a broker, and should not be liable for loss/damage claims, you must have agreed to assume liability for loss/damage in your contract with your client. If so, and you should have to pay claims to your client, it would obviously be best to get an assignment of the claim from them in the event it is necessary to bring suit against the responsible carrier.

However, if you do not have an assignment of the claim, I think it would still be possible to pursue the carrier based on general principles of indemnity. If you can prove that you paid the claim to your client, I think you would be able to seek indemnification from the carrier.

As a further comment, you could include appropriate language in your broker-carrier contracts that would clarify the rights and obligations of the parties.

FREIGHT CLAIMS - AVERAGES

Question: We are reviewing the number of claims we have submitted to our primary freight carrier for the past year. In reviewing the data there is an internal debate as to whether the number of claims we are experiencing are within average. What are the current industry standards for average number of freight claims?

Answer: Sorry, but we really don’t have any current data. At one time the Interstate Commerce Commission required motor carriers to submit loss and damage claims statistics, but that requirement was eliminated quite a few years ago. As a rough measure, claims with less-than-truckload carriers generally run from about 0.5 - 1.5% of the value of goods shipped, depending on the commodity.

About the best advice I can give is to talk to some of your colleagues in similar businesses. You should consider attending the Transportation & Logistics Council’s next Annual Conference, “Education for Transportation Professionals”, since there will be many knowledgeable transportation/logistics professionals in attendance, and I’m sure they would be willing to share their experience with you.

FREIGHT CLAIMS – BROKEN SEAL ON SL&C FOOD SHIPMENT

Question: I have several questions regarding chain of custody interruptions with foodstuff deliveries and containment of potentially tampered product from reaching the general public.

If a shipper load & count ("SL&C") load is delivered, seal missing or tampered, would the distribution center be within rights to refuse delivery (without inspection) of the full truckload and file claim for total value of the shipment? Are they required to inspect the product prior to refusal? If outright refused, what falls to the carrier in terms of liability of the product? Is it the shipper's responsibility to contain and dispose of product deemed to be unsaleable?

If the above delivery occurred via drop trailer, what time frame must the seal exception be reported in order to file claim?

Answer: Questions about broken seals on SL&C shipments of food products raise a number of factual and legal issues.

Contamination of food products, drugs, medicines or other items intended for human consumption is a serious matter. The mere possibility of contamination may, in and of itself, be sufficient.

There are 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. For example, there are provisions governing contaminated food under the Federal Food, Drug and Cosmetic Act - 21 U.S.C. §§ 342(a)(4) and 342(i):

Section 342(a)(4) states, "A food shall be deemed to be adulterated ... if it has been prepared, packed, or held in insanitary conditions whereby it may become contaminated with filth, or whereby it may have been rendered injurious to health." This provision has been used in the past to support damage claims.

Section 342(i), entitled "Noncompliance with sanitary transportation practices." This provision states, "food shall be deemed adulterated ... if it is transported or offered for transport by a shipper, carrier by motor vehicle or rail vehicle, receiver, or any other person engaged in the transportation of food under conditions that are not in compliance with regulations under section 350e of this title."

See also the discussion in *Freight Claims in Plain English* (4th Ed. 2009) at Section 11.5.

Even before "9/11", the anthrax scare, and the "Bioterrorism threat", the courts were very sensitive to situations where product was exposed to possible contamination or product liability.

For example, in *Trucker's Exchange, Inc v. Border City Foods, Inc.*, 998 SW2d 998 (Ct. App. Ark. 1999) a truckload shipment was rejected because of a missing seal. 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.

Another 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."

It is quite common for receivers of food products to refuse or reject product if there is a broken seal or the packaging itself shows signs of damage or tampering. Shippers often will take the position that it would be an unacceptable risk to allow the product to enter the market for human consumption, or that it would be impossible to adequately sample and test all of the food product to ensure that the quality had not been compromised.

On the other hand, carriers usually argue that there is a duty, under the common law, to "mitigate the loss". Depending on the facts and the type of packaging, it may be possible to inspect the product and segregate the good product from that which is actually damaged. It

may also be possible that some of the product can be usable for some purpose other that for human consumption, e.g., animal feed, etc.

In other words, there really is no "black and white" answer to your questions.

I would note that many shippers now include provisions in their transportation contract dealing with this problem, and providing that broken seals, failure to maintain specified temperature, etc. may be grounds for rejecting shipments or for destroying suspect product.

FREIGHT CLAIMS – BROKEN SEAL ON TRAILER OF FOOD PRODUCT

Question: We are a property broker and I have several questions regarding Chain of Custody interruptions with foodstuff deliveries and containment of potentially tampered product from reaching the general public.

If a shipper load & count ("SL&C") load is delivered, seal missing or tampered, would the distribution center be within rights to refuse delivery (without inspection) of the full truckload and file claim for total value of the shipment? Are they required to inspect the product prior to refusal? If outright refused, what falls to the carrier in terms of liability of the product? Is it the shipper's responsibility to contain and dispose of product deemed to be unsaleable?

If the above delivery occurred via drop trailer, what time frame must the seal exception be reported in order to file claim?

This is such a unique situation. Claimant is saying shipment is a total loss and the carrier is looking at perfectly fine pails of juice, still frozen, sitting in their cooler. The carrier wants my customer to help mitigate the loss. Customer wouldn't budge, so the carrier denied the claim completely!

Carrier had the opportunity to correct the problem after the first attempt to deliver when the pails arrived all over the floor and some leaking. We told the carrier to take pallets back to terminal, set the leaking pails aside and restack, re-stretch wrap and redeliver. They didn't follow instructions completely, and sent all pails back on the pallets, even the ones leaking. They attempted re-delivery and the pails again were all over the floor, that's when consignee refused again and didn't want any product from this batch or lot numbers from the same production run! Not sure where to go from here.

As a property broker, do we have any recourse or leg to stand on to get this claim settled?

Reason being, my customer is extremely frustrated that carrier denied the claim and instead of pursuing them further even to the point of litigation they seem to have washed their hands of it, and want us to reimburse them for the replacement product (claim amount $8,300.00) or credit their account, which means deducting from their outstanding balance! The reasoning behind their decision, "they don't do business with the delivering carrier, they do business with us". Any recommendations?

Answer: Contamination of food products, drugs, medicines or other items intended for human consumption is a serious matter. The mere possibility of contamination may, in and of itself, be sufficient.

There are 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. For example, there are provisions governing contaminated food under the Federal Food, Drug and Cosmetic Act - 21 USC 342(a)(4) and 342(i):

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See also the discussion in *Freight Claims in Plain English* (4th Ed. 2009) at Section 11.5.

It is quite common for receivers of food products to refuse or reject product if there is a broken seal or the packaging itself shows signs of damage or tampering. Shippers often will take the position that it would be an unacceptable risk to allow the product to enter the market for human consumption, or that it would be impossible to adequately sample and test all of the food product to ensure that the quality had not been compromised.

On the other hand, carriers usually argue that there is a duty, under the common law, to "mitigate the loss". Depending on the facts and the type of packaging, it sometimes may be possible to inspect the product and segregate the good product from that which is actually damaged. Likewise, some products might be usable for a purpose other that for human consumption, e.g., animal feed, etc.

In other words, there really is no "black and white" answer to your question, but I would certainly say, from the information you have provided, that this shipment could be considered a total loss, without any obligation to salvage or mitigate the loss.

I would note that many shippers now include provisions in their transportation contract dealing with this problem, and providing that broken seals, failure to maintain specified temperature, etc. may be grounds for rejecting shipments or for destroying suspect product.

With regards to the specifics of your unique situation, unfortunately, you seem to have gotten yourself in the middle. Brokers are not carriers, and generally don't have any liability for loss or damage in transit (unless they assume liability, hold themselves out as carriers, or their negligence caused the loss). You probably should have made this clear when you first dealt with your customer. Better yet, you should have a "broker-shipper" contract with your customers, or have standard terms and conditions that are incorporated into your rate quotes.

In any event, it is not unusual for shippers to hold the broker responsible since that is the party that they deal with. If you should decide, for business reasons, to pay the shipper's claim, I suggest that you get an assignment of the claim and bring suit against the carrier for indemnification.

FREIGHT CLAIMS – BROKER ENGAGES FRAUDULENT CARRIER

Question: I work for a broker. We were tendered a shipment from our customer in mid-December that was to pick up in Fontana, CA and deliver in Stuarts Draft, VA. On 12/17/09, I used an online load board (pay service account) to post the shipment to find a truck to handle the load. I received a call from Jose at Jose Colmenares Trucking and booked the load to pick up on 12/18/09 and deliver on 12/22/09.

Jose was on the road and used a FedEx office location to send and receive faxed information. I verified and received all pertinent info:

> MC# 695880, US DOT# 1963305, W-9 Form TIN# 656-63-3104, BIPD Insurance Policy # 044332190 through United Financial Casualty Company (Progressive Insurance). All licenses and insurances are accurate and active.

The load was picked up on 12/18/09 as scheduled at the Fontana, CA location.

The facility recorded a California drivers license # and tractor plate #, but both appear to be fake. The load never delivered to Stuarts Draft, VA and there has been no answer at the phone

number listed for Jose Colmenares trucking since the pickup took place. We have also obtained information verifying that Jose Colmenares stole at least 3 other loads during this same timeframe from other companies.

We filed a police report with the San Bernardino County Sheriff's Department, filed a claim with Progressive, and have pooled information with the others who were scammed for law enforcement to use to tie everything together. The claim value of our cargo is $45,360, and Jose Colmenares Trucking's insurance company Progressive notified us this morning that they are denying our claim. Our customer has put in a claim to us for the same amount that we are expected to pay.

We are doing all we can to find out if we have any recourse and are looking for any advice you can provide.

Answer: I see from the Federal Motor Carrier Safety Administration ("FMCSA") website that this carrier is shown to have active "contract" authority under MC 695880 that was recently granted on 12/01/2009, and that it also has a USDOT number (1963305), but has not yet been assigned a carrier safety rating. There is BI/PD insurance on file, but since it applied for "contract" authority, there is no BMC-34 cargo insurance endorsement on file.

I assume you are concerned about your liability as the broker that arranged for this move. As has been explained in past "Q&A's", unless you have held yourself out as a motor carrier or assumed liability for loss or damage by contractual agreement, your liability as a broker would normally have to be based on negligence. For example, if you were negligent in selecting an unfit carrier, you might have some liability.

Based on the information you provided, I would say that you probably exercised reasonable diligence in checking the official FMCSA website that indicated the carrier was "legal", i.e., properly authorized, insured, etc. (The only question in my mind is whether you should have been concerned that the carrier had only been granted operating authority some 17 days before you engaged their services.)

Under the circumstances, I would suggest that you advise your customer of all of the facts and tell them that you do not have any liability for this loss. If you have a broker's contingent liability policy or other insurance, you should also notify your insurer of the claim, since it is quite possible that the customer may look to you for payment or bring a lawsuit against your company.

Lastly, you do not specify the basis for the declination of the claim by the carrier's insurance company. Most carrier cargo legal liability policies do include an exclusion for employee theft or "infidelity". Thus, if the thief was the owner or an employee of the carrier, the insurer would have a basis for declining the claim. On the other hand, if the thief was not an owner or employee and was a third-party impostor, the insurance policy should cover the loss. This, of course, may require further investigation and contact with law enforcement authorities.

FREIGHT CLAIMS – BROKER LIABILITY

Question: We booked a load with two delivery stops. At the second delivery the freight, barrels of jalapeños, arrived leaking and some of them were on the floor. The consignee did receive them but because of the extra work they had to do in cleaning up and packing them, they charged the shipper for this work. The shipper, which is our customer, is passing on the charges to us. In this scenario why would we, the broker, be assessed these charges?

Answer: The shipper should file a claim for loss/damage directly with the carrier, not the broker.

FREIGHT CLAIMS – BROKER LIABILITY

Question: We are brokers who arranged for a shipment of cheese. When the receiver was putting away the boxes of cheese they found that some boxes were missing the cheese, and so they sent us pictures and told us the amount. We in turn want to deduct this missing cheese from the carrier's invoice. Now the carrier is threatening he will go after our bond if we do this because he says his driver did not take the cheese. What shall we do in this situation? How should we protect ourselves?

Answer: As a broker, you do not ordinarily have any liability for loss/damage claims, nor do you have any ownership interest in the shipment. You should have the shipper or consignee file a claim for the shortage. If you have paid the shipper's claim, then you should get an assignment of the claim from the shipper and present it to the carrier.

As a broker, you can "offset" claims against freight charges, but you will be exposed to collection efforts by the carrier in the form of a lawsuit or a claim against your surety bond.

FREIGHT CLAIMS – BROKER LIABILITY

Question: I am a freight broker. The truck I hired picked up a fresh load of chicken in Alabama and delivered to California. When the driver arrived at the destination, his temperature recorder showed the reefer never ran below 40 degrees Fahrenheit. The receiver salvaged as much as possible and reduced the claim from $70,000 to $30,000. Now the carrier has gone out of business and the insurance refuses to pay the claim stating that since they can't talk to the carrier they won't pay the insurance claim. My customer is seeking to recover the claim from me. How can I get the money out of the insurance company?

Answer: As the broker, you should not be "in the middle" on this claim. Brokers are not generally liable for loss or damage unless (1) they have held themselves out as a carrier, or (2) assumed carrier liability, or (3) were negligent and their negligence caused or contributed to the loss. You should make it clear to your customer that you are not responsible, and that they should pursue the carrier on the claim.

As for the insurance issue, if you were to bring suit against the carrier and get a judgment, the insurer would probably have to pay the claim (assuming that the policy was in effect at the time of the loss).

FREIGHT CLAIMS – BROKER RECORDS

Question: A customer wants to put in a claim for damages due to a late delivery with one of our carriers...but first the customer states the following and asks for the following information from us.

Yes, I agree, a full review of everything that happened with these shipments is necessary. I want to explore every aspect of what happened, as I am looking for full reimbursement of my damages. I will give you access to all of my information, but I have a request of you, can you please send me the records you have for these shipments? To be specific:

> §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:
>
> (a)(1) The name and address of the consignor;

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

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

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

(a)(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

(a)(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.

This is the response I got when I sent the client a claim for them to fill out. I was paid for these shipments before they delivered and I paid the carrier for one of the loads since it delivered 1 day late. The two other shipments delivered 6-8 days late. It is not clear exactly why they delivered so late but one of the loads did have other product on the truck. These loads were not sealed.

What obligation, if any, do I have to provide this information, I feel the client wants to hold me responsible and may take legal action even though all the merchandise did deliver in good condition?

Must I provide them with any documents and in particular my costs or invoices from the carrier? The carrier has not been paid on two of the loads and is going to my bond with a claim to get paid for the two loads not paid yet.

Answer: You ask "What obligation if any do I have to provide this information?"

The answer is quite clear and is found in the Federal Motor Carrier Safety Administration regulations, which provide "(c) Each party to a brokered transaction has the right to review the record of the transaction required to be kept by these rules." Since the shipper is a "party to the transaction" it is entitled to the information specified in the regulations.

FREIGHT CLAIMS – BUGS ON A TRAIN

Question: Do you have any experience with rail shipments being infested with bugs? During transit, the product became contaminated. The cars were inspected and deemed free of debris and infestation at the time of loading, and there were no flies present.

Do you know what could serve as proof in a situation like this?

Answer: This subject does come up from time to time, and it is usually a question of fact as to whether the infestation was present in the rail car (carrier liability) or whether it was present in the lading itself (shipper liability). The shipper has the burden of proving that the shipment was in good order and condition at the time of tender to the carrier; if it can do so, it should be able to recover its damages from the carrier. This subject is discussed in *Freight Claims in Plain English* (4th Ed. 2009) at Section 5.1.4.

You will probably need to obtain a written statement (preferably an affidavit) from a person with personal knowledge that describes the material and how the material was stored, that it was free from infestation, how it was loaded, etc. to establish good condition at origin. Likewise, you should get a statement from the receiver that describes the condition, amount and type of infestation, damage to the lading, etc.

FREIGHT CLAIMS – CANADIAN INSURANCE ON U.S. SHIPMENT

Question: I process claims on the side of the shipper for a large 3rd party logistic ("3pl) service provider. Many times the shippers or even the brokers have purchased additional insurance on high value shipments or on used goods from an insurance broker here in the United States. The insurance company they use is in Canada.

Recently we have had several claims disallowed due to improper packaging even when the packaging was in line with minimum package requirements in the National Motor Freight Classification ("NMFC"). Recently we had a rather large claim disallowed on a shipment that moved as "Used Copy Machines" released value not exceeding ("rvnx") $.50/lb. The linehaul carrier disallowed the claim based on improper packaging by the shipper. We agree that the 84 copy machines were rolled in to the trailer by the shipper's service technicians and that the driver was there at the time of loading and even supplied a blue strap as a form of bracing. He counted the machines signed for pieces shut the doors and moved the trailer out.

Somewhere down the line the load shifted and all of the machines were damaged beyond repair. According to the Code of Federal Regulations, "Driver may not operate a commercial motor vehicle and a motor carrier may not require or permit a driver to operate a vehicle unless the cargo is properly distributed and adequately secured as specified in Sec. 393.100 through 393.142."

The driver should have refused to move the trailer until it was properly blocked and braced. He applied one strap across the trailer. The carrier disallowed claim because of improper packaging we disputed the declination and will deal with that in small claims court. In the meantime, the insurance carrier says they don't pay claims based on United States law, they pay based on Canadian law. The Canadian insurer asserts that the shipper should have blocked and braced the load and that it was not up to the driver to make sure the load was secure.

So the franchise purchased $55,000 worth of insurance for nothing?? Who is liable? The shipper has accepted 50% of the liability and was willing to amend the claim by 50% but the insurance company is not willing to budge.

The shipment originated in Charlotte, NC and delivered to Portland, Oregon and therein lies the problem. We know the carrier is liable based on $.50/lb. It's the balance of the amount we transmitted to the insurance company based in Canada. They won't abide by our law here in the United States. I would accept their declination if the shipment originated in Canada but it didn't and that's where I'm stuck.

Answer: If the shipment originated in Canada, the insurer is probably correct that Canadian law would apply.

However, this does not answer your question, since you would need to know two things: (1) what the insurance policy actually says, and (2) how this fact pattern would be treated under Canadian law.

We don't have a copy of the insurance policy, so I can't comment on what it covers or what exclusions may be involved.

As to the latter, I believe that the law governing common carriers in Canada is quite similar to that in the U.S. Although there may be no equivalent regulations such as are found in 49 CFR Part 393, I think that the carrier has the primary responsibility to ensure that goods are properly loaded, blocked and braced in the truck, especially when the driver is present to observe the loading.

It would make a difference if this a shipper's interest policy, i.e., "inland marine", or was the carrier's cargo policy?

If the latter, my guess is that they claim they are only liable for the carrier's legal liability, which could be the amount calculated using the liability limitation.

Freight Claims – Carrier Demand's Proof of Loss Statement

Question: I have a situation where a carrier took in a multiple less-than-truckload ("LTL") delivery to a customer (consolidator for overseas shipment) and one of the shipments has turned up missing. The carrier contends they checked their OS&D ("over, short & damage") department and the dock areas of the terminals the goods transferred thru during transit and found nothing. Therefore, they contend they delivered the piece. We filed a claim for the missing piece. The carrier came back to us and asked us for a Proof of Loss statement on the consolidator's letterhead. I returned the email stating that it was the carrier's responsibility to obtain this document if it was necessary. They said they would try, but if unsuccessful, they would deny the claim. The loss is for just under $38,000.00.

I am holding a position that if they cannot produce a POD ("proof of delivery") for the missing piece, they are liable. Does the carrier have any grounds to stand on to deny the claim without a POD?

Answer: I don't know whether you have a contract with this carrier, but I usually include a provision in my transportation agreements that the carrier must supply a POD upon request.

In any event, even though it would normally be expected that the carrier should provide a POD, there is no law or regulation that requires this. Also, keep in mind the shipper's burden of proof under the Carmack Amendment: the shipper has the burden of proving that the shipment was tendered in good order and condition at origin, and that it was damaged or short at the time of delivery.

While failure to provide a proof of loss statement from the consolidator may not be a valid reason for declining a claim, as a practical matter you may want to provide this in order to get the claim paid without litigation.

Freight Claims – Carrier Demands "Proof of Deduction"

Question: I have a question regarding some transportation claims with FedEx Express. We walked away from a claims buyout agreement after many years and have since begun filing claims against FedEx Express for lost packages so we could better evaluate the carrier's performance.

What we discovered early on is the deduction and claims process is taking a very long time (4-6 months) to get the transportation claim filed against FedEx Express for lost packages. Historically, we would wait for deductions on our invoices by customers, these deductions would then trigger the transportation claims against FedEx Express.

Most recently we have taken a different approach in the filing of transportation claims for FedEx Express Shipments based on packages not delivered as opposed to deductions taken by our customers from our payment remittances. This approach has dramatically sped up our process for filing of claims.

The issue of late is that FedEx Express is pushing back requesting that we provide "proof of deduction" by the consignee. To provide this information will result in the claims process reverting back to the old processing timeline.

I have been of the belief and training that the carrier, FedEx Express in this case, has to clear themselves and provide proof of delivery ("POD") or pay the claim.

The question is does FedEx have a legal right to request a document from us requiring "proof of deduction" when FedEx Express can't even demonstrate proof of delivery?

(If FedEx Express wishes to pursue this document from the consignee as part of their claims investigation, great – if they can secure such a signed document (name and phone number and statement - that will work as the POD).

Answer: As with any claim, you need to start with the basics. It is the claimant's burden of proof: (1) that the shipment was in good order and condition when tendered to the carrier at origin and (2) that it was damaged (or short) at the time of delivery, see *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 337 U.S. 134 (1964), reh. den., 377 U.S. 948. These are factual questions that depend on the specific situations of each shipment.

It seems to me that the carrier is asking for some documentary evidence that there was a shortage at the time of delivery. Normally this would be a notation of shortage on a delivery receipt, or the consignee's receiving report (e.g. an "OS&D" report), showing a shortage. Apparently, this carrier would accept a "proof of deduction" that would be sufficient evidence of the shortage.

I really don't see anything wrong in asking you, as the claimant, to provide evidence to establish the shortage. You should be able to get something from the consignee for this purpose, and submit it to the carrier.

By the way, you suggest that FedEx is not able to provide a proof of delivery. Why is this? What happens if you request one?

Freight Claims – Carrier Fails to Follow Delivery Instructions

Question: If a carrier has a letter of instruction from a consignee of where to leave the merchandise, does that serve as a "signature" in lieu of getting an actual signature on the proof of delivery ("POD")?

The situation we have is that a person purchased merchandise from our company with a stolen credit card. Obviously the delivery address is not the actual address of the cardholder. When the carrier went to deliver the merchandise to the consignee, which I must say was legitimate as far as we knew at the time, the consignee had left a hand written letter authorizing the carrier to leave the merchandise in a location on their property without any further signature. The carrier has a copy of this letter on file and is presenting it to us as the POD. I was under the impression that because they had this letter signed by the consignee listed on our bill of lading ("B/L") that we had no claim for loss with the carrier.

If I am incorrect in assuming this please feel free to let me know where I am wrong. I appreciate any advice or help you can give.

Answer: I'm not sure why you are asking this question or what the problem really is.

Normally a common carrier has a duty to deliver goods "on demand of the consignee named in a nonnegotiable bill" when the consignee offers in good faith to satisfy the lien of the carrier on the goods and agrees to sign, on delivery of the goods, a receipt for delivery if requested by the carrier, see Section 80110 of Title 49, U.S. Code (the "Bills of Lading Act").

A carrier can be liable for a mis-delivery, i.e., a delivery to the wrong person, under Section 80111 of the Bills of Lading Act.

Certainly, it is always a "best practice" for a carrier to make sure that it delivers goods to an authorized person, and to get a signed delivery receipt. If it doesn't, and delivers to the wrong address or to a thief or impostor, it can be liable for any damages that result.

Technically, if a consignee instructs a carrier to deliver to a different address or person, it would be a "reconsignment" of the shipment. In such cases, most carriers have tariff rules as to the form and content of a request for reconsignment, and have an additional charge for this service.

I would note that there have been cases where a purchaser reconsigned a shipment, claimed that it had not been delivered, and refused to pay for the goods. That is why we usually recommend to our clients that they include a provision in their transportation contracts that a shipment cannot be reconsigned without the authorization of the shipper.

The situation you describe is a close call. I realize that the carrier may not agree, but I think that the carrier should not have left the shipment without getting a signature, and should have called the shipper for instructions. In other words, the carrier assumed the risk of a mis-delivery, for which it would be liable.

FREIGHT CLAIMS – CARRIER INSPECTIONS

Question: Back in October 2007 there were partial damages to a delivery. The carrier insisted for us to submit the claim for $635.00 to their insurance and so we did. The insurance company said they would not pay for it because it was below their deductible of $1,000.00. Now in 3/2008 the carrier is saying that if they are going to buy this damaged product they want to have it. Is the receiver obligated to have the damaged product this long? And if, the receiver does not have this damaged product anymore does the carrier have the right to not pay for the damages?

Answer: 1. The shipper is only required to hold damaged product for inspection by the carrier for a reasonable time. I would say that after 6 months the carrier has waived its rights to inspect the damaged product, and must accept the shipper's inspection.

2. If the damaged product was substantially worthless and had no salvage value, the shipper should be able to dispose of it.

The shipper is obligated to “mitigate” its damages, and if the product was sold or used in some manner, the carrier is entitled to an offset of that amount.

FREIGHT CLAIMS – CARRIER INSURANCE DEDUCTIBLES ON HOUSEHOLD GOODS

Question: I recently had my household goods shipped interstate and the shipment was completely destroyed while at their warehouse (I didn’t know the exact destination of my shipment... only what state it was being shipped to). The moving company has a $10,000 deductible on their warehouse policy. Their insurance company made an offer, which partially covers my loss, and the moving company is only offering to pay $5,000.

I have two questions (sorry if these are silly- I’m clueless about this stuff)

1- Don’t they have to cover the first $10,000? Why would I be subjected to the deductible they chose to keep their premium down?

2- Don’t movers have to have $10,000 of cargo coverage (the Federal Motor Carrier Safety Administration (“FMCSA”) website says $5,000 per vehicle, $10,000 per incident) anyways? Wouldn’t that coverage pay the gap in their deductible?

I guess I don’t understand how they can pay less than the entire deductible amount- doesn’t the insurance only kick in after they pay that out?

Answer: The liability of the moving company has nothing to do with its cargo legal liability insurance policy. That insurance is a separate contract of indemnity between the insured and the insurer.

The moving company may have some limitation of liability in its tariff that would be applicable to the loss of goods while in storage, but that is apparently not the issue.

You can try to recover against the carrier's BMC-32 endorsement. This is a mandatory cargo liability endorsement that is separate from the carrier's basic cargo legal liability insurance policy, and it does not have any deductible. You can get the name of the BMC-32 insurer on the FMCSA website, and file your claim directly.

FREIGHT CLAIMS – CARRIER LIABILITY FOR FAILURE TO REFRIGERATE

Question: A carrier picked up a load of potatoes but failed to operate the refrigeration unit during all or part of the transit. The receiver rejected the load and the shipper attempted to find an alternative customer.

Is the carrier responsible for the load because of the failure to refrigerate the load or is the shipper responsible because he directed the carrier on what to do?

Answer: With the limited information provided I can only give you the following answers:

1. A motor carrier is liable for loss or damage in its possession. If the potatoes were damaged at the time of delivery, the carrier is responsible for the damages.
2. If the consignee rejected the shipment, and the shipper then sought to find another buyer, this would be proper, since the shipper had a duty to "mitigate the loss" if possible. Any salvage proceeds would, of course, be credited against the claim.

FREIGHT CLAIMS – CARRIER RECORDS AND CONCEALED DAMAGES

Question: I am filing a concealed damage claim against a less-than-truckload carrier. It is company policy to not contact our customers to get an explanation as to what they did with the shipment once they signed for it clear or when they first noticed that shipment was damaged. Therefore, I am trying to obtain a copy of the shipping history report for the trailers that were involved in the shipment from the carrier, but the carrier has refused, stating "We are unable to send this as it is internal information". I know that when I respond to ask "Why?" I will be informed that it's due to confidentiality of other customer shipments that were on the same trailer(s). I would like to know if the motor carrier has the right to refuse my request for this information.

Answer: I don't think the carrier has an obligation to provide a shipping history report.

The thing to remember is the claimant's burden of proof: (1) that the shipment was in good order and condition when tendered to the carrier at origin and (2) that it was damaged at the time of delivery, see *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 337 U.S. 134 (1964), *reh. den.*, 377 U.S. 948. These are factual questions that depend on the specific situations of each shipment.

If damage is not found until after delivery, and not noted on the delivery receipt, then the claimant has an additional burden to prove that the shipment was in fact damaged at the time of delivery, and not afterwards. This is a factual question, and it is usually a good practice to have a written statement or affidavit from the receiver describing how the shipment was handled after it was delivered, how the damage was discovered, etc.

I understand that your company has a "policy", but under the circumstances I would suggest that you ask the consignee to provide a report or statement that confirms that the damage existed at the time of delivery, and could not have occurred after delivery (while the merchandise was in the hands of the consignee).

FREIGHT CLAIMS – CARRIER REFUSES TO ACKNOWLEDGE VISIBLE DAMAGE

Question: We hired a shipping broker to pack and ship two taxidermy Zebras, which were purchased on eBay. They packed the Zebras and shipped them via motor carrier to Louisiana. Upon arrival, the customer noticed buckling on crate and refused to sign for delivery. The driver instructed customer to look into crate to check merchandise. The customer looked into the crate and saw that the damage to the Zebras was extensive and so the customer refused delivery.

The customer asked the driver to take the shipment back and remove it off their property. The driver declined to take the shipment back stating that there was no room for him to take it back on the truck, which didn't make sense since he just took it off the truck. The customer again asked the driver to take back the Zebras, which he declined. The driver then cussed at the customer, threw the bill of lading on the ground and left without getting any customer signature.

The driver wrote on the delivery receipt that the crates were in 'perfect' condition. The customer spoke to the carrier company about them leaving the crates on their property and the carrier asked the customer to hold the Zebras until an inspector could come out.

When the customer asked the carrier company to take the Zebras to their warehouse for inspection, as they wanted the Zebras off their property, the carrier again asked the customer to wait until the inspection. The customer reviewed and took his own pictures along with the inspector taking her pictures. All the time, the carrier Claims Supervisor stated that the crates are in "perfect" condition, without being there to inspect, only based on the word of the driver.

The customer took pictures, which were not included in the inspector's report, that showed the damage to the outside of the crates. The inspector didn't have any pictures except for one that she provided in the report and none were of the crate except for the pictures provided by the customer to me in our claim.

The carrier continues to state that they are not responsible. We have asked the carrier to return the Zebras to us and informed them that the customer refused delivery and asked them to remove the Zebras from the premises. The carrier refused and now the customer has trashed the Zebras.

We have filed a claim with the carrier for loss and damage. Is the carrier responsible for the loss and damage of our Zebras?

Answer: This is our first "Zebra" case, and you seem to have quite a mess on your hands, but let me try to give you some guidance.

A motor carrier has a responsibility to transport and deliver merchandise in good condition - the same condition as the goods were received. The problem here is that there was no apparent damage to the CONTENTS of the crates at the time of delivery, and there is some dispute about the damage to the crates themselves. This is referred to as "concealed damage".

Carriers ARE liable for concealed damage, but the thing to remember is the claimant's burden of proof: (1) that the shipment was in good order and condition when tendered to the carrier at origin and (2) that it was damaged at the time of delivery, see *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 337 U.S. 134 (1964), reh. den., 377 U.S. 948. Once the claimant has established these two elements, the burden then shifts to the carrier to prove that the loss was caused by one of the recognized exceptions to liability such as act of God, act or default of the shipper, etc., AND that the carrier was not negligent. These are factual questions that depend on the specific situations of each shipment.

I would suggest the following:

1. Obtain a written statement from someone who has personal knowledge of the facts surrounding the shipping - describing how the shipment was prepared, packaged, etc. and

establishing that the Zebras were in good order and condition when tendered to the carrier at origin.

2. Obtain a similar written statement from the consignee that describes when and how the Zebras were received, how they were handled and stored up until the damage was discovered, together with any photographs of the crates and the contents. In addition, the statement should include facts to establish that the damage existed at the time of delivery, and could not have occurred after delivery (while the Zebras were in the hands of the consignee).

Resubmit your claim with the written statements and photos, and make a demand for payment. Unfortunately, if the carrier still refuses to pay the claim, you only remedy is to bring a lawsuit.

Note that the subject of concealed damage is discussed in *Freight Claims in Plain English* (4th Ed. 2009) which is available through the Council.

It seems that there is also some question as to whether the carrier inspected the contents of the crates that were damaged. You should be aware that the National Motor Freight Classification contains the following provisions about inspection of damaged goods:

> Item 300140 INSPECTION BY CARRIER
>
> Inspection by carrier will be made as promptly as possible and practicable after receipt of request by consignee. Inspection will be made within five normal work days after receipt of request from consignee, excluding Saturdays, Sundays and holidays. A day will be considered as the passing of twenty four (24) hours from 9 A.M., local time from the date of receipt of request for inspection. Inspection of carrier will include examination of the damaged merchandise, the shipping container, and any other action necessary to establish all facts. If a shortage is involved, inspector will check contents of package with invoice, weigh the shipping container and contents, or conduct any other type of investigation necessary to establish that a loss has occurred. In either case inspection will be limited to factual report. Consignee must cooperate with carrier in every way possible to assist in the inspection. A written record of carrier's findings will be made at least in duplicate. The original of the report will be given the consignee for claim support. Any inspection report issued must be incorporated in claim file.
>
> Item 300145 FAILURE TO INSPECT
>
> In the event carrier does not make an inspection the consignee must make the inspection and record all information to the best of his ability pertinent to the cause. Consignee's inspection, in such case, will be considered as the carrier's inspection and will not jeopardize any recovery the consignee is due based on the facts contained in the report.

FREIGHT CLAIMS – CARRIER WANTS TESTING ON DAMAGED PRINTER

Question: I have a claims question regarding mitigation of claim. We have a claim with a less-than-truckload (“LTL”) carrier regarding damage to a high end printer. The printer was initially taken to destination but due to need for a lift gate was not delivered on day 1. Printer was in the nose of the trailer at that time and when departing, driver ran over curb and bounced the trailer. The next day, the printer was delivered on a trailer with a lift gate. When trailer was opened, printer was lying on its side. The delivery receipt was signed noting condition of printer on its side, broken pallet and damage to exterior packaging. The consignee did take delivery of printer and 9 days later the carrier’s inspector did inspect printer at consignee’s location. Damages have been deemed beyond repair by the shipper and filed for invoiced cost of printer.

Carrier is denying claim stating that inspection by a technician needs to be done to determine extent of damages. Shipper’s Director of Logistics and Director of Technology have stated that

cost to setup, test and fully inspect printer will exceed cost of printer, will void warranty and may not identify hidden damages that may occur in the future. The carrier is not moving forward on claim asking for mitigation. How do we get carrier to move forward on this claim, and is there precedence that can be presented to get carrier to settle this claim?

Answer: You mention that the carrier's inspector did inspect printer at consignee's location. I assume that the inspector did not consider the printer a total loss, and suggested that it be examined or tested to determine the extent of the damage.

I would suggest that the consignee contact the manufacturer and request one of their service representatives to check out the machine and give a written opinion as to its condition - whether it can be repaired, what it would cost, whether the manufacturer's warranty would still be valid, etc.

FREIGHT CLAIMS – CARRIER'S RIGHT OF RETENTION

Question: Can you please provide me with the laws in USA regarding a carrier's right to retain damaged goods?

Answer: A carrier does not have any legal right to retain goods that are damaged in transit - they still belong to the owner (usually the shipper or consignee). If the owner authorizes the carrier to salvage the goods, then the carrier can salvage or sell the damaged goods and apply the proceeds to the claim. Likewise, if the carrier pays the owner for the value of the goods, it can then salvage or sell the goods and keep the net proceeds.

There is a different rule for goods that are refused or rejected, i.e., "on hand" goods. Section 4 of the Uniform Straight Bill of Lading provides as follows:

> Sec. 4. (a) 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.
>
> (b) 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.
>
> (c) Where carrier has attempted to follow the procedure set forth in subsections 4(a) and (b) 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.

FREIGHT CLAIMS – CARTON COUNT OF SHRINK WRAPPED PALLETS

Question: We have several customers that are demanding our carriers allow them to break down stretch wrapped pallets to take a carton count inventory before signing a delivery receipt. We tender our shipments as pallets said to contain "x" number of cartons and our customers want to take a carton inventory even if everything is in apparent good order.

While I think this is a wise move on the part of our customers to fully inspect their shipments in the presence of a driver, a few of our carriers are claiming this is a violation of law. I can understand why the carrier would not want to allow this practice because of the time their driver would be held up, but I could not find any legal basis when I researched in *Freight Claims in Plain English* as well as other texts published by the Transportation and Logistics Council. Does the carrier have a legal basis to afford the consignee this opportunity?

Answer: It certainly is not "illegal" to break down the pallets and to count the goods at the time of delivery, and when the driver is still present to witness any loss or damage -- in fact, it is definitely a good practice. The only reason why carriers might object is because of the delay and the fact that their driver is being held up from making other deliveries. Drivers themselves might not be too happy as many are paid on a basis of miles driven.

FREIGHT CLAIMS – CHARGE FOR "INCOMPLETE SHIPMENT"

Question: We manufacture kitchen gadgets and recently sent a shipment to the distribution center ("DC") of a big grocery chain using an approved less-than-truckload ("LTL") carrier. Upon arrival, the DC refused two cartons and signed "2 cartons item XXX damaged and refused". The grocery company paid our invoice short $73.00 for the damaged and refused items, but also deducted $50.00 for "incomplete shipment" e.g. they didn't receive the entire order and felt it necessary to penalize us.

We shipped complete, but the carrier was responsible for the damage which led to the penalty. Do we have a chance to collect the $50.00 from the carriers if we include it in the claim for a total of $123.00?

Answer: It would seem to me that the $50.00 charge for "incomplete shipment" would be considered "special damages", unless the carrier had been put on notice that such a charge by the consignee would be incurred if the shipment were delivered short.

Special damages are only compensable where the carrier has actual or constructive knowledge, at the time of shipment, of the consequences of delivering with shortage or damage, or of a non-delivery. This subject is discussed in detail in Section 7.3 of *Freight Claims in Plain English* (4th Ed. 2009).

FREIGHT CLAIMS – CLAIM FOR DAMAGED TOOTHPASTE TUBES

Question: We are a third party logistics provider and handle cargo claims for one of our customers. We had a customer ship 4 pallets of tubes for toothpaste. The consignee refused all pallets as tubes had been damaged, dislodged, arrived loose, and all 4 pallets had been restacked and rewrapped. The tubes had been exposed to external elements and therefore the carrier was required to destroy the product due to contamination. Carrier admits to rewrapping

and restacking all 4 pallets; however, the carrier states that the customer could have used portions of the product and that contamination is only subjective and speculative on the part of the customer. As a result the carrier is only willing to pay for 1/2 of the cost. The customer is demanding full restitution.

Can you please provide some insight regarding contamination as it pertains to non-food related cargo claims? Thank you.

Answer: In my opinion, products such as the packaging used for foods, drugs or other items for human use and/or consumption are subject to the same strict standards to prevent possible adulteration or contamination as foods. I certainly would not want the toothpaste tubes to enter the stream of commerce, and agree that they should have been destroyed, without any salvage.

Contamination of food products, drugs, medicines or other items intended for human consumption is a serious matter. The mere possibility of contamination may, in and of itself, be sufficient to require product to be destroyed.

There are 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. For example, there are provisions governing contaminated food under the Federal Food, Drug and Cosmetic Act - 21 USC 342(a)(4) and 342(i).

Section 342(a)(4) states, “A food shall be deemed to be adulterated ... if it has been prepared, packed, or held in insanitary conditions whereby it may become contaminated with filth, or whereby it may have been rendered injurious to health.” This provision has been used in the past to support damage claims.

Section 342(i), entitled “Noncompliance with sanitary transportation practices.” This provision states, “food shall be deemed adulterated ... if it is transported or offered for transport by a shipper, carrier by motor vehicle or rail vehicle, receiver, or any other person engaged in the transportation of food under conditions that are not in compliance with regulations under section 350e of this title.”

See also the discussion in *Freight Claims in Plain English* (4th Ed. 2009) at Section 11.5.

It is quite common for receivers of food and related products to refuse or reject product if there is a broken seal or the packaging itself shows signs of damage or tampering. Shippers often will take the position that it would be an unacceptable risk to allow the product to enter the market for human consumption, or that it would be impossible to adequately sample and test all of the product to ensure that the quality had not been compromised.

FREIGHT CLAIMS – CLAIM FOR DAMAGES FROM DELAY

Question: Can a Shipper file a delay claim on a Super Load where the carrier has to order permits for each state in runs through? There was no notation on the shipper’s bill of lading (“B/L”) regarding a delivery time.

Answer: Delay claims often fall into the category of “special damages”. The basic rule is that a carrier has a duty to deliver with “reasonable dispatch”, i.e., within the usual and customary time for a similar shipment between the same origin and destination.

If, however, there is a special requirement as to transit time (or to deliver by a certain date and time) that is communicated to the carrier, and the consequences (damages) that will result from failing to meet that requirement, and the carrier accepts the shipment, then the carrier may be liable for the resulting damages.

This subject is covered in *Freight Claims in Plain English* (4th Ed. 2009) at Section 7.3.

FREIGHT CLAIMS – CLAIM FOR LATE DELIVERY OF TIME SENSITIVE SHIPMENT

Question: We arranged for transportation of a load that was to run from 9/24 to 9/27 per the rate confirmation. The load was delivered two days late as the bill of lading shows that it was delivered 9/29.

The customer has claimed us $32,633.56 for downtime and airfreight. I understand the carrier gave false estimated times of arrival and would not let the broker cross-dock or repower the load, but my question is that we were never notified of the potential excessive claim charges due to late delivery. I would like to put this under the category of special damages.

Now, the customer states they needed to air freight the product (dated 9/28). I understand the carrier has liability, that is not the question. The issue I am having is that neither our company nor the carrier were notified of the extreme time sensitivity of delivery which could lead to $32K claim for two days late.

I am asking for your professional opinion to help me determine which direction I need to go with this. Now the customer has already deducted the claim from us. Also, I still need to get the customer to actually send me all the proof of the charges they have claimed. I have not received any documentation proving the $6,415.56 down time portion, nor have I received proof that they paid the $26,218 air freight bill.

Answer: From the information provided it appears that your company was contacted by a food company to arrange for the transportation of a shipment of food ingredients from East Bernstadt, KY to Salem, OR.

Acting as a broker, your company arranged with a motor carrier to transport the shipment. According to the rate confirmation, the shipment was to be picked up “09/24/2010 – asap” and delivered “9/27/2010 - 10:00”. Other than specifying a reefer trailer, 48 ft or 53 ft, temperature -10, weight 25,000 lbs., there were no other special instructions as to transit time or any failure to deliver on September 27th.

The carrier picked up the load on 9/24/2010 at East Bernstadt, KY and delivered it to Salem, OR at 6:10am on 9/29/10. The bill of lading contains no special instructions - either as to temperature or delivery requirements.

The e-mail messages indicate that the shipment contained ingredients that were to be processed by a company in Portland, OR and the processed products then transported to Naperville, IL, for ultimate delivery to Walmart in Chicago. Because of the delay, production was interrupted, and the claimant then had to ship the products by air to Illinois.

The claim submitted consists of two elements:

1. An invoice from the processing company for $6,415.58 for “Down Time, Labor and Overhead incurred due to missed delivery of ingredient...”

2. An invoice from an air freight forwarder for freight charges in the amount of $26,218 to deliver the finished product from Oregon to Illinois.

This claim is a classic example of what is referred to as “special damages” for which the courts have almost always denied recovery.

Since claims for loss, damage or delay to goods arise out of a breach of the contract of carriage, the kind of damages and the amount of recovery are based on principles of contract law. One of these principles is that a carrier is responsible for such damages as might reasonably have been contemplated by the parties at the time the contract of carriage was made.

The leading case relied upon even today is *Hadley v. Baxendale*, an 1854 English case in which a delay in delivering a part caused the shutdown of a mill. The Hadley rule, cited time and time again in loss and damage cases, is that “special damages” are those which are the consequences of the breach, but would not ordinarily be foreseeable. In order to recover

"special damages," the courts generally require actual or constructive notice of the special circumstances of the shipment or the effects of the breach.

As the court in *Hadley* put it:

> . . . if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of the contract under these special circumstances so known and communicated.

As pointed out in *Marquette Cement Mfg. Co. v. Louisville & Nashville R.R. Co.*, 281 F.Supp. 944 (1967), aff'd, per curiam, 406 F.2d 731 (6th Cir. 1969), the *Hadley* rule has been worked into the Restatement of Contracts, Section 330, in terms of foreseeability:

> In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it; otherwise it must be shown specifically that the defendant had reason to know the facts and to foresee the injury.

From the facts as you have described them, there was no notice at the time of shipment that a delay would result in a plant shutdown or disruption of production. Likewise, there was no notice that your customer had any contractual obligation to deliver the finished product to Walmart in Chicago by a certain deadline, and that failure to do so could result in alternate transportation costs for air freight.

The court decisions dealing with substitute air transportation arising out of a delay in delivering goods generally refuse to grant damages in the absence of express notice at the time of contacting, see, e.g., *Affiliated Foods, Inc. v. Puerto Rico Marine Management, Inc.*, 645 F.Supp. 838 (D. Puerto Rico 1986), and *Florida East Coast Ry. Co. v. Beaver Street Fisheries, Inc.*, 537 So.2d 1065 (Dist.Ct.App. Fla. 1989).

Note that the subject of "special damages" is thoroughly discussed in Section 7.3 of *Freight Claims in Plain English* (4th ed. 2009).

FREIGHT CLAIMS – CLAIMS FILING BY 3PL

Question: A question was just proposed to me by a 3rd party logistics provider ("3PL") owner. He wants to know if he can legally file a claim on behalf of his customer. He is getting declinations from carriers telling him he has no legal right to file a claim because he is not part of the bill of lading contract. The 3PL ultimately pays the carriers' invoices. I always thought that anyone that was part of the bill of lading contract could file the claim. All shipments are tendered on their bills of lading. Can he file claims?

Answer: A 3PL (or broker) ordinarily should NOT be shown as the shipper or consignee on a bill of lading, and it is not a "party" to the bill of lading.

(I would note that there could be some cases where the 3PL is performing shipping or receiving functions such as distribution or warehousing services for its customers, in which case the name of the true shipper, consignee or owner of the goods should also be shown on the bill of lading.)

Basic principles of agency allow a person to designate an agent to act on their behalf. If a 3PL (or broker) is authorized to file a claim on behalf of the shipper or consignee the carrier should accept the claim.

If it is filing a claim on behalf of its customer, the claim should be made in the name of the actual shipper or consignee, and it should be made clear that the broker or 3PL is acting as an agent of its customer.

Freight Claims – Collecting Against Insurance Policies

Question: Our Broker Division hired a common carrier to haul a trailer load of beer. While the trailer was in the carrier's possession, the trailer was stolen out of their yard. The police were notified and a report was issued. We filed the loss claim on the behalf of the shipper for ($22,000.00) to the carrier's insurance company under their BMC-32 Endorsement. The insurance company is denying the claim based on the trailer and tractor that the beer was on in the carrier yard was not covered on their policy. If the claim is filed under the BMC-32 they say they are only liable to pay ($5,000.00). The carrier's Motor Cargo coverage has coverage of $100,000.00. Under the BMC-32 is the insurance company liability to the shipping public only $5,000.00?

Is this declination justified under the law? If not, what other steps can be taken against the insurance company?

Answer: Unfortunately, most of the cargo insurance policies that motor carriers carry have all sorts of exclusions and limitations - loss from an unattended vehicle, reefer breakdown, certain commodities such as electronics and alcoholic beverages, etc. You can't tell what exclusions are in a policy from looking at the carrier's certificate of insurance, and most people don't demand a copy of the actual policy for review.

My guess is that this carrier's policy does have an exclusion for alcoholic beverages, so the insurer is probably on solid ground in declining to pay the claim under the cargo policy.

The BMC-32 Endorsement is a different story. Motor carriers and freight forwarders that are registered with the Federal Motor Carrier Safety Administration ("FMCSA") are required to have minimum cargo insurance. The FMCSA requires a special endorsement to be issued by the insurer (BMC 32) and a certificate must be filed with the FMSCA (form BMC 34). The insurance remains in effect until a cancellation certificate is filed by the insurer with the FMCSA. The coverage is $5,000 for loss of or damage to property carried on any one motor vehicle and $10,000 for aggregate losses of or damages to property occurring at any one time and place. The regulations are found in 49 CFR Part 387.

This is a mandated minimum cargo insurance that covers the legal liability of the carrier without any of the typical exclusions. In order to avoid liability under the BMC-32 the carrier's insurer would need to establish one of the common-law carrier defenses such as an "act of God" or an "act of the shipper himself", AND that the carrier was free from negligence, see *Missouri Pacific Railroad Co. v. Elmore & Stahl*, 377 U.S. 134 (1964).

The only problem with the BMC-32 is that $5,000 is not really enough to cover many losses. The Transportation & Logistics Council has been advocating an increase in the amount for many years, but the FMCSA continues to ignore our requests.

Lastly, I would note that the liability of the carrier (as opposed to its insurer) is for your "actual loss". Thus, regardless of what you can recover from the carrier's insurance, the carrier would be liable for any difference.

Freight Claims – Collecting Costs Incidental to Repair

Question: Under Carmack, can you point to case law regarding the recovery of costs which are incidental to the repair? It's clear that a shipper can recover the cost of materials and labor

for the repairs. Do you have a case citation where travel, lodging, rental cars, meals, etc. were recovered for the engineers and the work crew who did the repairs?

Answer: Carriers will usually argue that most of these expenses are "special damages" that are not recoverable because they were not "foreseeable" at the time the carrier received the shipment. However, at least one court considered similar expenses to be "general damages" and awarded the damages to the claimant. This is the *Vacco Industries* case that is discussed in *Freight Claims in Plain English* (4th ed. 2009) as follows:

> . . . . *Vacco* was the consignor of goods allegedly damaged in transit on an interstate move by Navajo Freight Lines. The bill of lading showed a declared value for a piece of machinery to be $130,000. At trial, *Vacco* sought damages in the nature of its itemized repair costs, as well as overhead and administrative costs for the repair work, inspection costs, freight, packaging, the evaluation trip and lab fees.
>
> The California appeals court upheld the finding of liability by Navajo and went on to discuss the appropriate measure of damages, most specifically the overhead, administrative and general costs and profit element sought by Vacco in connection with the repair. The court noted the testimony of various experts on behalf of the plaintiff as to usual and customary overhead, general and administrative costs in the industry. The court specifically held that the consignor could recover a profit element for the repair work it performed and that the profit element, like normal costs of repair, was a recoverable item of general damage.

As to the question of when similar types of "special damages" are recoverable, the case of *Marjan International*, also discussed in the book, is instructive:

> In *Marjan International Corp. v. V.K. Putman, Inc.*, 1993 WL 541204 (S.D. N.Y. 1993), a shipment of oriental rugs was intended for an auction in Tacoma, Washington. The shipment was delayed, missed the auction, and the rugs ultimately returned to the shipper in New York, with two valuable rugs missing. The plaintiff claimed for the value of the missing rugs, plus the expenses of sending its employees to Tacoma for the auction (wages, air fare and hotel accommodations), and also sued for the return of the freight charges, which the carrier had demanded before releasing the shipment upon its return to New York, see Section 7.4.9.
>
> In awarding the plaintiff's expenses in connection with the auction, the court stated:
>
>> The court is fully satisfied that the prerequisite to recovery of special damages has been established in this case. Major repeatedly and emphatically advised Putman's driver on the date of loading in New York that Marjan required delivery of the rugs to their destination no later than Friday, November 29 at 2:00 p.m., Pacific time. Major specifically informed Westfall: that the rugs were to be sold at an auction in Tacoma, and that failure to deliver on time would prevent the auction sale; that three or four Marjan employees would be flying to Tacoma with Major to receive and unload the cargo and to assist in the sale; and finally, that considerable advertising and other expenses would be incurred by Marjan in connection with the auction. Furthermore, Westfall acknowledged the urgency of prompt delivery before leaving Marjan's store in New York.

FREIGHT CLAIMS – COLLECTING IN SMALL CLAIMS COURT

Question: Depending on the dollar limit in the state, can a claimant/shipper/ receiver take a less-than-truckload ("LTL") carrier to small claims court to collect on a damage claim, when the LTL carrier refuses to pay the loss?

Answer: Small claims courts are an effective way to collect on a loss or damage claim if the carrier declines the claim. There are some caveats: (1) these courts have dollar limits, typically $5,000 - $10,000; (2) usually the plaintiff must be an individual or a principal (owner or officer) of the business, and in some states a corporation must be represented by an attorney; (3) even though motor carriers are required to have designated agents for service of process (the BOC-3 filing) in all states, it can be difficult to get service of the summons and complaint. In other words, you need to check your local court rules.

Freight Claims – Computing Salvage Value

Question: When filing a damage claim for a product that cannot be repaired to new sellable condition as a result of freight damage, what is the correct formula for computing the salvage value when filing a claim?

We are using the price of the goods sold minus any salvageable parts (we are a manufacturer so we use cost for salvage value) and add labor time to dismantle and physically scrap components to compute the total amount of our claim. We do not charge carriers for refrigerant disposal or contaminated material disposal even though this is a cost we absorb because the freight was damaged beyond repair and returned to us.

Not only are we losing money on a product we cannot sell but we are also losing money on scrap claims filed. We are filing these claims per outline above but carriers are taking up to a 35% allowance claiming this is a “reasonable” allowance. I see nothing anywhere in their tariffs or the National Motor Freight Classification to indicate this is the guideline.

Answer: From your description, it sounds as though you are properly computing the actual net salvage amount for the purposes of your claim.

There is no basis for an arbitrary allowance percentage (such as the 35% you refer to).

The carriers should be glad you are attempting to mitigate the loss, and not claiming the full invoice price for the damaged goods. You should stick to your position.

Freight Claims - Concealed Damage and the "15-Day Rule"

Question: We recently received a claim declination from a carrier that said “claims for concealed shortages must be filed within 15 days”. Their claims rep said that this is the “fifteen day rule”.

Is this true, and if so, what is the “fifteen day rule”?

Answer: First, the “Carmack Amendment”, 49 USC § 14706 explicitly states:

> (e) Minimum Period for Filing Claims. -
>
> (1) In general. - A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section . . .

In other words, it makes no difference whether loss or damage is “concealed” - you can always file a claim at any time within nine months.

Second, the carrier has an obligation to investigate all claims - whether they are concealed or not. The federal claim regulations are found in 49 CFR Part 370, Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage, and these regulations apply to all motor carriers and freight forwarders. Section 370.7 states:

370.7 Investigation of claims.

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

Third, carriers ARE liable for concealed damage or shortage, but the thing to remember is the claimant's burden of proof: (1) that the shipment was in good order and condition when tendered to the carrier at origin and (2) that it was damaged (or short) at the time of delivery, see *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 337 U.S. 134 (1964), reh. den., 377 U.S. 948. Once the claimant has established these two elements, the burden then shifts to the carrier to prove that the loss was caused by one of the recognized exceptions to liability such as act of God, act or default of the shipper, etc. AND that the carrier was not negligent. These are factual questions that depend on the specific situations of each shipment.

Fourth, as to a so-called "fifteen day rule", there is a provision in Item 300135 of the National Motor Freight Classification that deals with "Reporting Concealed Damage" and states:

Item 300135 REPORTING CONCEALED DAMAGE

When damage to contents of a shipping container is discovered by the consignee which could not have been determined at time of delivery it must be reported by the consignee to the delivering carrier upon discovery and a request for inspection by the carrier's representative made. Notice of loss or damage and request for inspection may be given by telephone or in person, but in either event must be confirmed in writing by mail. *If more than fifteen days pass between date of delivery of shipment by carrier and date of report of loss or damage, and request for inspection by consignee, it is incumbent upon the consignee to offer reasonable evidence to the carrier's representative when inspection is made that loss or damage was not incurred by the consignee after delivery of shipment by carrier.* While awaiting inspection by carrier, the consignee must hold the shipping container and its contents in the same condition they were in when damage was discovered insofar as it is possible to do so.

This does NOT mean that a carrier is not liable if the damage is reported after the fifteen-day period. All it means is that the consignee has an additional burden of proof. It is a factual question, and if you can prepare a written statement or affidavit describing how the shipment was handled after it was delivered, how the damage was discovered, etc., and that confirms that the damage existed at the time of delivery, and could not have occurred after delivery, the carrier should pay the claim.

It should be noted that Item 300135 in the NMFC is NOT part of the federal regulations, and therefore it only becomes applicable by contract, e.g., a bill of lading or a transportation contract), and when the motor carrier is a participant in the NMFC, see 49 U.S.C. 13703(G).

FREIGHT CLAIMS – CONCEALED DAMAGE ON DROPPED TRAILER

Question: A less-than-truckload ("LTL") shipment moving on a common carrier was delivered to a destination on a dropped trailer. The carrier had the destination sign a dropped trailer agreement stating that all shortages/damages must be reported within 24 hours of delivery of the trailer. Destination had a shipment that was shipper load & count ("SLC") and when the pallets were broken down, it was determined that there were missing cases.

Destination signed the delivery receipt short 4 days after delivery. A claim was filed for the missing cases. The carrier denied the claim stating that notification of missing items was not made in accordance with the dropped trailer agreement limit of 24 hrs.

My question is whether we have any recourse with the carrier to get the claim reopened and paid?

Answer: The simple answer lies in the language of the Carmack Amendment, 49 U.S.C. §14706, which states:

(e) MINIMUM PERIOD FOR FILING CLAIMS-

(1) IN GENERAL- A carrier may not provide **by rule, contract, or otherwise**, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice.

In other words, you can always file a claim within nine months.

Concealed damage does involve other issues: the claimant will have an additional burden to establish that the loss or damage did not occur after delivery. You may need to supplement your claim with a written statement by a person having actual knowledge of the facts to show that the shortage did in fact exist at the time of delivery.

FREIGHT CLAIMS – CONCEALED DAMAGE ON SHIPPER LOAD & COUNT

Question: We have no real claim process. We simply notify the carrier of the loss or damage. What is the law for concealed damage? The broker's carrier made a delivery and our customer did not make any notations or exceptions on the delivery receipt. The load was signed for seal intact and clear of any mention of damage.

Later the customer reported substantial damage. What recourse do we have with the broker/carrier that denied the claim? Please advise.

Answer: What you have is a typical "concealed damage" situation.

The thing to remember is the claimant's burden of proof: (1) that the shipment was in good order and condition when tendered to the carrier at origin and (2) that it was damaged at the time of delivery, see *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 337 U.S. 134 (1964), reh. den., 377 U.S. 948. Once the claimant has established these two elements, the burden then shifts to the carrier to prove that the loss was caused by one of the recognized exceptions to liability such as act of God, act or default of the shipper, etc. AND that the carrier was not negligent.

These are factual questions that depend on the specific situations of each shipment.

With a "shipper load & count" situation, and a sealed trailer, the first requirement is to establish that the merchandise was in good condition when loaded into the trailer, and was properly packaged to withstand the normal rigors of transportation. You may also need to show that the damage was not due to improper or inadequate blocking, bracing or securement of the cargo in the trailer.

Regarding the destination condition, where the damage is not found until after delivery, and not noted on the delivery receipt, you have an additional burden to prove that the shipment was in fact damaged at the time of delivery, and not afterwards. Obviously, the more time that passes, the more difficult it is to sustain this burden of proof.

We usually recommend that the shipper obtain a written report or statement from the consignee that details how and when the damage was discovered, the type of damage, etc. In addition, the statement should include facts to establish that the damage existed at the time of delivery, and could not have occurred after delivery (while the merchandise was in the hands of the consignee).

Lastly, if this is a large claim, you may want to consult an expert who is qualified to give an opinion on the nature of the damage and whether it was caused by collision, excessive vibration, rough handling, etc. during transit, or by inadequate packaging, blocking, bracing, etc.

I note that the subject of concealed damage is discussed in *Freight Claims in Plain English* (3rd ed. 1995), which is available from the Council.

FREIGHT CLAIMS – CONCEALED DAMAGE WITH CLEAN DELIVERY

Question: I have a question regarding a claim for damage to a palletized machine. The shipper loaded the cargo, which the carrier then transported to the receiver. The receiver closes at 4 pm and the carrier understood they would not arrive until after the receiver closed. The carrier contacted the receiver and the receiver told them to deliver the freight; they will have someone meet them. The carrier went to the receiver, where the truck was unloaded by an employee of the receiver at 5:15pm. The bill of lading was signed clean and no damages were noted.

The receiver stated the following day when the machine was unpacked they noticed a broken rail. I filed the claim with the carrier and they denied the claim. The reasons for the denial are: the bill of lading was signed clean and it was shipper load, receiver unload. The freight was unattended until the following business day. The carrier is not accepting any responsibility for the freight after it was delivered; they state they can not account for what happened after they delivered the freight until the time it was inspected. Is the denial valid?

Answer: This appears to be a classic case of "concealed damage" and carrier liability, if any, will depend on the specific facts.

First, the claimant has to prove that the shipment was tendered in good order and condition to the carrier, and then must prove that the damage existed at the time of delivery, and could not have occurred afterwards. This is usually established by statements from witnesses that have actual personal knowledge of the situation (loading, unloading, etc.). In some cases the claimant may need to bring in an expert that can inspect the damage and determine whether it occurred during transit or otherwise.

I note also that the claim regulations at 49 CFR Part 370 do require the carrier to "promptly and thoroughly investigate" the facts, not merely disallow the claim because of a "clear" delivery receipt, or that the shipment was loaded by the shipper and/or unloaded by the consignee.

I suggest that you investigate the facts and if carrier liability is indicated, provide your findings to the carrier.

FREIGHT CLAIMS – CONCEALED DAMAGES

Question: We have a brokerage division who tendered a load of paper to a partner carrier.

The customer has a clause in their contract stating they have 90 days to file a claim for concealed damage. The customer has filed a claim, the carrier has refused to honor, stating the delivery receipt was not noted.

How should we proceed?

Answer: If this was a motor carrier shipment, a loss or damage claim can be filed at any time up to nine months from the date of delivery (the minimum time limit provided by the "Carmack Amendment", 49 U.S.C. 14706).

The thing to remember is the claimant's burden of proof: (1) that the shipment was in good order and condition when tendered to the carrier at origin and (2) that it was damaged at the time of delivery, see *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 337 U.S. 134 (1964), *reh.*

den., 377 U.S. 948. These are factual questions that depend on the specific situations of each shipment.

With concealed damage, where the damage is not found until after delivery, and not noted on the delivery receipt, the claimant has an additional burden to prove that the shipment was in fact damaged at the time of delivery, and not afterwards. Obviously, the more time that passes, the more difficult it is to sustain this burden of proof.

We usually recommend that the shipper obtain a written report or statement from the consignee that confirms that the damage existed at the time of delivery, and could not have occurred after delivery (while the merchandise was in the hands of the consignee).

FREIGHT CLAIMS – CONCEALED DAMAGES SEALED CONTAINERS

Question: We're a container hauler moving containers out of the rail yards and marine terminals in Seattle and Tacoma and delivering them regionally.

One of the consignees we deliver to on a regular basis is an alcoholic beverage wholesaler. A few of the containers we've delivered have been tampered with and product has turned up missing. On one occasion our driver failed to inspect the seal when he picked up the container from the railroad and it turns out that the container didn't have a seal but the interchange from the railroad showed a seal. It was missing $4,500 of whiskey. The consignee filed a claim with our customer and they in turn filed a claim against us. Of course our signed delivery receipt has no seal number on it but it also has no exceptions listed on it either. It wasn't a live unload. We dropped the container at their loading dock, had the delivery receipt signed and returned when it was empty.

The interchange shows what time the driver left the rail yard. The driver noted the time he arrived at the consignee on the delivery receipt. The distance between the two is 15 miles through an often heavily congested metropolitan area. If it were possible to travel the speed limit it would take 22 minutes. It took the driver 30 minutes this time. There's just no way that container could have stopped long enough for anything to be removed. The driver had just gone through orientation a few day prior and he was told that all the trucks have GPS systems installed in them but unfortunately the GPS in that truck wasn't working correctly and I don't have any proof of his route.

My customer maintains that because there's no seal noted on our delivery receipt (but there's one on the interchange) that we're the responsible party. I maintain that since there are no exceptions noted on the delivery receipt, that we're not.

In general, these containers are handed off between two railroads and one other trucking company before we get them for their last 15 miles. The shipper doesn't document seal numbers. They leave it up to the original trucker. Last year one pilfered container had a Norfolk Southern seal (first railroad) and the Burlington Northern ("BN") never documented it (second railroad) and the BN's interchange listed the original seal number. This has happened four times in the last year for containers coming from Jim Beam and I've easily been able to deny 3 of them.

Can I deny this claim based solely on the lack of exceptions on the delivery receipt?

Answer: What you have is a case of a "concealed shortage" since the shortage was apparently not discovered until some time after delivery (dropped container).

Obviously there is a question of fact as to where the theft or shortage occurred. Because of the question as to the condition of the seal at the rail yard, it may be that the product was removed before your driver picked up the container. Likewise, it could be possible that the theft occurred after the container was dropped at the consignee's facility.

The thing to remember is that the shipper has a basic burden of proof: (1) that the shipment was in good order and condition when tendered to the carrier at origin and (2) that it was damaged (or short) at the time of delivery, see *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 337 U.S. 134 (1964), reh. den., 377 U.S. 948. These are factual questions that depend on the specific situations of each shipment.

You do have an obligation to thoroughly investigate the claim, if you have not already done so. You may wish to check whether the weight of the container was recorded at various points enroute (bill of lading, equipment interchange documents, etc.). If you are confident that the loss could not have occurred while the goods were in your possession you can decline the claim, but be sure to give the claimant your reasons for doing so. You should not deny the claim merely because of the lack of exceptions on the delivery receipt.

FREIGHT CLAIMS – CONCEALED FREEZE DAMAGE

Question: We are a broker. I had a customer file a claim with us for frozen energy drinks. The load was shipped less-than-truckload ("LTL") (standard van) from the shipper by one carrier then taken to the terminal of the second carrier. This load was moved in the winter months in the northeast – WI to Ohio during a blizzard. At the terminal an employee of our claimant picked up 80 cases and signed the bill of lading stating both pallets were inspected - good. He noticed the cans were very cold and told the driver the drinks could not be frozen. The second carrier then delivered the remaining two wrapped pallets, the consignee signed the proof of delivery with no exceptions. One week later the consignee noticed some cans leaking on the floor. When they walked over to inspect the cans they saw the bottom row of cans had exploded and leaked on the cardboard and onto the floor.

I filed the claim with the carrier. They denied the claim, stating the bill of lading and proof of delivery were signed clean, if there were exceptions it "should be written on the face of the delivery receipt." The carrier also stated that there was no specification, line item or direction on the bill of lading stating the need for freeze protection. It appeared the shipment was in good order at the time it was tendered to the consignee.

I have a letter from the consignee stating the conditions of the temperature regulated warehouse. From the letter the product was not in freezing temperatures. Can I request this claim be reopened and possibly paid? Thank you for your assistance.

Answer: This is a tough one.

First, you have a concealed damage situation, since the damage was not discovered until some time after delivery at the second stop. You might be able to get around that problem by proving that the damage could not have occurred after delivery, so it had to occur while the shipment was in the hands of the delivering carrier.

More difficult is the fact that there was no notice on the bill of lading (only a verbal comment to the driver) that protective service would be needed. Usually, a carrier is not required to provide protective service unless it is specifically requested, and there are tariff rules as to how this must be done.

FREIGHT CLAIMS – COST OF DELIVERY AND CUSTOMS DUTY

Question: Our company filed a claim against a "truck load" carrier due to their trailer being broken into while in transit and 245 cartons being stolen.

The trucking company has made us a settlement offer, which only includes the price of the merchandise as listed on the invoice from our vendor in Honduras.

We also filed for the pro-rated duty cost and ocean freight on this shipment.

The trucking company is using the statement from *Freight Claims in Plain English*, which states, “When the claim is based on the destination value of the goods, that value presumably includes the delivery charges and thus those charges cannot be separately claimed.”

I have provided them with a copy of the merchandise invoice from the vendor, a copy of the DHL invoice showing the duty amount we were billed on this shipment and a copy of the wire transfer showing where we paid US customs this duty amount.

I also provided them with a copy of the ocean freight bill showing the freight charges for this shipment and a copy of the wire transfer showing we paid these charges to the ocean carrier.

The carrier is presuming that the duty and freight are included on the merchandise invoice and I feel we have given them appropriate back up proving the contrary.

Our claim was filed for vendor invoice value, duty and freight. This is what would make us “whole” from this loss.

The difference in what they are asking us to accept as final payment is $3,632.00.

After submitting these documents to the carrier they have now advised that they had their legal department review this file and it is their opinion that the limitation of liability applies.

Answer: The carrier would be right, but only IF your vendor’s invoice price is a “delivered” price that included the duty and the freight to destination.

You haven’t indicated the terms of sale (usually “Incoterms”), but from your description of the facts, it would appear that the vendor's invoice reflects the origin cost (“FAS port of shipment” or equivalent) and does not include freight or duty. Thus, you are entitled to your “landed cost” which includes the vendor’s invoice price, plus freight and duty.

You mention that the carrier now asserts that a “limitation of liability applies”. This is an entirely different consideration than the measure of damage that I cannot answer without more information. Carriers can limit their liability, but must satisfy certain requirements in order to do so.

FREIGHT CLAIMS – COST OF PALLETS

Question: We handle motor truck cargo losses in this office in behalf of insurance carriers and their policyholders. We have recently begun to see some shippers including as part of their formal claim, the cost of the pallets upon which their merchandise was loaded on during the shipment.

Does the motor carrier’s legal liability extend to the cost of the pallets? One might assume payment of invoice at destination takes into effect the sales price of the shipper’s goods, which probably includes their cost of doing business, which I would further assume includes shipping costs such as pallets.

Does the motor carrier owe for this expense?

Answer: It would seem that if a palletized shipment is lost, the claim should also include the value of the pallet, since the cost of the pallet would ordinarily have to be considered and included in the pricing of the goods to the customer.

I would note that National Motor Freight Classification Item 995 - Gross Weights and Dunnage, Section 1 provides: “Unless otherwise provided, charges shall be computed on actual gross weights, except that when estimated weights are authorized such estimated weights shall be used. A shipping carrier, container or package, or pallet, platform or skid constitutes part of the gross weight.”

The fact that the carrier is charging for the gross weight - including the pallet - would support my opinion.

FREIGHT CLAIMS – COST OF REDELIVERY AS MITIGATION

Question: I have a question regarding the consignee's responsibility to receive damaged cases. We hired a broker to ship frozen food product from OH with a delivery in NV and a second delivery in CA. The receiver in NV refused 32 cartons due to damage and noted the damage on the Bill of Lading ("B/L"). The carrier then made the delivery in CA, switching 32 of the good cases with the damaged cases. The customer in CA accepted the damaged cases as part of their delivery, leaving the carrier with 32 good cases. The carrier could not take the 32 good cases back to NV because the driver had to make another pick up in CA. The carrier then took the cases to a redelivery service. We were able to resell the product the next day, and the redelivery service delivered the product the following week, according to their LTL schedule. (The customer could have accepted the shipment immediately.)

It is my understanding that we fulfilled our obligation to mitigate damages by reselling the product, and that the charges incurred with the redelivery service would be the carrier's responsibility, since there would have been no need if the damage hadn't occurred in the first place.

The broker is charging us for the redelivery costs, stating that since our customer in CA accepted the damaged cases, that "proves" there was nothing wrong with the product in the first place. Is he correct? I was, frankly, surprised that the customer in CA did accept the damaged cases, as the majority of our customers would have refused them.

Answer: I don't see how your company could be at fault for trying to mitigate the potential loss arising out of this mess.

As to the consignee in Nevada, since this shipment was frozen food and intended for human consumption, it would not be unreasonable to reject a shipment if the cartons were damaged, see *Freight Claims in Plain English* (4th Ed. 2009) at section 11.5.

It would seem to me that, even if the second customer did inadvertently accept the damaged cartons, the costs of mitigating the loss should be borne by the carrier.

FREIGHT CLAIMS – COST OF RETURNING DAMAGED GOODS TO MANUFACTURER

Question: I filed a claim against a motor carrier for a damaged shipment. The claim included the original outbound charges to the consignee, the return freight charges back to us, and the charges to send the damaged material to the manufacturer for salvage credit. The motor carrier has partially approved the claim stating that they will not reimburse the freight charges to return the material back to the manufacturer for salvage credit because it was shipped using a different carrier. I informed the motor carrier that we gave the damaged material to them for the return shipment but that they returned it to us stating that they did not service the delivery location (Pennsylvania).

The motor carrier still asserts that they will not pay these charges because if they had been notified that the shipment was going to Pennsylvania that they would have never picked up the damaged item in the first place and that it was our decision to ship the damaged item back to the supplier for credit.

I informed the claims examiner at the motor carrier that we would have never given material to any carrier until they have been informed about the delivery location and that we were obligated by law to mitigate the cost of the claim and that if we had discarded the material--because of insurance liability reasons, we would be unable to give the carrier this item as salvage--they would have denied this claim outright. However, they still state that they are not liable for the freight charges to have the material returned back to the manufacturer.

I know that the motor carrier is liable, because this is an expense that we would not have incurred had they delivered the shipment without incident. However, I need to know how I should word my rebuttal to their partial declination.

Answer: As you are aware, there is a general duty to "mitigate damages" if it is reasonable under the circumstances to do so.

From your description of the facts, it appears that the damaged item could not be repaired or salvaged "because of insurance liability reasons". Thus, in order to mitigate the loss, it was necessary to return the damaged shipment to the manufacturer for salvage credit.

It is my opinion that the freight charges to return the shipment to the manufacturer were a legitimate expense incurred in mitigation of the loss and should be paid by the carrier. See *Freight Claims in Plain English* (3rd ed. 1995) at Section 7.

FREIGHT CLAIMS – COST OF STORAGE UNTIL CARRIER PICKS UP

Question: I have a claim that was transmitted to a carrier over 120 days ago. The carrier picked up a shipment that was in a crate, but delivered loose with no crate (it was a rack for a show vehicle). It was noted damaged at time of delivery. The unit could not be repaired by the consignee, however the shipper was willing to take the unit back for inspection and possible mitigation.

My role in this is I transmitted the claim on behalf of the third party broker's customer to the carrier and have been working with the carrier for months trying to get them to pick it up. The carrier kept saying they didn't have the equipment to pick the damaged goods back up to return to the shipper. The same carrier then delivered the replacement to the consignee; same unit, same size, etc. The consignee put the damaged unit back in to the crate that the replacement was delivered in but the carrier says it's too large for them to pick back up again. (It has been suggested that the consignee will not rent a forklift for the carrier to use when picking up the damaged unit and that is why the carrier can't pick it up).

Claim was transmitted to the carrier in July and it's now almost December. The consignee is tired of looking at this damaged unit and wants it gone as it's in the way and they need the space (Platt County Sheriff's Department). They can't hold on to it any longer.

The consignee wants to start charging storage at $25.00/day until they can find a storage unit at which time they will hire someone to come in and move it to the storage facility and then bill the shipper the amount of the storage shed (shipper is claimant).

The delivering carrier has stated that if anyone moved the damaged goods via another carrier they would not be responsible for any further damage. So if it does get more damage both carriers would disallow the claim. The first one because it moved back to the shipper and sustained further damage and the carrier that moved it back would claim that goods were damaged before they picked it up.

We started charging the carrier storage charges because in the past when we give a carrier notice to pick up salvage within a specific time frame according to the National Motor Freight Classification they end up disallowing the claim because the consignee didn't hold on to it. What are our options in this matter and can we charge the carrier storage?

The trouble with this is that the consignee was getting tired of holding on to the damaged goods and being told by the carrier that delivered it to them that they don't have the equipment to get it picked up to return to the shipper.

If the carrier will not settle a claim for damage and won't pick up the goods to return to the shipper and will not authorize another carrier to come in and get it and the consignee knows

better than to dispose of it, can the consignee rent a storage shed and charge the carrier the storage charges? What is the shipper's alternative in this matter?

Answer: It isn't entirely clear what your role is in this, and I don't know what authority you have to charge the carrier for storage. The real issue is how to get the damaged item back to the shipper in order to mitigate the loss.

I would suggest that you notify the carrier in writing that if they won't pick up and return the shipment within some reasonable time (say 10 days) to the shipper for possible repair or salvage, you will arrange for another carrier to handle it and will include the freight charges in the claim for the damage as a reasonable expense incurred in attempting to mitigate the loss. I would not suggest that you put the shipment in storage or try to collect storage charges from the carrier.

As for any possible damage that might occur during the return shipment, make sure that you carefully document the condition (detailed inspection report, photos, etc.) that existed at the time of the original delivery.

FREIGHT CLAIMS – COST TO CLEAN MACHINE

Question: Carrier had taken a load of "Carbon Black", delivered it and did not clean out the remnants prior to picking up our load (machinery used in making product governed by the Federal Drug Administration). Upon delivery, it was noted on the delivery receipt that the machine was "Covered in Carbon". The cost to clean the machine (so far) was $1,200 (it may cost more later on if product is found not to pass FDA guidelines). How do we proceed? Can we hold back pay due to their negligence or do we file a claim with their insurance company? I'm not sure if this would fall under Loss or Damage as it pertains to filing claims. Please advise.

Answer: There is no question that you have damages for which the carrier is liable. I would suggest that you keep accurate records of the labor and materials needed to clean the machine and file a claim (in writing) with the motor carrier (not its insurance company).

You can withhold payment of freight charges, but I usually do not recommend this, since you may be incurring late payment penalties or interest on the freight charges.

FREIGHT CLAIMS – CROSS-BORDER SHIPMENT TO MEXICO

Question: A carrier picked up the load in the U.S. on 12/17 for delivery in Mexico. The U.S. carrier dropped the trailer at the border crossing, it was then picked by another carrier for crossing the border and delivered to final destination by that carrier. The bills we have when the U.S. carrier dropped the trailer at the customs broker are clean, but the final destination shows wet product. The wet product appears to have been caused by a tarp that was in poor condition, a tarp which was provided by the U.S. carrier. It has taken eight months, since the delivery in Mexico, to determine which product was able to be utilized and we are only now receiving the claim.

Which carrier is responsible for the damages? There were notes on the original bill of lading ("B/L"), signed by the carrier, stating "..load must be fully tarped and I am responsible for any wet or damaged material.."

Answer: The answer could depend on whether the shipment moved under a through B/L or under separate B/Ls (one to the border, and a new B/L from the border to destination).

After reviewing the documents, from what I see, the first carrier issued a B/L to Nogales, AZ with a stop at Tucson, AZ. From Nogales the shipment was carried by a Mexican carrier to the final destination. There was no through B/L from the U.S. to the destination in Mexico.

Under the "Carmack Amendment", a receiving carrier is liable for loss or damage to goods while they are in its possession or in the possession of a connecting carrier. However, on a shipment to an adjacent foreign country (Mexico or Canada), the receiving carrier is only liable if there is a through B/L from the U.S. to the foreign destination.

If there was no through B/L, delivery to the Mexican carrier would end the liability of the receiving (U.S.) carrier. Since there is no evidence that the damage occurred before the shipment was delivered to the Mexican carrier, I don't see how the receiving carrier would be liable.

I don't think that you can sustain an argument that the notation on the B/L to tarp the load, and that "I am responsible for any wet or damaged material" can be extended to cover the loss if the damage actually occurred while the shipment was in the hands of the Mexican carrier.

You can file a claim with the Mexican carrier, but note that under Mexican law, a carrier's liability is very limited.

FREIGHT CLAIMS – DAMAGE BY LUMPER SERVICE

Question: What sort of liability (if any) does a lumper service have if they damaged merchandise while unloading?

Details: One of our customers ships bug spray/insect repellant. We tendered a shipment to one of our contracted truckload ("TL") carriers. The shipment arrived at the destination intact and when the seal was broken and the doors of the trailer were opened, everything was in good order. The consignee requires and had engaged a lumper service for the unloading of TL merchandise. When the driver returned to his trailer, he found that 3 pallets of damaged insect spray were on the trailer. At that time he was able to visually see that some cans had been breached and that insect repellant was spaying all over his trailer. The consignee and the lumper service denied any knowledge of what happened or how. The driver left the consignee facility and immediately dumped the 3 pallets that were continuing to contaminate his trailer. After
dumping the damaged pallets the driver took his trailer to a facility for cleaning. The inside of the entire trailer needed to be washed thoroughly to bring it back to a usable condition.

We filed our claim with the carrier not knowing the circumstances. The carrier denied our claim and advised us of what happened. Now our customer is asking that we go after the lumper service for payment. Are lumper serviced bonded? Is there any liability against the consignee because they engaged the lumper service?

As always, your insight is greatly appreciated!! This is an issue that has never come up before, and I couldn't find anything in your publication, *Freight Claims in Plain English*. Please forgive me if I overlooked the relevant text. Thank you!

Answer: From your description of the facts, you apparently have determined that the damage to the three pallets of insect spray was caused by the lumper service, and not by the motor carrier.

There is a section of the Interstate Commerce Act (49 USC 14103) that addresses lumping:

> Sec. 14103. Loading and unloading motor vehicles
>
> (a) SHIPPER RESPONSIBLE FOR ASSISTING- Whenever a shipper or receiver of property requires that any person who owns or operates a motor vehicle transporting property in interstate commerce (whether or not such transportation is subject to jurisdiction under subchapter I of chapter 135) be assisted in the loading

> or unloading of such vehicle, the shipper or receiver shall be responsible for providing such assistance or shall compensate the owner or operator for all costs associated with securing and compensating the person or persons providing such assistance.

Unfortunately this section does not really address your question, and I am not aware of any court decisions that do.

It would seem that if the lumper caused the damage, it should be liable for its negligence. Presumably there would be liability to the motor carrier (for the cleaning of the truck) and also to the shipper or consignee (for damage to the goods). There is no law or regulation that requires lumpers to be bonded or insured, although it is possible that the consignee may have such a requirement if it regularly uses that particular lumper.

As to the consignee, even if it hired the lumper, I would think the lumper would probably be considered an independent contractor so the consignee would not be liable for the negligence of the lumper.

FREIGHT CLAIMS – DAMAGE MITIGATION

Question: We are a broker who dispatched a carrier to pick up a shipper's load that was a truckload (10 drums & 10 totes) for delivery freight prepaid.

During transit the load shifted. It looks like the 10 drums were loaded in the nose, with the totes singled & doubled behind without any blocking or load locks.

Three drums were damaged (1 open & leaking, 2 badly dented) and were refused by the consignee. The 3 damaged drums were returned to the shipper.

The shipper has filed a claim for the 3 drums saying they were "presold" and the law states they should be made whole as if there was no loss or damage.

If there was any salvage value to the returned product, shouldn't the salvage credit be applied to any claim?

Answer: You say that 3 drums were damaged in transit, were refused by the consignee and then returned to the shipper.

The shipper is entitled to claim for its invoice price to the customer, since this is the amount it would have received if the drums had been delivered in good condition.

However, there is a duty to "mitigate the loss" if it is reasonable and practical to do so. Thus, if the returned goods could be salvaged (repackaged, etc.), this should be done and the net salvage value should be deducted from the claim.

That being said, please understand that as a broker, you generally have no liability for loss or damage claims.

FREIGHT CLAIMS – DAMAGE NOTATIONS

Question: I have viewed your answer on concealed damage not noted on the proof of delivery ("POD") receipt.

I have a customer that signed a POD with "possible damage". What is the rule on that? Can I claim the damage on that shipment?

Answer: A notation on a delivery receipt such as "possible damage" or "subject to inspection" - alone - is not the same as a notation that there actually WAS some damage that was observed at the time of delivery. Even if damage to the contents of a package is not known before the driver leaves, exception notations should state the facts, e.g., "package crushed on top", "fork lift hole in crate", "cartons wet on the bottom", etc.

As previously advised, you can always file a claim for "concealed damage"; it just places an additional burden on the claimant to prove that the damage existed at the time of delivery and did not occur afterwards, while the goods were in the hands of the consignee.

FREIGHT CLAIMS – DAMAGE TO GOODS IN DROPPED TRAILER

Question: A carrier dropped a trailer at a customer's yard, then left. That night, it rained and the material got damaged. Can a claim be filed against the carrier?

Answer: The carrier's liability normally ends when it completes delivery in accordance with the contract of carriage (bill of lading) and there is nothing further for the carrier to do. Unless there was some other agreement (for example, that the load was to be tarped and the tarp must be left on the load, etc.), I don't think the carrier is liable.

FREIGHT CLAIMS – DAMAGE TO RETURN SHIPMENT

Question: Was wondering if anyone can answer a question we have on the return of a damaged shipment. Basically the question is, does the carrier that delivers the product to the consignee have to be the carrier that returns it to the shipper if required?

We return a number of our damaged shipments back to our warehouses so they can be put into a damaged inventory stock.

Answer: I am assuming that the consignee accepted delivery of the damaged shipment, and later returned it to the shipper.

If so, the return movement is a separate shipment moving under a different bill of lading, and for which there will be an additional freight charge. It therefore probably makes no difference what carrier handles the returned goods.

I would observe that you must be careful to document the damage and condition of the goods at the time of delivery to the consignee (the original outbound movement), since a claim for that damage must be filed against the original carrier.

If this is not done, and there is any additional loss or damage during the return shipment, you would have difficulty in proving what damage occurred on the return movement vs. the original outbound movement.

FREIGHT CLAIMS – DAMAGE WHEN SHIPPER USES LEAKY TRAILERS

Question: I filed a claim with a carrier, but the carrier stated they had no record of this shipment. Upon investigation the shipper now advises that they loaded one of the carrier's trailers to move some product to another on site location as a convenience. During the movement, the food product got wet from the leaking trailer. Would the carrier that owned the trailer be responsible for the damage? I suspect the trailer was going to be used for a line haul movement but it did not happen.

Answer: Common carrier liability does not begin until the carrier takes possession and control of the goods (or issues a bill of lading), which apparently never occurred.

I suppose you could argue that the carrier was negligent in furnishing a defective trailer, since there is a general statutory duty to "provide safe and adequate service, equipment and facilities....", 49 U.S.C. 14101(a).

However, it is questionable as to whether this duty would apply to a situation where the shipper is using the trailer without the carrier's knowledge or any compensation. Also, there is a

question as to whether the defect (leak) could have been discovered by the shipper through a proper inspection. In other words, the shipper could have been negligent in failing to inspect the trailer.

If the damage had occurred in transit, the answer would be different, but I think you will have trouble collecting from the carrier.

FREIGHT CLAIMS – DAMAGES FOR DELIVERY A DAY LATE

Question: We are a third party logistics provider ("3PL") and have a claim being presented for lost profits on a load that we delivered a day late due to truck mechanical issues. The load was fresh and scheduled to deliver on day x. The consignee was unable to work the fresh product any other day so that resulted in our customer having to mitigate by reselling the freight at a lesser cost. We are being claimed for the balance of $30,800. Can a shipper file a claim for lost profits when our contracts do not specify guaranteed delivery? Are we in a position to push back to our customer?

Answer: I have reviewed the various documents that you provided.

This was a shipment of refrigerated product from Columbia, South Carolina to Denver, Colorado. According to the bill of lading the shipment was tendered to the carrier on "DATE 9-8-11, TIME 2245", for delivery on "09/10/2011". You have indicated that it was delivered a day late, on September 11th. Other than a delivery date on the bill of lading, there is no other notation that would indicate that the consignee would not accept the shipment if the carrier failed to deliver on September 11th, or what would be the consequences of a late delivery.

There are two issues here: your liability as a broker, and the carrier's liability for the late delivery.

Unfortunately you seem to have gotten yourself in the middle. Brokers are not carriers, and generally don't have any liability for loss or damage in transit (unless they assume liability, hold themselves out as carriers, or their negligence caused the loss). You should make it clear to your customer that you only acted as a broker, and did not assume liability as a carrier.

In the future, you should always explain your responsibilities as a broker to your customers before doing business with them. Better yet, you should have a "broker-shipper" contract with your customers, or have standard terms and conditions that are incorporated into your rate quotes.

As for the carrier's liability, the court decisions generally say that a carrier is only required to deliver with "reasonable dispatch". This is a question of fact: what is the usual and customary transit time for a similar shipment from the same origin to the same destination. My initial reaction is that three days (instead of two) on a trip from South Carolina to Colorado would not be unreasonable.

With regard to the consignee's refusal to accept the shipment, and the shipper's alleged damages, the carrier will most likely take the position that these are "special" or "consequential" damages for which it is not liable. For special damages to be recoverable, the rule is that they must be "foreseeable". If the alleged damage is for delay, usually there must be notice at the time of shipment that the goods must be delivered by a particular date and time, AND what will be the consequences if they are not. This subject is discussed extensively in *Freight Claims in Plain English* (4th Ed. 2009) at Section 19.4.2.

In my opinion, based on the information you have provided, neither the simple notation of a "delivery date" on the bill of lading, or anything in your transportation contract with the carrier, would be sufficient to make the carrier liable for the alleged damages resulting from the late delivery.

FREIGHT CLAIMS – DAMAGES ON INTER-COMPANY MOVE

Question: I am the Cargo Claims Manager for a freight forwarder. Our customer, the claimant, is also the shipper - the product was moving from their production facility to their warehouse/toll contractor and therefore, there is no original commercial invoice available - they can go back NOW and prepare/create an invoice for the purposes of submitting proof of cost but I doubt that the cargo insurance company is going to accept this.

Because this load is valued at over $100,000.00, I also doubt that the insurance company will accept a price certification statement in absence of an original invoice.

Please advise on what the manufacturer can provide as proof of cost that will have to be accepted by the insurance company.

What I normally do in absence of the original invoice is have them sign a price certification statement that I prepare. Would this suffice?

Answer: Assuming that the proper measure of damages is the manufacturing cost (since this was a movement from the manufacturer to its "warehouse/toll contractor"), I would suggest the following:

Ask the manufacturer to provide a letter (or signed affidavit) from its accounting department certifying the inventory cost of the goods, as it is carried in their accounting system, and submit it with the claim. Note that the value of the goods in this situation is not really the "wholesale price", but the manufacturer's cost as carried on its books for inventory purposes.

While your certification form may be sufficient, I think it would be better if the certification were from your customer (the actual manufacturer and shipper) on their letterhead.

FREIGHT CLAIMS – DAMAGES TO FOOD PRODUCTS

Question: Do you have any document that provides a definition of damage relating to food products?

Specifically, we have a customer that is refusing product with small tears, creases in outer cartons and some corners bent in the outer carton but the product inside is not compromised.

Answer: It is quite common for receivers of food products to refuse or reject product when the packaging itself shows signs of damage or tampering. Ideally, the rights and obligations of the parties should be spelled out in the sales contract and/or terms and conditions of the purchase order ("PO"). Many shippers/receivers in the food industry establish guidelines or terms and conditions in their PO, stating that they are not required to accept freight arriving in damaged cartons or which may be in a compromised condition. I would first look to these documents (if they exist) for any terms and conditions on this issue.

Assuming there is no provision in any sales contract or PO, then the receiver would have a general duty, under the common law, to mitigate damages - i.e., inspect the product, accept any good product, salvage any product that is salvageable - as long as the cost of mitigation does not exceed the value of the freight.

However, keep in mind that there are certain federal statutes and Food and Drug Administration ("FDA") regulations which may come into play and give the customer some leverage. For example, there are provisions governing contaminated food under the Federal Food, Drug and Cosmetic Act - 21 USC §§ 342(a)(4) and 342(i).

Section 342(a)(4) states, "A food shall be deemed to be adulterated ... if it has been prepared, packed, or held in insanitary conditions whereby it may become contaminated with filth, or whereby it may have been rendered injurious to health." This provision has been used in the past to support damage claims.

Section 342(i), entitled "Noncompliance with sanitary transportation practices." This provision states, "food shall be deemed adulterated ... if it is transported or offered for transport by a shipper, carrier by motor vehicle or rail vehicle, receiver, or any other person engaged in the transportation of food under conditions that are not in compliance with regulations under section 350e of this title."

Notwithstanding the foregoing, the first thing that I would do is ask your customer to provide you with its authority to support its position that it is entitled to discard the product based on tears in the package.

FREIGHT CLAIMS – DECLINED SHIPMENT DAMAGED ON RETURN

Question: My company made a shipment to our customer and it was delivered. However, at delivery the consignee rejected it due to an over shipment of material. It was more than what they had ordered. Consequently, the shipment was returned to us and at that point it was in a damaged state. I filed a claim against the carrier which was denied due to the fact I filed for full invoice value. The carrier has stated they would entertain the claim if I changed the value of the claim to manufacture price only. Had this material not been damaged it would have been placed back in inventory for sale. It would have been sold within a few days as this material is in high demand on the market place. I allowed a salvage allowance in the claim as we destroyed it. My company does not allow any of their products to be disposed of by carriers for obvious reasons.

My question is: am I due the full invoice value or do I have to reduce the claim to manufacture pricing?

Answer: Based on your description of the facts, it would be my opinion that the proper measure of damages in this case would be your selling price, less any related expenses that are not incurred, such as delivery of the product to the ultimate customer, sales commissions, etc. The precedent for establishing this as the measure of damages is discussed in Section 7.2.8 of *Freight Claims in Plain English* (4th Ed. 2009). While this section deals with stock transfers (warehouse to warehouse), the reasoning of the cases is equally applicable here:

> The measure of damages on stock transfer losses is the same as on shipments to customers, except that any expenses not incurred by reason of the non-delivery of the product to the ultimate customer are properly deducted from the claim; i.e., warehousing and redelivery expenses, agent's commission, etc. *Polaroid Corp. v. Shuster's Express, Inc.* 484 F.2d 349 (1st Cir. 1973); *Baltimore & O.C. Terminal R.R. Co. v Becker Milling Mach. Co.*, 272 F. 933 (7th Cir 1921). And see Miller's supra, pp. 371-373.
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> In Polaroid, supra, the Court of Appeals for the 1st Circuit awarded damages in the amount of the dealer's cost (wholesale) less expenses not incurred due to the goods being hijacked (warehousing and redelivery costs). The claimant had established that the goods would have been sold within a relatively short time due to their great demand. The Court rejected the position that a carrier is only liable for the cost of manufacturing the replacement shipment, stating:
>
> > As to the proper measure of damages, courts have generally held that "full actual loss" under 49 U.S.C. ? 20(11) is equivalent to market value at destination. See *Chicago, M. & St. P. R. v. McCaull-Dinsmore Co.*, 253 U.S 97, 40 S.Ct. 504, 64 L.Ed. 801 (1920) and *Gore Products v. Texas & N. O. R*, 34 So.2d 418 (La.App. 1948). There is some authority for limiting recovery to replacement cost where a manufacturer ships substituted goods to his buyer. *Meletio Sea Food Co. v. Gordons' Transports*, 191 S.W.2d 983 (Mo.App. 1946). However, mere

replacement costs deprive a manufacturer of expected profit which he is on the verge of earning and do not compensate him for what he "would have had if the contract [of delivery] had been performed . . .", the test enunciated by the Supreme Court. *McCaull-Dinsmore*, supra, 253 U.S. at 100, 40 S.Ct. at 505.

The *Meletio* exception, in any case, is not relevant to the Polaroid situation. Hijacked goods, unlike those destroyed, ultimately compete with the manufacturer and, therefore, no true replacement is possible. Moreover, Polaroid is the sole manufacturer of the types of products lost; all the purchasers of the hijacked goods would have had to purchase them from Polaroid.

The special circumstances of *Illinois Central R.R. v. Crail*, 281 U.S. 57, 50 S.Ct. 180, 74 L.Ed. 699 (1930), in which the court limited recovery to replacement costs, is also inapplicable. In that case, the shipper was merely a distributor adding nothing to the value of the coal he purchased for resale; no sales were lost by the shortage and no coal was purchased to replace that lost. In addition, the shipper claimed his retail price which included costs not incurred, such as the cost of delivery to consumers. If the entire shipment had been lost or the coal repurchased to carry on business, the usual rule would have been applied. *Crail*, supra, 281 U.S. at 64, 50 S.Ct. 180.

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. See *Tri-State Produce Co. v. Chicago, B. & Q. R.*, 104 F.Supp. 452 (N.D. Iowa 1952). Only speculative profits, not profits per se, are denied.

The reasoning in *Polaroid* has been adopted in *Eastman Kodak Co. v. Westway Motor Freight, Inc.*, 949 F.2d 317 (10th Cir. 1991), and in *Philips Consumer Electronics Co. v. Arrow Carrier Corp.*, 785 F.Supp. 436 (S.D. N.Y. 1992). In *Eastman Kodak*, 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.

See also an earlier case involving Kodak, and reaching the same result, *Eastman Kodak Co. v. Trans Western Express, Ltd.*, 765 F.Supp. 1484 (D. Colo. 1991).

FREIGHT CLAIMS – DEFAULT TERMS

Question: This is regarding a parcel carrier shipment refused by our customer. We shipped collect using our customer's parcel carrier account number. The customer refused the shipment as damaged and it was returned to us. When the order was entered no FOB term was used other than collect. I believe customer should be responsible for the claim. They should have accepted the freight, signed damaged and put in the claim. I have not been able to find an answer in any text.

Answer: Risk of loss in transit does not depend on freight payment terms (prepaid or collect). Where no "FOB" term specified the usual presumption is that the sale is "FOB Origin". Under the Uniform Commercial Code, this would mean that risk of loss in transit passes to the

buyer when the goods are tendered to the carrier at origin, and the buyer should be the one to file claims with the carrier.

FREIGHT CLAIMS – DEFENSE OF PUBLIC AUTHORITY

Question: I own a copy of *Freight Claims in Plain English*. I am trying to locate information about the subject involving Super Size Loads and their exemptions from delay claims due to state regulatory agencies, haven't been able to find anything. Can you help?

Answer: I would assume that your question essentially is whether certain actions of the state agency could provide the carrier with a legal defense in the event of a delay claim.

One of the five common law defenses to carrier liability is the "public authority", see *Missouri Pac. R. Co. v. Elmore & Stahl*, 377 U.S. 134 (1964). There are few court decisions on this defense, but there is one fairly recent one, *Delta Research Corp. v. EMS, Inc.*, No. 04-60046 (E.D. Mich. Aug. 16, 2005), in which the carrier argued that a vertical clearance sign was either improperly marked or improperly placed, and that the accident was caused by MDOT and therefore fell within the public authority exception. The court disagreed, stating:

> EMS is correct that MDOT has jurisdiction over the highway and that it has a duty to maintain the highway in reasonable repair, keeping it reasonably safe and convenient for public travel.
>
> See Mich.Comp. Laws § 691.1402. EMS' argument may support its own lack of negligence, but it fails to establish that it falls within scope of the public authority exception, MDOT's placement of the sign is not analogous to the types of conduct deemed by courts to fall within the public authority exception.
>
> Although cases raising the public authority defense are antiquated, the facts typically include active intervention by a public authority and a situation beyond the knowledge or control of the carrier. For example, in *Boyd v. King*, 201 Mich. 436, 167 N.W. 901 (1918), cert. denied, 248 U.S. 572 (1918), although the government had imposed a quarantine on livestock, the carrier accepted a shipment of livestock. Because of the carrier's knowledge of the possibility that the shipment would be subject to the quarantine, the court held that the public authority defense was not available to it. In another case in which the exception was raised, *Chicago & EIR v. Collins Produce Co.*, 249 U.S. 186 (1919), the carrier was unable to deliver its cargo because the military seized it. At issue was whether the seizure was by invitation or confiscation. The Court noted that in the event that the cargo was offered to the military, the defense did not apply. The court was concerned, in particular, about collusion between carriers resulting in unaccountable losses of cargo in transit.
>
> EMS, who bears the burden to show the applicability of the exception, has not cited a single case wherein a carrier was relieved of liability under the Carmack Amendment based upon the malfeasance or nonfeasance of the governmental agency charged with the duty to maintain the roads. Its situation is not analogous to situations involving active intervention in or prevention of delivery by the government, such as embargos, loss of cargo through the legal process and declaration of martial law.
>
> In addition, EMS cannot show a situation beyond its knowledge or control, as a matter of law, given the language contained in the permit itself. It reads in relevant part, "The granting of a permit shall not be considered as a guarantee of the sufficiency of a highway; highway width or vertical clearance; or highway structure for transporting on the route." See Pl.'s Ex. D, Item P. The permit adds that "the permittee certifies that he has checked the route as necessary for vertical

> clearances and overhead obstructions prior to any movement. Striking or damage to any structure or facility will be perceived to be noncompliance with this section and will result in termination of this permit." Id. Item S. Finally, the permit indicates, "The permittee shall be responsible for damages to the highway, to person, and property caused by or arising from operations covered by this permit. The permittee shall indemnify and save harmless the Transportation Commission, the department and all of their employees from any and all suits, claims, and damages for every kind arising out of, under, or by reason of this permit, or from operations covered by this permit." Id., Item T. The alleged negligence of MDOT does not necessarily relieve EMS of liability to Plaintiff. EMS had ample notice that the selected route was not guaranteed to be adequate for vertical clearance of the boring mill. Accordingly, the Court denies EMS' request for summary judgment on its contention that the public authority defense exempts it from liability. Further, given EMS' failure to establish a viable defense, the Court grants Plaintiff summary judgment as to EMS' liability.

I realize that this is a somewhat lengthy answer to your question, but I thought that the detailed analysis and explanation by the court would be helpful.

FREIGHT CLAIMS – DENIAL FOR IMPROPER PACKAGING

Question: I have a damage claim that has been denied. The claim was for four identical pumps that the carrier signed for without exception regarding the packaging and delivered. One out of the four pumps sustained damage and now the carrier is denying the claim saying that it was improperly packaged. This shipment was arranged thru a logistics provider with a carrier. What are my options or rights to fight this claim denial?

Answer: The fact that three identical pumps with the same packaging arrived safely without damage is good evidence that the packaging was adequate, and the fourth pump must have been damaged through the negligence of the carrier. As stated in *Freight Claims in Plain English* (4th Ed. 2009) at Section 6.5.1:

> Comparison shipments of identical commodities, although circumstantial, is frequently weighed by courts, along with other evidence, to determine carrier liability issues. This is one of the issues raised by *Plough, Inc. v. The Mason & Dixon Lines*, 630 F.2d 468 (6th Cir. 1980), where only two of seven trailers were contaminated, the two being owned by common carriers and the five others being privately owned and operated trailers. Also, see *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Metal-Matic, Inc.*, 323 F.2d 903, 912 (8th Cir. 1963) where no other damage was reported in any of the other 58 cars in a train. See also, *M. & S. Tomato Repacking Co. v. B. & M. Corp.*, 310 F.Supp. 186 (D. Mass. 1970) (one of two trailers of tomatoes failed to ripen properly); *Jos. Schlitz Brewing Co. v. Transcon Lines*, 757 F.2d 171 (7th Cir. 1985) (truck shipment of cans was damaged, but rail shipment was not).

A question: was there any evidence of physical damage to the packaging of the damaged pump that would indicate rough handling, e.g., that it was dropped, crushed by other freight, etc.? This would also help to establish carrier liability.

In any event, if the carrier will not reconsider its declination your only recourse may be to bring a lawsuit. If the claim is within the jurisdictional limit of your small claims court you may be able to handle this without a lawyer; otherwise you will need to be represented by counsel.

Remember that the claimant's burden of proof is only to show that the goods were tendered to the carrier in good order and condition and that they arrived damaged; then the carrier has

the burden of proving that the "act of default of the shipper" (inadequate packaging) was the cause of the loss AND that it was free of any negligence.

FREIGHT CLAIMS – DETERMINATION OF RISK OF LOSS

Question: What determines who is responsible for filing a freight claim? I have a customer who wishes to keep their terms of sale as FOB Origin and keep responsibility for the freight charges, but wishes to shift the risk of loss in transit (and thus the responsibility for filing the claim) to the shipper.

Answer: For commercial sales transactions the Uniform Commercial Code ("UCC") establishes certain presumptions about "risk of loss" in transit based on the terms of sale specified in the sales contract. UCC 2-319 covers FOB and FAS terms. It essentially provides that where "FOB Origin" is specified, risk of loss passes to the buyer-consignee once goods are put in possession of the carrier at origin. On the other hand, if the contract of sale is "FOB Destination" or equivalent, the seller retains the risk of loss in transit.

Risk of loss depends on the contract on sale between the seller and the buyer, and the presumptions established by the UCC can be changed if the parties wish to specify different provisions. In any event, it does NOT depend on which party contracted with the carrier or which party pays the freight charges.

To answer your question, if the parties agree, the risk of loss can remain with the seller even though the terms are "FOB Origin".

Some observations:

1. Shippers often assume responsibility for filing claims even when the buyer-consignee has risk of loss in transit. This is done for good customer relations, or because the customer simply doesn't pay for the goods or "short pays" and deducts from the invoice.
2. If the buyer-consignee has a transportation contract with the carrier, it could cause problems for the seller if the contract has liability limitations or other provisions that could limit or preclude recovery for loss or damage in transit.
3. There is little incentive for the buyer-consignee to assist the shipper with information needed to process the claim (delivery receipts, OS&D reports, salvage, etc.)

FREIGHT CLAIMS – DETERMINING LIABILITY

Question: We hire a carrier to pick up at one of our vendors. During unloading at our facility we are finding 2-7 cases with forklift damage on every 3rd load or so. It looks pretty clear that while loading at the vendor the forklift operator is hitting cases on the previously loaded pallet in front of the one he is putting into the trailer and causing the small punctures. The vendor is denying us credit for the damaged cases and stating that because the carrier we hired signed for the freight, we need to file a claim against the carrier. The carrier is claiming that the driver could not have seen the damage because it's happening after the pallet goes into the trailer.

The problem we have is that we are reasonably sure that the damage is from a forklift, and that it was caused by the shipper who loaded the truck. The shipper is going back to the bill of lading and saying since the carrier signed for it with no exceptions we have to go after the carrier. The carrier points out that it is forklift damage, so the driver could not have caused the damage. They also point out the driver could not have seen the damage.

So the shipper points to the carrier and the carrier points to the shipper. Neither one will pay for the damage. Who is legally responsible, who should pay for the damaged cases, the carrier or the shipper?

As always, you've been a HUGE help, George. Thanks to you and your firm for all the assistance and guidance you provide - hopefully one day in the near future, our company will be a member of the Transportation & Logistics Council, Inc.

Answer: The basic thing to remember is the claimant's burden of proof: (1) that the shipment was in good order and condition when tendered to the carrier at origin and (2) that it was damaged at the time of delivery, see *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 337 U.S. 134 (1964), reh. den., 377 U.S. 948. Once the claimant has established these two elements, the burden then shifts to the carrier to prove that the loss was caused by one of the recognized exceptions to liability such as act of God, act or default of the shipper, etc. AND that the carrier was not negligent. These are factual questions that depend on the specific situations of each shipment.

Normally, when a carrier signs the bill of lading without exceptions, it is an admission that the shipment was in apparent good order and condition ("contents and condition of contents of packages unknown").

Thus, the driver should make some notation if there is any visible damage to the outer packaging or container.

However, if the carrier did not use a forklift at any time during the transportation, and the driver was prohibited from observing the damage because of the way the pallets are being loaded by the shipper, it is likely that the carrier would decline the claim.

If you are reasonably sure that the damage is from a forklift, and that it was caused by the shipper who loaded the truck, you should pursue the shipper, and not the carrier.

In my opinion, based on the facts as you have described them, the carrier would not be liable for this damage, notwithstanding that there was no notation made at the time the goods were received. If you are having a problem resolving this situation, it might help to get a written statement or letter from the carrier, and submit it to your vendor.

FREIGHT CLAIMS – DETERMINING RESPONSIBILITY FOR DAMAGES

Question: My company is a freight brokerage. Our customer had us arrange transportation of a piece from a trade show in San Diego to their office in Minneapolis. We contracted with a carrier that provided an empty conestoga, air-ride tractor & trailer. The company whom the show used for loading freight, loaded the piece on the back of our carrier's trailer. The driver signed for the freight and left. Upon arrival in Minneapolis the consignee noticed that there were some major chips on the inside of this piece. The damage must have occurred either during loading or, somehow, in transit (air ride trailer, exclusive use of trailer, no accidents en-route). The damage was noticed before they unloaded the freight from the trailer and pictures were taken while it was still on the trailer. The shipper/convention people told my customer that once the freight is loaded and signed for by the driver they are no longer responsible. The piece was craned on and off the trailer.

The consignee noted that the piece was damaged on the bill of lading. But, someone (the consignee said it was the driver and the driver says it was the consignee) also put "damage caused during loading" next to the consignee's signature.

My customer, the consignee, wanted to file a claim. I helped gather the information and he filed the claim back in November, 2011. I know that the carrier has received the claim - since I have talked to them about it since - but they have not responded at all to my customer (he said that he turned it over to his insurance company's investigators??).

Two questions - do you think my customer has a good claim to make in this instance? And, second, doesn't the carrier (or his insurance company) have to acknowledge the claim, in writing and let him know its status? Are there time limits?

Answer: Your first question is whether the consignee has a “good claim”. This really depends on the facts - who actually caused the damage, the carrier, the consignee, or the company the show used to load the piece. From your description, this was a very large piece and the damage was discovered prior to unloading. Therefore, the damage must have occurred either during the loading process or in transit, and the consignee would not be liable. If the damage occurred during loading after the show, I don’t see why the carrier would be liable. You need to ask the people that were present during the loading and get a statement from them as to the cause of the damage.

A comment: if the damage was visible from the ground and could have been noticed by the driver when he picked up the load, the driver should have made some notation at that time - otherwise he accepted the load in “apparent good order and condition” and the carrier would be liable.

As to your second question, there are federal regulations that govern the time limits applicable to carriers for processing claims. These are found at 49 C.F.R. Part 370 - Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage. Two sections establish the time limits for acknowledgement of claims and disposition of claims:

370.5 Acknowledgment of claims.

(a) Each carrier shall, upon receipt in writing or by electronic transmission of a proper claim in the manner and form described in the regulations in the past, acknowledge the receipt of such claim in writing or electronically to the claimant within 30 days after the date of its receipt by the carrier unless the carrier shall have paid or declined such claim in writing or electronically within 30 days of the receipt thereof. The carrier shall indicate in its acknowledgment to the claimant what, if any, additional documentary evidence or other pertinent information may be required by it further to process the claim as its preliminary examination of the claim, as filed, may have revealed.

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; Provided, however, That, if the claim cannot be processed and disposed of within 120 days after the receipt thereof, the carrier shall at that time and at the expiration of each succeeding 60-day period while the claim remains pending, advise the claimant in writing or electronically of the status of the claim and the reason for the delay in making final disposition thereof and it shall retain a copy of such advice to the claimant in its claim file thereon.

If the carrier has not responded to the claim, I suggest that you remind them that they are in violation of the federal regulations.

FREIGHT CLAIMS – DIMINISHED VALUE

Question: Our insured motor carrier provided transportation of a valuable engine for one of their customers which received damage during transit. After agreeing to have the unit repaired, the claimant now wants to recoup diminished value, which is almost equal to the repair cost. The claimant alleges it cannot sell the engine as new and will take a hit when selling it as a rebuild. Is the diminished value claim legit?

Answer: I would analyze the measure of damage as follows:

If the engine had been destroyed and could not be repaired, the shipper would have been entitled to the full invoice price to its customer -- the amount it would have received if the engine had been delivered in good order and condition.

In this situation, the engine was repaired and can apparently be sold at some value less than the original invoice price. Thus, actual the loss would be the original invoice price less the amount received upon the sale of the reconditioned engine.

If the engine has not yet been sold, then it would be necessary to determine what amount could reasonably be expected if it were sold to a bona-fide buyer.

FREIGHT CLAIMS – DISALLOWANCE FOR IMPROPER PACKAGING

Question: I process claims on behalf of a large 3rd party logistics provider ("3PL"). I have been doing this now for about 1 1/2 years. I have 30+ years experience in the industry. I am seeing a huge increase of claims being disallowed for improper packaging. When I dispute and point out that per item 680 Sec.2 of the National Motor Freight Classification ("NMFC" or "Classification") reads as follows:

> whether or not the authorized minimum packing requirements are observed, outer (shipping) containers or package, inner containers, interior protection devices, method of packing within containers or package, or other form of shipment authorized must be made of materials of such strength or be of such nature as to afford a reasonable and proper protection of lading and to protect against damaged to other freight or equipment, and carrier may for good reason refuse to accept freight the transportation of which, in their judgment, would not be reasonably safe and practicable and so notify the shipper.

I also use several different court cases as a reference such as *Super Service Motor Freight v U.S.* 350 F.2d 541. If a carrier's negligence was the proximate cause of the damage, the carrier is liable despite the shipper's improper packing or other act or omission. I also reference *Elmore & Stahl*, 84 S.Ct. 1142. I'm not talking about 1 or 2 claims, there are several dozen claims that have been disallowed for improper packaging.

I even went so far as to send some claims to the Federal Motor Carrier Safety Administration, however, I never got a response from them.

There are carriers that are limiting their liability through their tariffs for improperly or un-crated goods. Our customers are having to file through small claims court in order get any satisfaction or we end up making good on the claims. Customers are being lost due to this situation. Once a claim is filed, the carriers are offering just a portion of the amount claimed as settlement. Can you suggest what we can do to get assistance in this matter?

Answer: You seem to have a good understanding of the legal principles involved, including the fact that a carrier not only needs to prove that the damage was caused by the shipper's improper packaging, but also that the carrier was free from any negligence in handling the shipment. This subject is discussed at length in *Freight Claims in Plain English* (4th ed. 2009).

Unfortunately, it is no secret that carriers don't like to pay claims, especially when revenue is down due to competition and a bad economy.

I would observe that a carrier must be a participant in the NMFC in order to invoke any of the provisions of the Classification that relate to packaging requirements, see 49 U.S.C. §13703(f). If the carrier is not a participant, it can't rely on the NMFC packaging specifications.

Freight Claims – Do Limitations Apply When Trailer Catches Fire?

Question: Our company has recently become a member of the Transportation & Logistics Council, Inc. I recently filed a claim against a less-than-truckload carrier for an entire shipment because the trailer the load was shipped in caught on fire during transit. The carrier is relying on their tariff which states "in the event of loss or damage to any shipment, carrier's maximum liability for loss or damage shall not exceed $5.00 per pound for the actual weight of the damaged or lost portion of the shipment, subject to a maximum liability of $100,000 per shipment, and $250,000 per incident and in no instance shall liability be greater than the actual value of lost or damaged articles less salvage."

Interestingly enough, the carrier stated that based on the above item they would only pay their maximum liability of $10.00 per pound.

I received a copy of the police report on file and it stated that the cause of the fire was "mechanical malfunction".

My question is, can we legally hold the carrier liable to pay the claim in its entirety due to the fact that the damage incurred was not the act of a cargo handling situation but due to mechanical malfunction?

Answer: I'm assuming that the bill of lading in this case had the usual language incorporating the carrier's tariffs, and that the carrier did have a tariff and has provided a copy to you.

The court decisions say that a liability limitation is enforceable if certain criteria are met: a notice of a tariff limitation (usually on the face of the bill of lading), a tariff that is applicable to the rate charged for the shipment, and a choice of higher or lower rates commensurate with the liability assumed by the carrier. If all of these criteria are met, courts will usually enforce the liability limitation -- and it makes no difference what caused the loss or damage.

I do find it interesting that the carrier has offered $10 per pound instead of $5 per pound (if that is what the tariff actually states).

Freight Claims – Document Retention Periods

Question: I have a shipper load & count ("SL&C") customer. This customer has actual Shipper Load and Count Agreements in place for all carriers through my company, which is a third party logistics provider ("3PL").

The agreement specifies that a DCN (Discrepancy Confirmation Notification) must be submitted to the shipping facility within 24 hours of first break.

The carrier repeatedly denies claims based on a timely notification of pallet shortages at the origin terminal. My customer requires a copy of the DCN proving timely notification before they will accept the carrier's denial and excuse the carrier's liability. The carrier states that they do not keep copies of this document for more than 90 days. As you well know, many claims are not even discovered until the consignee short pays an invoice. I file the claim. The carrier denies stating that a DCN was sent to xxxxx@xxx.com.

When I contact that associate to confirm that an investigation was conducted, that individual denies ever receiving notification. How long is the carrier required to retain a document that is being used to deny claims for missing or damaged pallets?

Answer: The federal requirements governing record retention are found in the Federal Motor Carrier Safety Administration's ("FMCSA") regulations at 49 CFR Part 379 - Preservation of Records, and apply to all motor carriers and brokers (available on the FMCSA website). The regulations specify various time periods depending on the type of record and as a general rule, records relating to claims, delivery receipts, etc. must be retained for one year.

It would seem that the carrier would be required to retain copies of the Discrepancy Confirmation Notification for more than nine months.

FREIGHT CLAIMS – DOCUMENTATION OF PIECE COUNT

Question: I manage freight claims for a shipper. The carrier has recently changed the form of its delivery and has started using a copy of the front of the bill of lading ("B/L") imaged onto the delivery receipt form. The spaces for indicating the piece count and weight of what the carrier picked up are left blank. The carrier contends that since the copy of the shipper's B/L is imaged on the delivery receipt there is no need for the carrier to state the piece number or weight. I contend that this document does not conform to 49 C.F.R 373 because it does not contain the number of packages or the weight of the freight that the carrier received from the shipper.

In the past, the process would have been that the carrier would sticker the B/L identifying what they actually received, then create the delivery receipt to reflect the count of pieces and weight.

It was my understanding that an LTL carrier's delivery receipt must reflect what they received from the shipper and what they are actually delivering so that the consignee can make the determination based off of the facts of the delivery and make notes at that time. I contend that is the carrier's responsibility to put on the delivery receipt the piece count and weight or they should be imaging a copy of the carrier's actual receipt of goods from the shipper.

The immediate problem involves a shipment loaded by the shipper at the shipper's location. The trailer was picked up by the carrier and then broken down at the first terminal. The shipper's B/L indicated "1 BDL" of parts without any count of pieces. At the terminal, the carrier made no notation of the number of pieces, even though it actually picked up 9 pieces not bundled.

Upon delivery, the carrier only delivered 1 piece, but because the carrier's driver had only recorded 1 with no notation of piece or bundle, the consignee did not note a shortage. The carrier then delivered 8 more pieces on a free astray that same day. The consignee again signs for the 8 additional pieces with no notations. When actually checking in the freight off of the packing slip, which did not come with the carrier's papers, the dealer discovered that he should have gotten 12 pieces bundled. The consignee then filed a shortage claim which the carrier denied based on the clear receipt.

My question is whether this type of delivery receipt, which does not indicate piece count or weight, is a proper and valid delivery receipt? Is the document created by the carrier to deliver the freight considered a receipt of the freight they have been tendered to deliver?

Answer: The shipper should always receive a bill of lading ("B/L") or receipt for the goods at the time they are tendered to the carrier. The basic content of the B/L is, as you have indicated, listed in 49 CFR Part 373, and would include the number of packages, description, weight, etc. as well as any exceptions noted by the driver. The bill of lading or receipt is generally

considered “prima facie evidence” of the count and condition of the goods received by the carrier.

A delivery receipt may be either the carrier’s copy of the bill of lading (if it travels with the shipment), or it can be some other form of document. The purpose of the delivery receipt is to document what was actually received by the consignee, and any notations as to over, short or damage at the time of delivery.

As I understand it, the shipper shipped “1 BDL” of parts (as described on its B/L). Apparently the "bundle" was broken down during transit and part of the shipment was delivered at two different times, with the consignee signing for the number of pieces it received each time. However, there was still a shortage.

I don't see anything wrong with the carrier’s delivery receipt, since it properly shows what the shipper stated on its B/L. The problem with this particular shipment is that the shipper did not state how many pieces were in the “bundle”.

I suggest that you get a written statement from the shipper as to how many pieces were in the “bundle” when it was tendered to the carrier, and a statement from the consignee as to the actual number of pieces it received. Re-submit the claim to the carrier with your explanation of the facts.

FREIGHT CLAIMS – DOCUMENTATION OF VALUE ALTERED

Question: I have been asked to review a customer cargo claim. In doing so, I have found where a document has been altered that involves value. I have not been successful in looking up laws, regulations and or penalties against such practices. Can you help me out here?

Answer: On import/export transactions falsification of documents like export declarations, commercial invoices, etc. would probably be subject to criminal penalties under U.S. customs laws. Otherwise general tort principles involving fraudulent practices would probably apply, with civil remedies.

Regarding bills of lading, the Bills of Lading Act, 49 USC 80101, et seq., does have specific application to bills of lading:

> 80116. Criminal penalty
>
> A person shall be fined under title 18, imprisoned for not more than 5 years, or both, if the person -
>
> (1) violates this chapter with intent to defraud; or
>
> (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.

FREIGHT CLAIMS – DOCUMENTING CLAIMS IN SL&C DROPPED TRAILERS

Question: We are looking into getting involved with pool shipments. These would be full trailer loads shipped to our location by our shipper. The trailers would be dropped at our location and carrier would pick up an empty. The trailers at origin point would be SL&C (shipper load and count). My question is, how do we handle damages when we go and open the trailer doors? When trailer is dropped, is there any notation that can be signed on the delivery receipt for potential damages when trailer is opened that would protect us for carrier liability?

I am assuming damages would be handled like concealed damage shipments. That would put us at a very severe position, since concealed damage claims are very hard to prove.

Any guidance for making pool shipments is appreciated.

Answer: "SL&C" shipments that are "dropped" for unloading at destination do pose problems for establishing carrier liability in the event that shortage or damage is discovered upon unloading. As with any concealed damage situation, the claimant has a more difficult burden of proving that the shipment was tendered in good order and condition at origin, and was delivered with shortage or damage at destination.

These are factual issues, and there are certain procedures that can help you prove your claims.

First, you need to establish what was actually shipped and its condition. A bill of lading that says "SL&C" is not enough and you will need statements and/or documents from the shipper to support your claim.

At destination you should have procedures for inspecting the trailer for any signs of damage or forced entry, checking the seals against the bill of lading, etc. before opening the doors. During unloading you should carefully inspect and count the goods, make accurate records of any discrepancies, and have a digital camera available to photograph conditions that may be observed. The personnel that unload the trailer should sign and date any OS&D (“over, short & damage”) reports that are created. Damaged goods should be segregated, and the carrier should be requested to make an inspection.

Remember, it is your burden to prove that any loss or damage could not have occurred after the trailer was delivered.

Loss or damage can occur in three places: at the shipper’s facility, while in transit, or at the consignee’s facility. If there should be some recurring pattern of loss or damage, it may be appropriate to contact the security people at the shipper and at the carrier.

These are only a few suggestions, but I hope they are helpful.

And, by the way, a notation on the bill of lading at the time of delivery that says “subject to inspection and count” or similar language has no legal value.

FREIGHT CLAIMS – DOCUMENTING DAMAGE ON BILL OF LADING

Question: Shipper provided carrier a bill of lading (“B/L”) which the carrier presented at delivery. As the first pallets of the load were being unloaded the receiving clerk saw the rest of load had fallen over and was damaged.

On the shippers B/L the clerk made a note of count of the damaged TVs and why they were being refused and signed his name next to the note. The unloading stopped and carrier left with the B/L.

Behind the damaged fallen TVs were two more pallets of product for which the shipper is now asking payment.

The shipper has no traditional signature by the clerk with the date, pieces and our corporate stamp.

The shipper says the B/L with the note of the refused also is the proof of delivery for everything else.
What are my options?

Answer: You indicate that the shipper is now asking payment for the two pallets of product that you say were left on the truck. Obviously, there is a factual question as to what happened to the two pallets and whether they were lost/stolen while in the carrier's possession or returned back to the shipper with the damaged goods.

First, you should get a written statement or affidavit from your receiving supervisor to establish that the two pallets were not received and were taken away by the carrier with the damaged goods.

Then, I would suggest that you request the carrier to investigate the situation; if there is reason to believe that the loss occurred while the goods were in the carrier's possession, file a claim for the value of the two pallets of goods.

It would also be a good idea to ask your shipper to check his inventory to make sure that the two pallets were not inadvertently received and put back into inventory.

FREIGHT CLAIMS – DOCUMENTING VALUE ON IMPORTED FOOD

Question: I have received a claim from a large customer for a shipment of asparagus that was rejected due to “out of temp”. The claim is for 384 cases of asparagus @ $53.20 per case. I felt it would be prudent to verify what their retail pricing is for a bundle of asparagus. According to the produce manager, I was told that bundles were being sold at $3.48. I confirmed that there were 12 bundles to a box, for a retail case price of $41.76. This left me questioning how we were being claimed for $53.20 a case when they are selling the product for less than what they are paying for it. I sent them a request for further documentation since their invoice was not supplied within the supporting documentation. I stated that “Under the Carmack Amendment, the shipper is only entitled to recover from the carrier ‘the actual loss or injury to the property’. A shipper’s recovery is limited to the replacement cost or wholesale cost of the damaged cargo.”

I insisted they provide an invoice from their supplier quoting the text of 49 CFR Part 370, Investigation of Cargo Claims subsection B. “The original invoice, a photographic copy of the original invoice, or an exact copy thereof of any extract made therefrom, certified by the claimant to be true and correct with the respect to the property and value involved in the claim; or a certification of prices or values, with trade or other discounts, allowance or deductions, of any nature whatsoever and the terms thereof, or depreciation reflected thereon.” I stated “Without a valid invoice, I am unable to process your claim. Upon receipt of the requested documentation, I will then be able to continue the investigation of your claim.”

They provided the following response: “Your declination is declined. All of the shipments are import freight. Import suppliers do not send invoices as their invoices are paid via bank draft through our direct imports department. You have been provided with a document that shows the item number and the cost of the product. All of our carriers receive this document on import loads in lieu of an invoice since the import suppliers do not submit payment via invoice. This claim will remain valid and open for payment.” The document they provided is a screen print titled “P O Maintenance - Item Review”.

I’ve been told I have to handle this claim with “kid gloves” because to be black balled by this customer would mean a loss of millions of dollars in revenue for the company. However, this claim, including their proportionate freight charges, is over $22,000. Even by paying “retail” for the cost of the asparagus, would mean a savings of around $10,000. Am I correct in believing they should provide a copy of the invoice to verify their costs? Is this a common practice to pay

vendors based on no documentation? I've even offered a settlement in lieu of an invoice, which they have subsequently denied. What recourse do I have at this point?

By the way, when I discovered your website, with all of its questions and answers, I felt I had come across the "Holy Grail" of claims information. It made my day! Thank you!!

Answer: The measure of damages is a factual question that usually depends on the specific facts and circumstances of each situation. While the courts have often used the "destination market value" of the goods, it is also recognized that other measures can be used where appropriate.

I assume that this claim is from the importer that is the consignee of a shipment that originated in a foreign country. The consignee would normally be entitled to claim its actual landed cost (including freight, duty, etc.). Under certain situations, where the consignee has already re-sold the goods to its customer, it may be entitled to its invoice price to its customer.

It would seem to me that the claimant should be able to provide documentation that shows its landed cost since all goods imported into the United States are usually accompanied by a commercial invoice.

FREIGHT CLAIMS – DOES B/L OR RATE CONFIRMATION CONTROL?

Question: We are researching a claim where product was damaged due to the load not being tarped. The rate confirmation received by the carrier definitely shows an "N" in the tarp question section. However, clearly marked on the bill of lading ("B/L") it states "load must be fully tarped". Do we have an argument against the carrier that the prevailing document in this situation is the B/L?

Answer: The bill of lading is usually considered the "contract of carriage" between the shipper and the carrier, and is therefore binding on the parties. Normally an instruction to tarp a load that is clearly stated on the face of the B/L would be binding on the carrier when it accepts the shipment and issues (signs) the B/L.

I don't think the "rate confirmation" trumps the B/L. However, depending on the facts, it is possible that the broker may have some liability to the shipper if it was negligent because it failed to give proper instructions to the carrier.

FREIGHT CLAIMS – DOES DAMAGE TO THE BOX INDICATE DAMAGED PRODUCT?

Question: We are a freight forwarder, and our customer has filed a claim for damaged water meters. The less-than-truckload ("LTL") load arrived damaged to the receiver. The bill of lading ("B/L") has special instructions for the carrier not to double stack the load and the boxes have large stickers on them stating "DO NOT DOUBLE STACK". When the customer filed the claim the pictures clearly indicate the boxes were double stacked.

The proof of delivery ("POD") was noted "all boxes damaged." The customer filed a claim including the inspection report where the meters were tested. There was no visible damage to the meters, the damage was internal.

I filed the claim with the carrier who had an independent inspection agency inspect the freight. They denied the claim stating the POD only noted that there was damage to the boxes. There was no indication of any product damage or damage loss. They did not test each meter individually, they just visually inspected the meters. According to the inspector there was no physical damage to the merchandise, and the claim is purely speculative for which the carrier is not liable.

Since the bill of lading had special instructions not to double stack, and the boxes had stickers indicating they were not to be double stacked, and the pictures indicate the boxes were double stacked, who is liable for the damage?

Answer: This is a little different from the usual "concealed damage" situation, since there was visible damage to the boxes at the time of delivery. This should have put the carrier on notice that the contents of the boxes (meters) could also be damaged, and might need to be individually checked or tested, which was done.

The mere fact that the POD and/or visual inspection only reported damaged boxes is not sufficient to deny the claim in view of the fact that actual damage to the meters was found when they were tested.

In my opinion, the shipper acted properly to mitigate the loss by testing the meters, so it is entitled to the value of the meters that were found to be damaged, plus its reasonable expenses in connection with the testing of the meters.

FREIGHT CLAIMS – DOES PREPRINTED BOILERPLATE PREVAIL OVER NOTATION

Question: I need your expertise regarding the denial of the following claim:

Our bill of lading ("B/L") is stamped as a night pickup by carrier and the driver signs for 176 pieces on 7 shrink wrapped skids. The carrier delivers 7 skids and our dock signs for 4 pieces short, 172 pieces received. However, the preprinted text on the carrier's delivery receipt reads "All freight received in good order and shrinkwrap/banding intact unless otherwise noted" and our dock receiver did not indicate whether the shrink wrap was intact or broken. The carrier denied the claim, stating the shrink wrap intact ("SWIT") and relying on the preprinted text on the delivery receipt.

Answer: I'm not sure I understand your question, since it appears that the shortage was noted on the delivery receipt at the time of delivery. Any handwritten notation will generally take precedence over preprinted boilerplate.

As with any claim, you need to start with the basics - what was shipped, and what was delivered. It is the claimant's burden of proof: (1) that the shipment was in good order and condition when tendered to the carrier at origin and (2) that it was damaged (or short) at the time of delivery, see *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 337 U.S. 134 (1964), reh. den., 377 U.S. 948. These are factual questions that depend on the specific situations of each shipment.

It may be more difficult to prove that a shortage occurred in transit if the shipment is delivered with the original shrink wrap intact, e.g., you may need to get statements from people with actual knowledge of what was shipped and received. However, there is no rule that says a carrier is not responsible for a shortage because the shipment is shrink-wrapped and/or palletized.

Certainly it would be a good practice for the consignee to note any exceptions on the delivery receipt at the time of delivery, including any obvious discrepancies with the shrink wrap. However, if the shortage was discovered at the time of delivery, while the driver was still present, and noted on the delivery receipt, I don't see why it would make any difference.

FREIGHT CLAIMS – DRIVER NOT ALLOWED TO VERIFY DELIVERY COUNT

Question: We have some customers that refuse to have our drivers on their dock or rear of the trailer to verify piece count and condition of the shipments being delivered. Also, there are other shipments that may be on the trailer that do not belong to the specified customer. The customer states their policy is for either insurance reasons or Occupational Safety & Health Administration ("OSHA") regulations. I have been unable to find this information to be true.

As a carrier, do we have a right to be on the customer's dock or at the rear of our trailer to verify the count, condition, and labels of each piece being delivered, as well as, protect the interest of various other customers' freight loaded on the same trailer? Does the Homeland Security Act touch on this particular issue when driver is unable to view what is loaded/unloaded onto their truck? Please advise.

Answer: Unfortunately this is a common problem.

I don't think there is anything in the consignee's insurance policy or in OSHA that would preclude your driver from being present on the dock or at the rear of the trailer. All major companies have general commercial liability insurance policies that cover injury to business guests and invitees while on their premises. Most likely this is a company policy that originated with their legal or risk management department.

The reason for such a company rule is that, while your driver/employee would normally be covered by your worker's compensation in the event of an injury during the performance of his duties, the company could be sued and might be liable if there was any negligence that caused or contributed to the injury. For example, it is common for a shipper or consignee to be sued if there is an unsafe condition on the loading dock, a malfunctioning fork lift, etc.

Obviously, the owner of the property has the legal right to make and enforce safety rules and to limit access to particular areas of the premises.

I certainly agree that it is a better practice - for both the carrier and the consignee - to allow the driver to be present to count the freight and to observe any damage or shortage as the goods are actually unloaded. This vastly simplifies the ability of the parties afterwards to allocate liability and to avoid contested claims.

About the only suggestion I can offer is to instruct your drivers to make a written record any time they are prohibited from being present when the freight is being unloaded.

FREIGHT CLAIMS – DRIVER SIGNING DELIVERY RECEIPTS

Question: I've been asked a relatively simple question that has me stumped: Is there a real need to have a driver sign a delivery receipt ("D/R")? Most, if not all D/Rs contain a space for the driver name / signature, but I've not been able to find any reference to the driver actually signing it. I've checked the Code of Federal Regulations and Freight Claims in Plain English (granted, not thoroughly, but enough to be discouraged.)

Obviously, the carrier would use it for their records, and our associates use the names to track trends and look for potential theft issues. But, is it a necessity that the driver sign or is it simply a nicety?

Answer: The purpose of a delivery receipt is to document that the shipment was delivered to the consignee and to note any discrepancies (over, short or damage). The D/R is an important document for both the shipper and the carrier (to confirm delivery for the purposes of payment of the seller's invoice and the carrier's freight bill, and to document the destination condition of the goods in event of a claim for loss or damage). Obviously, it is important that the consignee sign the D/R.

I would say that there usually is no requirement for the carrier's driver to also sign the D/R, unless there is some notation as to an over, short or damage condition. Then, it is helpful from an evidentiary standpoint since it shows that the driver also witnessed the condition and agreed with the notations made by the consignee.

FREIGHT CLAIMS – EXCESSIVELY LATE DELIVERY

Question: We are in the process of disputing a claim filed against a carrier and are at a standstill as to how to proceed next. Our customer's customer only received 11 out of 12 pallets of food product. The carrier later found the remaining skid and attempted to deliver the product. However, the purchase order number ("PO#") was already closed out. We were able to provide the carrier another PO# in which to deliver the product but they never attempted a redelivery. Six months later we have found out from our customer that the carrier never attempted to redeliver the product. During this time, the food product has expired making it of no use to our customer.

The carrier is denying all liability because they are not responsible for shelf life of product. All of our sales representatives agree that the company is at fault for not delivering the product; however, they are not willing to pay this $6,500.00 claim. Any advice or suggestions you can provide would be most beneficial to us.

Answer: From your description of the facts, I think you have a valid claim for non-delivery of the product.

The case of *Paper Magic Group, Inc. v. J. B. Hunt Transport, Inc.*, 2001 WL 1003052 (E.D. Pa. Aug. 29, 2001), affirmed, 318 F.3d 458 (3rd Cir. 2003) involved a delayed shipment of boxed Christmas cards. J. B. Hunt had picked up the shipment on October 16, 1998 at Paper Magic's facility in Danville, PA. The shipment was to be delivered to Target Stores in Oconomowoc, WI. Typically, such a shipment would have a transit time of two or three days. Unbeknownst to any of the parties, the shipment had been misplaced by Hunt. On February 5, 1999, almost four months after the shipment was picked up, Hunt found the shipment sitting at its Chicago, IL terminal. Both Paper Magic and Target refused to accept delivery of the shipment because Christmas had passed and the shipment was now worthless to both.

Thereafter, Paper Magic filed a claim for $130,080.48, which represented the invoice value of the Christmas cards. Hunt was able to salvage the Christmas cards for $49,645.96 and offered this salvage value to Paper Magic as full and final settlement of the claim. Paper Magic refused this offer. The district court ruled that Hunt's four-month delay in delivering the Christmas cards was essentially a "non-delivery." The appellate court agreed and determined that Paper Magic was entitled to recover its full invoice price.

In your case, there should be no question that the carrier was aware that food products have a "shelf life" and cannot be sold after the specified date.

Unfortunately, if the carrier refuses to pay the claim your only recourse may be to bring a lawsuit.

FREIGHT CLAIMS – FEDERAL REGULATION OF HOUSEHOLD GOODS CARRIERS

Question: Is there a household goods ("HHG") equivalent for the N.F.C. & S.C. Freight Claims Rule book - Principles & Practices for the Disposition of Freight Claims?

If not, do HHG carriers subscribe to the above rule book?

Answer: The "N.F.C. & S.C. Freight Claims Rule book - Principles & Practices for the Disposition of Freight Claims" is an obsolete publication. The National Freight Claim and

Security Council was a council of the American Trucking Associations that was disbanded quite a few years ago.

The Federal Motor Carrier Safety Administration ("FMCSA") regulations at 49 CFR Part 370 govern the handling and processing of loss and damage claims. Part 370 is titled "Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage" and applies to motor carriers, including household goods carriers. If you are not aware of these regulations or do not have them, they are available online (http://www.access.gpo.gov/nara/cfr/waisidx_02/49cfr370_02.html).

I would note that household goods carriers are also subject to additional federal regulations at 49 CFR Part 375, Transportation of Household Goods in Interstate Commerce: Consumer Protection Regulations. (online at http://www.access.gpo.gov/nara/cfr/waisidx_02/49cfr375_02.html)

FREIGHT CLAIMS – FILING AGAINST BOTH CARRIER AND SHIPPER

Question: Can a claim be filed against the carrier and shipper/vendor simultaneously? If so, is there a process if one denies or one pays in full?

Answer: There is no reason why you can't file a claim against the carrier and against the shipper/vendor simultaneously, but, obviously you can't collect from both and keep the money.

One problem is that if you file a claim against the shipper/vendor, it may then file another claim against the carrier. The "Standard Form For Presentation of Loss And Damage Claim" in the National Motor Freight Classification contains an "Indemnity Agreement" that addresses the situation where there may be other claims for the same shipment, although it does specifically focus on submittal of an original freight bill or bill of lading:

> INDEMNITY AGREEMENT
>
> In the absence of the Original Freight Bill and/or Original Bill of Lading, we agree to hold the above named carrier to whom this claim is presented and any other participating carrier harmless and indemnified against any and all lawful claims which may be made against it or them arising out of the same shipment and will pay to the said carrier and any participating carrier(s) any losses, damages, costs, counsel fees or any other expenses which they or any of them may suffer or pay by reason of payment of our claim, herein described, without the surrender of the Original Freight Bill or Bill of Lading, as such was not provided and/or cannot be located.

I would suggest that if you file a claim against the shipper/vendor, that you at least let them know you have also filed against the carrier, and will only hold them liable if the carrier declines the claim.

FREIGHT CLAIMS – FILING ON EXEMPT PRODUCTS

Question: How many days has a freight broker to provide the documentation needed to a cargo broker to verify the cost of the loss or damage, specifically produce??

Answer: Since this is an exempt commodity (produce), unless otherwise provided in the bill of lading, claims (and supporting documentation) must only be filed with the carrier within a "reasonable" time.

However, perishables such as fresh produce should always be handled promptly in order to mitigate the loss. Usually this means that the load is taken to a produce dealer where it is sorted out and any portion that can be salvaged is promptly sold, with the salvage proceeds applied against the claim.

If you are involved in a damaged delivery, you should ask for documentation such as an invoice for the goods, U.S. Department of Agriculture report, record of the salvage sale, etc. I would think that the broker should be able to provide this information to you within a few days after the delivery.

FREIGHT CLAIMS – FOB ORIGIN RISK OF LOSS

Question: Our company purchased two motors from a vendor. The terms of sales were "FOB Origin" and we instructed the vendor to ship via carrier collect using our account number. Each motor was packaged separately in a carton and upon delivery our receiving department refused both cartons due to the bottoms of the cartons open and the motors showing damage (scratched, dented). The material was returned to the vendor and the vendor is calling us stating we are responsible for the damages and claim because they tendered the freight in good condition to the carrier and used that carrier as per our instructions.

When the consignee refuses freight for damaged material and even though the terms are FOB Origin or shipping point using the consignee account number is consignee responsible for paying for the material and/or putting in a claim even if material is back at the shipper?

Answer: As between the seller and the buyer, the risk of loss in transit is usually determined by 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, and the buyer would be the proper party to file a claim for loss or damage with the carrier. I am not aware of any reason why the risk of loss would shift back to the seller because it accepted a return of the damaged goods.

I assume that the goods were returned to the seller in order to determine whether there was any salvage. If so, there should be some adjustment for the salvage, and the carrier would be entitled to have the claim reduced by the amount of the net salvage proceeds.

FREIGHT CLAIMS – FOODSTUFFS AND POSSIBLE CONTAMINATION

Question: I have several questions regarding "Chain of Custody" interruptions with foodstuff deliveries and containment of potentially tampered product from reaching the general public

If a shipper load & count ("SL&C") load is delivered, seal missing or tampered, would the distribution center be within rights to refuse delivery (without inspection) of the full truckload and file claim for total value of the shipment? Are they required to inspect the product prior to refusal? If outright refused, what falls to the carrier in terms of liability of the product? Is it the shipper's responsibility to contain and dispose of any product deemed to be unsaleable?

If the above delivery occurred via drop trailer, what time frame must the seal exception be reported in order to file claim?

Answer: Questions about broken seals on SL&C shipments of food products raise a number of factual and legal issues.

Contamination of food products, drugs, medicines or other items intended for human consumption is a serious matter. The mere possibility of contamination may, in and of itself, be sufficient.

There are 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. For example, there are provisions governing contaminated food under the Federal Food, Drug and Cosmetic Act - 21 USC §§ 342(a)(4) and 342(i):

Section 342(a)(4) states, “A food shall be deemed to be adulterated ... if it has been prepared, packed, or held in insanitary conditions whereby it may become contaminated with filth, or whereby it may have been rendered injurious to health.” This provision has been used in the past to support damage claims.

Section 342(i), entitled “Noncompliance with sanitary transportation practices.” This provision states, “food shall be deemed adulterated ... if it is transported or offered for transport by a shipper, carrier by motor vehicle or rail vehicle, receiver, or any other person engaged in the transportation of food under conditions that are not in compliance with regulations under section 350e of this title.”

See also the discussion in *Freight Claims in Plain English* (4th Ed. 2009) at Section 11.5.

Even before 9/11, the anthrax scare, and the “Bioterrorism threat”, the courts were very sensitive to situations where product was exposed to possible contamination or product liability.

For example, in *Trucker’s Exchange, Inc v. Border City Foods, Inc.*, 998 SW2d 998 (Ct. App. Ark. 1999) a truckload shipment was rejected because of a missing seal. 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.

Another 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.”

It is quite common for receivers of food products to refuse or reject product if there is a broken seal or the packaging itself shows signs of damage or tampering. Shippers often will take the position that it would be an unacceptable risk to allow the product to enter the market for human consumption, or that it would be impossible to adequately sample and test all of the food product to ensure that the quality had not been compromised.

On the other hand, carriers usually argue that there is a duty, under the common law, to “mitigate the loss”. Depending on the facts and the type of packaging, it may be possible to inspect the product and segregate the good product from that which is actually damaged. It may also be possible that some of the product can be usable for some purpose other that for human consumption, e.g., animal feed, etc.

In other words, there really is no “black and white” answer to your questions.

I would note that many shippers now include provisions in their transportation contract dealing with this problem, and providing that broken seals, failure to maintain specified temperature, etc. may be grounds for rejecting shipments or for destroying suspect product.

FREIGHT CLAIMS – FORGED DELIVERY SIGNATURE

Question: I work for a company that hires carriers to take product from plants and distribution centers and deliver to our customers. On several occasions, I’ve had cause to file freight claims against a carrier because our customer, the consignee, stated they did not receive the product and upon receipt of the delivery receipt (or proof of delivery (“POD”)) says that the signature is not one of their employees. The carriers always decline payment of these claims because it’s difficult to get specific proof of this fact. What action(s) can we take to ensure these claims get paid? Would it be advisable to have the consignee sign a form stating the signature does not belong to anyone at their location? If so, what information should be on the form?

Answer: There are a couple of possibilities: (1) the driver or someone else in the carrier's employ forged a consignee's signature to cover up a shortage or theft; (2) some impostor at the consignee's location took the goods and signed the delivery receipt; or (3) the consignee is lying so it won't have to pay the vendor for the goods.

At the very least, if you are going to file a claim with the carrier, you should get a written and signed statement from the consignee that supports their contention that the signature is not that of one of their employees.

FREIGHT CLAIMS – FREE ASTRAYS

Question: In the claims section of a contract we have with some of our less-than-truckload ("LTL") carriers one of the items reads as follows:

> Free-astrays must be delivered within 7 calendar days from the original shipment. Any Free-astrays not delivered within the specified time frame will be considered a shortage and a claim will be filed.

My interpretation of this statement is only that we will "issue" a claim after the 7 days. If the carton is found and delivered after the "7 days" I do not feel that we can expect a carrier to pay for our claim after the store has accepted delivery of the merchandise we issued the claim for. Can/should we pursue the claim?

Answer: If "free astray" merchandise is actually delivered and accepted, even if you have filed a claim based on the 7-day period referred to in the contract, you obviously cannot collect the value of the goods based on a non-delivery. However, under some circumstances, there might be a claim for damages resulting from the delay (market decline, etc.), see generally *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.

I would note also that if there were a long delay and the merchandise was seasonal or time-sensitive, the shipper might be able to treat the delay as a non-delivery and recover the full value. The case of *Paper Magic Group, Inc. v. J. B. Hunt Transport, Inc.*, 2001 WL 1003052 (E.D.Pa. Aug. 29, 2001), affirmed, 318 F.3d 458 (3rd Cir. 2003), involved a delayed shipment of boxed Christmas cards. J. B. Hunt had picked up the shipment on October 16, 1998 at Paper Magic's facility in Danville, PA. The shipment was to be delivered to Target Stores in Oconomowoc, WI. Typically, such a shipment would have a transit time of two or three days. Unbeknownst to any of the parties, the shipment had been misplaced by Hunt. On February 5, 1999, almost four months after the shipment was picked up, Hunt found the shipment sitting at its Chicago, IL terminal. Both Paper Magic and Target refused to accept delivery of the shipment because Christmas had passed and the shipment was now worthless to both. Thereafter, Paper Magic filed a claim for $130,080.48, which represented the invoice value of the Christmas cards. Hunt was able to salvage the Christmas cards for $49,645.96 and offered this salvage value to Paper Magic as full and final settlement of the claim. Paper Magic refused this offer. The district court ruled that Hunt's four-month delay in delivering the Christmas cards was essentially a "non-delivery." The appellate court agreed and determined that Paper Magic was entitled to recover its full invoice price.

FREIGHT CLAIMS – FREIGHT CHARGES

Question: We shipped a load from Atlanta to Miami. The trailer with the goods was stolen. We filed a claim for the goods and were paid by the carrier's insurance company. The carrier wants us to pay for the transportation from Atlanta to Miami even though final delivery was never made. Three days later the same carrier hauled the replacement shipment for the stolen load and did make delivery. We are saying no to paying the original freight charges.

Can you elaborate and advise what the "law" may be on this?

Answer: Normally, I would say the answer is simple: the carrier would not be entitled to its freight charges because it never delivered the goods, which was a breach of the contract of carriage.

However, my question is whether the insurance company paid you for your full invoice price to the customer, a portion of which would have represented the freight charges to deliver the goods. If so, then you have received money for freight charges that you did not in fact pay to the carrier, so that money doesn't belong to you, and you should pay the carrier.

FREIGHT CLAIMS – FREIGHT CHARGES ON DAMAGED GOODS

Question: 1) What is a carrier's legal liability to refund a customer the portion of the freight charges on damaged goods, if any?

2) Can a shipper or consignee claim for freight charges for the replacement of their damaged goods?

Answer: 1. The Carmack Amendment provides that the measure of damages is "actual loss", i.e., the claimant is entitled to be "made whole" for any loss or damage caused by the carrier.

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.

The court decisions generally refer to the "destination market value" as the measure of damages. When goods are lost or damaged in the course of delivery to a customer, in most cases this is the invoice price to the customer.

Where the claim is based on the invoice price to the customer, that value is presumably comprised of the origin ("FOB") price of the goods plus the cost of delivering them to the destination (which would be typical of a "freight prepaid" shipment), and the freight charges may not be separately claimed.

If the claim is based on the origin ("FOB") price, not including freight charges for delivery (which would be typical of a "freight collect" shipment), and the freight charges have been separately paid to the carrier, then the claim should be for the origin ("FOB") price, plus the freight charges.

In the case of a partial loss, the claimant can recover for the value of the damaged item and the pro-rata portion of the freight charges attributable to the damaged item (usually calculated on the weight of the damaged item compared to the weight of the total shipment).

This subject is covered in detail in *Freight Claims in Plain English* (4th Ed. 2009) at Section 7.4.9.

2. The fact that a shipper may choose to send a replacement shipment to satisfy a customer has nothing to do with its claim for loss or damage to the original shipment. They are independent, separate transactions. I realize that the claimant may feel that the actions of the carrier necessitated shipping a replacement to its customer. The shipper may have some

contractual obligation to its customer to replace the lost or damaged goods, or it may just be doing it to keep the customer's good will, but that is not the carrier's concern. In other words, the cause of action is for a breach of the contract of carriage for the original shipment, i.e., the loss or damage to those goods.

FREIGHT CLAIMS – FREIGHT CHARGES ON MIS-DELIVERED SHIPMENT

Question: I am a broker and I have a claim for failure to deliver. I hired a carrier to deliver a shipment of two pallets and the carrier delivered the product to a cold storage in Kansas instead of delivering it to Indiana as the contract stated. I had to hire another carrier to take product back to Indiana, which cost me over $800.

This was a time sensitive product. The carrier now is trying to file on my bond for payment of the freight charges even though he did not make the delivery to the proper destination. How do we deal with the bonding company to make sure this is denied? I feel I should be able to file a claim for non-delivery and charge him the cost of redelivery. What is your opinion? Should I be liable to the carrier for freight charges for non-delivery or should the carrier be liable for the redelivery charge?

Answer: As to your first question, you should explain (in writing) to the bonding company what the facts are and provide them with appropriate documentation. (I would note that some bonding companies take the position that they will only pay claims where the carrier has obtained a judgment against the broker.)

As to your second question, it appears quite clear that the carrier mis-delivered the shipment, which is a breach of the contract of carriage. Your damages are not as easy, and I don't know of any court decisions directly dealing with this question.

I think you should file a claim against the carrier for the cost of re-delivering the shipment to the proper party named in the bill of lading. The carrier, on the other hand, may argue that it has a claim in *quantum meruit* for the reasonable value of the services that it actually did provide, but I don't think a court would look favorably on its position. If the carrier won't pay you for the re-delivery charges and drop its claim for the freight charges, you may need to bring an action (in small claims court) against the carrier for the re-delivery charges.

FREIGHT CLAIMS – FREIGHT CHARGES ON PREPAID SHIPMENT

Question: I have a carrier who says that if my invoice to my customer does not show freight charges billed to the customer, I cannot collect freight charges on a claim. The carrier is assuming that since the customer invoice has no freight on the invoice for the merchandise that the charge is included in the cost of the item. I believe there is no way to prove this but I can prove I paid a carrier invoice. These shipments are prepaid with the freight being paid by us.

My question is does the carrier have to reimburse the freight charges on a valid lost or damage claim even if the customer's invoice does not show the freight charges invoiced to the customer?

Answer: From your description of the facts, I assume that you filed your claim based on the actual invoice price to your customer. If this is so, then it would be presumed that the invoice reflects a "delivered price" which includes the cost of delivering the goods to the customer. In other words, you can't collect the freight charges twice, and the carrier is right.

FREIGHT CLAIMS – GENERAL DAMAGES OR SPECIAL DAMAGES

Question: I have filed a claim with a carrier due to its loss in transit of 9 poles. They assumed liability and paid that portion of the claim in full. The problem is that this customer had ordered 9 black poles and in order to replace the shipment we had to paint the 9 replacement poles. I also filed a claim for the cost of painting the 9 replacement poles and this was the carrier's response:

> Please be advised that the Carmack Amendment of the Interstate Commerce Act was preserved [codified at 49 U.S.C. § 14706], which makes carriers liable for the full actual loss, damage or injury to the property caused by them to property they transport.
>
> The implied liability of the carrier herein is more commonly restricted to "General Damages" which can best be defined as foreseeable consequences of the carrier's breach of contract. Conversely "Special Damages", which are additional charges over and beyond the cost of the goods shipped is incorporated, are those not ordinarily recoverable unless the carrier is put on written notice. That is, if the shipment is required to be delivered for a specific market/scheduled event, or that additional charges would be incurred if loss or damage occurred in transit, and a demand is made against the carrier there are certain criteria that must be met in order to retain that level of liability. First, the carrier must be made aware of the requirements they must meet, and second they must be made specifically aware of the consequences if the carrier fails to meet the requirements.
>
> Since there was no stipulation on the contract of carriage that the carrier's liability would exceed the invoiced value, or that there would be additional charges for painting the replacement fixtures this is considered special damages as previously outlined. As such, we must respectfully decline this portion of the claim.

Is there anything that I can use to go back to him in order to get our money back for having to paint these poles since we did not have them in stock and had to paint them only because they were lost in transit by this carrier?

Answer: Unfortunately, I think the carrier is right - the painting costs would be "special damages", see *Freight Claims in Plain English* (3rd ed. 1995) at Section 7.3.

FREIGHT CLAIMS – GOVERNMENT SHIPMENTS

Question: I previously worked for an inland motor carrier and currently handle claims for a marine transportation company; we move containers and vehicles on our barges to and from Puerto Rico. Are claims filed by U.S. government agencies subject to the same claim regulations as "normal" claims? The claims are primarily filed regarding military shipments and at both companies I have been told they are exempt from the normal requirements but the only explanation is that "it's the government and they do what they want." Your assistance is appreciated.

Answer: I wasn't sure of the answer to your question, so I asked my colleague, Hy Hillenbrand. Here is his response:

"This is a complicated question without sufficient information to give a response. If the shipment moved was on a government bill of lading under a section 22 quote, then we would have to look at the contract to determine the answer. If the shipper is an ordinary shipper who was shipping government property under its own contract, bill of lading or contract, the shipment being governed by the Harter Act, unless the contact incorporates COSGA as many bills of

lading to Puerto Rico do, then the fact that is government property does not make a difference and it's an ordinary claim. However, here again, we do not have a copy of the contract."

FREIGHT CLAIMS – HANDLING CLAIM ON DAMAGED RETURNED PRODUCT

Question: I am new to freight claims and am not sure how to proceed with this issue. One of our customers arranges to have his shipments picked up at our warehouse by his truck or by a common carrier. On the last order, the carrier brought back 10 cases of product that had been refused due to damage. The warehouse took the product in and notified our logistics team of the receipt. We had no prior notice from the customer that anything was being returned. The cases were signed for as being in good condition and without any exceptions noted on the bill of lading by the customer's carrier when it shipped from our location.

I am not sure who our company holds responsible for the loss, the customer or the customer's carrier. The customer wants credit for the items returned, but I am not sure what our next step should be to recover our loss or if the customer should have to file a claim against the carrier for their loss. Your assistance with this matter is greatly appreciated.

Answer: It appears that the damage occurred in transit, while in the possession of the carrier, since you had a clean bill of lading when they were picked up, and also because the carrier returned the damaged goods to your facility.

As far as filing a claim, it really doesn't matter who contracted with the carrier, i.e., whether it was "your" carrier or your customer's carrier (except that your customer may have a contract with the particular carrier that contains provisions governing carrier liability and/or claims). Otherwise, either the shipper or the consignee has standing to file a claim.

The key is which party had "risk of loss" in transit. As between the seller and the buyer, the risk of loss in transit is usually determined by 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. These presumptions can be altered by contractual terms in contract of sale or other agreement between the parties.

Thus, if your terms were "FOB Origin", the customer legally is not entitled to a credit and should file its claim with the carrier. However, I would note that parties often ignore these rules, e.g., the purchaser may just refuse to pay for goods that are lost or damaged in transit, and the seller will handle the freight claim, even when the terms of sale are FOB Origin.

If your customer does deduct the loss from your invoices, you probably will need to file the claim in writing with the carrier. If so, make sure that you get proof from the customer that the goods were damaged at delivery and rejected to the carrier. This would usually be in the form of an exception noted on the delivery receipt or an over, short or damage report by the receiving department.

FREIGHT CLAIMS – HOLDING PAYMENT TO BROKER FOR FREIGHT CLAIM

Question: We have moved several loads for a customer, including truckload, rail, and less-than-truckload ("LTL") shipments. Recently one of the LTL shipments was damaged. The total claim for the damages is approximately $1,200 and customer is now withholding payment on ALL loads that were moved until they have an agreement on the damages. Is this legal? These were done with different carriers and all other loads went fine. We still have to pay the carriers. Can the customer refuse to pay until the damage claim is settled for all loads? Can they refuse to pay even for the damaged shipment?

Answer: First, as a broker you normally would not have any liability for loss or damage and the shipper should have filed its claim directly with the responsible carrier. You should always make this clear in your agreements with the shipper and/or in your rate confirmations, so you don't get "caught in the middle".

That having been said, there is no law or regulation that prohibits a shipper from withholding payment from the broker because of an unpaid claim, and it is frequently done. If the matter can't be resolved within a reasonable time, your only remedy may be to bring a lawsuit against the shipper to collect the freight charges that are due.

FREIGHT CLAIMS – HOURLY RATE FOR REPAIRS

Question: Is there a limit on the hourly rate that a consignee can charge for repairs to damage that occurred during shipping? I had a claim where the consignee charged $60.00 per hour for repairs on nine damaged units delivered to them. The damage was notated on the delivery receipt at time of delivery and the charge was $180.00 for three hours of labor.

The carrier's response was that companies are not allowed to make a profit off of a freight claim. According to their rules tariff, the maximum compensation for hourly rate is between $40.00 and $50.00 per hour.

I do not think the hourly rate was too high and feel it was justifiable. This was the repair charge submitted to us. If the consignee was not able to do the repairs or the units were not repairable, the cost would have been a lot more.

Answer: There is usually a duty to "mitigate damage" if a damaged item can be repaired and the expense is reasonable under the circumstances (cost vs. value of the damaged item, etc.). If an item can be repaired the claimant is entitled to be reimbursed for the labor and materials incurred to mitigate the loss.

Most companies have standard hourly rates for pricing purposes. Usually these will include the actual direct hourly rate paid to the worker, plus the overhead that is allocated to that department or function in the company (inspection, manufacturing, shipping, etc.). This does not mean that the rates include a "profit". There is no "limit" to hourly rates, and they depend on the nature of the business and the work that is performed.

You say that, according to the carrier's rules tariff, "the maximum compensation for hourly rate is between $40.00 and $50.00 per hour."

Tariff rules can be incorporated by reference through a bill of lading, and if applicable to the particular shipment, may be binding and enforceable. Did the carrier actually provide a copy of the tariff? I have never seen such a provision, and would be surprised if there actually is such a tariff rule (let us have a copy if you can).

FREIGHT CLAIMS – HOW ARE LIABILITY LIMITS INCORPORATED?

Question: We are a company located in Canada and had a problem with an order delivered to us. Our vendor would prepay to any designated location within the United States, so we chose a location with relative ease for a carrier who could bring goods to us at reasonable cost. Our vendor utilized a major U.S. less-than-truckload carrier for their portion of transport.

The goods were signed for in good condition on our carrier's dock. The goods were then delivered to our dock with damages on multiple units being clearly noted. These goods were new and can be most easily described as compressors - class 85.

The nature of these goods are such that most shippers of similar units usually ship these goods bolted to skids, without crating and sometimes with a wrap of sorts surrounding the units.

Our carrier denied our claim asserting that when the proper packaging as provided in the National Motor Freight Classification ("NMFC") is not adhered to and shipment is inadvertently accepted, the carrier's liability shall be limited to not exceed 10 cents per pound regardless of the RVNX (Released Value Not Exceeding) shown on the bill of lading. If no specific packaging is provided in the NMFC and the commodity is shipped in an unprotected state (i.e. an uncrated machine shipped loose or on a skid) the carrier's liability shall be limited to not exceed 10 cents per pound.

It is interesting to note that carrier refers to the NMFC, though it does not subscribe to that particular tariff. It is also interesting to note that the carrier handled several such shipments prior to incident in question.

At no time were we advised of carrier liability limitations. I am aware of carrier liability limitations to used equipment ($.10 per lb.), though was not aware of such limitation on new equipment.

These goods were transported via Long Box trailer and were delivered locally on a 5 ton truck. It is my opinion the damage occurred during the cross-dock procedure and that goods were not properly braced within the local delivery vehicle. In other words, compressors fell over.

The shipment was delivered by the U.S. carrier to the delivering carrier in Seattle, WA and the delivering carrier used the U.S. carrier's delivery receipt as the bill of lading for its leg of the transport.

Do you have any opinion as to our recourse?

Answer: From the information and documents you provided, here is my analysis:

1. This apparently was not a through (interline) movement since the U.S. carrier's bill of lading shows delivery to your company c/o the delivering carrier at Kent, Washington. The movement via the delivering carrier from Kent to Calgary in Canada would be a separate contract of carriage.

2. You indicate that the delivering carrier did not issue its own bill of lading, and used the U.S. carrier's delivery receipt as the bill of lading. Liability limitations and other tariff provisions are only part of a contract of carriage if they are incorporated by reference in the bill of lading. Usually, a bill of lading has language such as "Subject to the classifications and tariffs....", but there is no such language on the U.S. carrier's delivery receipt. Therefore, the delivering carrier cannot assert its tariff provisions limiting liability, and is liable for the full actual loss.

3. You also mention that the delivering carrier refers to Item 508 Packaging Requirements, which says "When the proper packaging as provided in the NMFC is not adhered to and shipment is inadvertently accepted, CSA's liability shall be limited to not exceed 10 cents per pound regardless of the RVNX shown on the bill of lading."

In addition to the deficiency noted above, the delivering carrier is not shown as a participant in the National Motor Freight Classification. 49 U.S.C. 13703(g)(B) provides:

> (B) PARTICIPATION OF CARRIERS-
>
> (i) IN GENERAL- A motor carrier of property whose routes, rates, classifications, mileage guides, rules, or packaging are determined or governed by publications established under agreements approved under this section must participate in the determining or governing publication for such provisions to apply.

This would be an additional reason why the delivering carrier cannot rely on or incorporate NMFC packaging rules as a reason for limiting its liability.

FREIGHT CLAIMS – HOW LONG DOES A CARRIER HAVE TO PAY A CLAIM?

Question: How long does a shipper have to present a freight claim, and once a freight claim has been received by carrier, how long does the carrier have to make payment on this? Does a carrier have the right to take 120 days before resolving (submitting payment) a claim?

Answer: Under federal law (the "Carmack Amendment", 49 USC § 14706) a shipper has at least 9 months from the date of delivery to file a claim for loss or damage.

There are also federal regulations that govern the time limits applicable to carriers for processing claims. These are found at 49 C.F.R. Part 370 - Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage. Two sections establish the time limits for acknowledgement of claims and disposition of claims:

> 370.5 Acknowledgment of claims.
>
> (a) Each carrier shall, upon receipt in writing or by electronic transmission of a proper claim in the manner and form described in the regulations in the past, acknowledge the receipt of such claim in writing or electronically to the claimant within 30 days after the date of its receipt by the carrier unless the carrier shall have paid or declined such claim in writing or electronically within 30 days of the receipt thereof. The carrier shall indicate in its acknowledgment to the claimant what, if any, additional documentary evidence or other pertinent information may be required by it further to process the claim as its preliminary examination of the claim, as filed, may have revealed.
>
> . . .
>
> 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; Provided, however, That, if the claim cannot be processed and disposed of within 120 days after the receipt thereof, the carrier shall at that time and at the expiration of each succeeding 60-day period while the claim remains pending, advise the claimant in writing or electronically of the status of the claim and the reason for the delay in making final disposition thereof and it shall retain a copy of such advice to the claimant in its claim file thereon.

FREIGHT CLAIMS – INCLUDING FREIGHT CHARGES

Question: Our customer got paid on a claim for a total loss. In that claim he did not include the freight charges, which is our payment for arranging the load. Is he responsible for paying us (the broker) the freight charges?

Answer: The liability of your customer to pay freight charges is independent of whether it was paid by the carrier on a loss/damage claim. As a broker, you are entitled to the freight charges based on your contract with the customer.

FREIGHT CLAIMS – INCLUDING FREIGHT CHARGES

Question: We have recently been receiving denials from carriers on the freight charge portion of claims for loss and damage on prepaid shipments. This appears to be a new trend and contrary to past behavior. Are we allowed to include the freight charges in our claims?

Answer: The question of whether freight charges may be included in a claim for loss or damage to goods in transit depends on the facts and circumstances in each case.

1. Where the goods are lost (non-delivery) or damaged so they are "substantially worthless":

Where freight charges have been paid to the carrier, and the goods have not been delivered or have been damaged so that they are substantially worthless, the claimant may recover them on the theory that the carrier has not performed the contract of carriage.

When the claim is based on the destination value of the goods, that value presumably includes the delivery charges, and thus 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 actual loss. If the claim is based on the origin value of the goods, then the delivery charges may be added and included in the claimant's damages. Obviously, if the freight charges have not been paid, they may not be claimed.

Contempo Metal Furniture Co. of California v. East Texas Motor Freight Lines, Inc., 661 F. 2nd 161 (9th Cir. 1981), involved a shipment of stainless steel tubing that was delivered in a rusted and pitted condition. The consignee sued for the cost it had paid its supplier, the freight charges paid to the carrier, and the cost of labor attempting to use some of the tubing. The court held that since the goods were unfit for their intended purpose and could not be salvaged, the acceptance of delivery was not an acceptance of the carrier's services. The freight charges were, therefore, recoverable as part of the "actual loss" caused by the carrier's damage to the tubing. The Court stated:

> . . . .Contempo received no benefit from the delivery of the tubing because it could not use the tubing, even as salvage. In these circumstances, we do not view Contempo's acceptance of delivery as an acceptance of ETMF's services. Accordingly, we hold that the freight charges Contempo paid for ETMF's useless services are recoverable as part of the "actual loss" caused by ETMF's damage to the tubing.

See also, *Marjan International Corp. v. V.K. Putman, Inc.*, 1993 WL 541204 (S.D. N.Y. 1993), in which a shipment of oriental rugs intended for an auction in Tacoma, Washington, was delayed, missed the auction, and the rugs ultimately returned to the shipper in New York, with two valuable rugs missing. As part of its claim, the plaintiff sought the return of the freight charges, which the carrier had demanded before releasing the shipment upon its return to New York. In awarding the plaintiff recovery of the freight charges, the court observed:

> . . . In the case at bar. . . Marjan received no benefit whatsoever from the carrier's services. Instead, as Marjan accurately describes it, this was the shipment that went nowhere, but "meandered" around the continental United States, never arrived at the point of destination, and was ultimately returned to New York.

2. Partial losses:

If only part of a shipment is lost or damaged so that it is "substantially worthless", recovery of freight charges is limited to that portion of the shipment. Usually this means that the freight charges are apportioned based on the weight of the portion of the shipment lost or damaged. See, e.g., *American National Fire Ins. Co. v. Yellow Freight Systems*, 325 F.3d 924 (7th Cir. 2003) in which the Court held:

> We believe that existing precedent on the measure of damages requires that National Insurance be allowed to recover the freight, taxes, fees and insurance only

for the portion (55.1%) of the shipment of cigars that was damaged. See *Albion Elevator*, 254 N.W.2d at 18 (finding that permitting shipper "to recover freight charges paid on the lost portion of the shipment" was necessary to compensate him for the "full actual loss" where he received "only the point of shipment value of the lost commodity").

3. Shipment delivered and received, but not substantially worthless:

Where a carrier does in fact deliver a shipment that is accepted by the consignee, and the goods are not "substantially worthless", there are court decisions that say the carrier is entitled to its charges. Here the reasoning is that the carrier has earned its freight charges, and that the goods can be repaired, refurbished or salvaged and that these costs and expenses represent the claimant's actual loss. See, e.g., *Perlow v. AAAcon Auto Transport, Inc.*, 280 Pa.Super. 52, 421 A.2d 399 (Super.Ct. Pa. 1980).

FREIGHT CLAIMS – INCLUDING FREIGHT CHARGES FOR REPAIR PARTS

Question: Our company assists our customers with filing freight claims on their behalf.

If a customer has a damaged unit repaired, and they have to use a different carrier such as UPS or FedEx to ship the actual repair parts to the job site, and UPS or FedEx is not the original transporter that damaged the original shipment, should the original carrier pay that freight charge for the repair parts if it is technically a different carrier? Sometimes our customer has small parts for the repairs shipped to a job site by a parcel express carrier rather than using a full less-than-truckload ("LTL") carrier. Should that freight charge for those parts be paid on the claim?

Answer: As you know, a claimant has a duty to "mitigate loss". This usually means that, if it is possible to sort, segregate, repackage, repair, etc. for a reasonable cost, it should be done.

In such cases, all reasonable and necessary expenses for parts, labor, overhead, etc. should be reimbursed by the carrier. I would say that, since the shipping charges for the repair parts are both reasonable and necessary in order to repair the damaged unit, they may be included in the claim.

FREIGHT CLAIMS – INCLUDING INSPECTION, TESTING OR SORTING COSTS

Question: I am filing a damage claim with a carrier for a total loss of $9300. The $9300 is based on the per piece invoice value and the number of units damaged. My quality department spent 10 hours sorting and testing the damaged units to determine the number of units damaged. My question is can I also add the 10 hours of time spent sorting and testing? The $9300 would now be $10,000. Again, can I legally add sort and test time to a claim or am I just allowed to file on the invoice value only?

Answer: I assume that only a portion of the shipment had damaged items, and that some other portion was delivered without damage.

There is a general principle in the law of loss or damage that there is a duty to "mitigate loss", which you have done by sorting and testing to determine which of the units were damaged. You should therefore be entitled to be reimbursed for the reasonable expenses incurred in mitigating the loss. This subject is discussed in *Freight Claims in Plain English* (4th Ed. 2009) at Section 7.4 - 7.5.

FREIGHT CLAIMS – INCLUDING PRE-PAID FREIGHT CHARGES

Question: We have been filing claims with a major less-than-truckload (“LTL”) common carrier, mostly involving non-delivery of our goods to our customers. We ship PPD (freight charges pre-paid) and are filing for the cost of product(s) missing and the freight charges in whole or part as applicable. The carrier is denying our claims based on not paying their freight bill, even though they have not completed the delivery because they have lost the freight. What are the legal options we have with them in regard to the claims filed being denied?

Answer: Ordinarily there would be no legal requirement that freight charges have to be paid in order to file a claim for loss or damage to a shipment. I would note, however, that if the freight charges have not been paid, they can’t be included in the amount of the claim.

Some LTL carriers are now including a provision in their rules tariffs that requires payment of freight charges before a claim will be accepted. I would suggest that you demand a copy of the applicable tariff if this is the basis for the carrier's rejection of your claim.

In any event, unfortunately if the carrier fails or refuses to pay a valid claim for loss or damage, the only recourse would be to file a lawsuit.

FREIGHT CLAIMS – INCLUDING TAXES IN DAMAGES

Question: Our customer sent us an invoice for repairs for damages to their cargo, but the invoice included taxes. In Canada the carrier and their insurance company are not liable for the taxes, as the customer must submit the taxes themselves when they are remitting their tax returns.

How does it work in the USA?

Would the carrier and or the insurance company be liable for the taxes that are being claimed for and would it be their responsibility to remit the taxes?

Answer: In the U.S., state sales tax must be added/collected for most services such as labor and materials for repairing an item. If the claimant had to pay an invoice from the party that did the repairs, and the invoice included sales tax, that would be a legitimate measure of damages for the claim. The party collecting the sales tax would be required to report it and to pay what it collected to the taxing authority.

I really don’t know why it would be any different in Canada.

FREIGHT CLAIMS – INCLUSION OF FREIGHT CHARGES

Question: When can freight charges be included in a claim? I’ve had issues with prepaid charges not being allowed/paid even on lost shipments. Right now I have an inbound collect shipment that was damaged and refused at time of delivery. After the claim was filed, the carrier stated that damage was repairable and requested consignee to accept and repair damaged item. Consignee did receive damaged item and repaired the item. It amended the claim for repair cost plus original freight charges. For damaged freight that can be repaired at destination, can the collect freight charges be claimed being that the shipment was not received in good condition? Can original freight charges be claimed on the basis that the shipment had to be repaired as a result of the poor handling of the shipment by the carrier? And if not, what is the basis for the answer?

Answer: Unless the shipment is substantially worthless, and the consignee accepts the shipment and is able to repair it, the measure of damage would be the cost of the repairs (labor, materials and overhead).

The Carmack Amendment provides that the measure of damages is "actual loss", i.e., the claimant is entitled to be "made whole" for any loss or damage caused by the carrier.

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.

The court decisions generally refer to the "destination market value" as the measure of damages. When goods are lost or damaged in the course of delivery to a customer, in most cases this is the invoice price to the customer.

Where the claim is based on the invoice price to the customer, that value is presumably comprised of the origin ("FOB") price of the goods plus the cost of delivering them to the destination (which would be typical of a "freight prepaid" shipment), and the freight charges may not be separately claimed.

If the claim is based on the origin ("FOB") price, not including freight charges for delivery (which would be typical of a "freight collect" shipment), and the freight charges have been separately paid to the carrier, then the claim should be for the origin ("FOB") price, plus the freight charges.

In the case of a partial loss, the claimant can recover for the value of the damaged item and the pro-rata portion of the freight charges attributable to the damaged item (usually calculated on the weight of the damaged item compared to the weight of the total shipment).

For example:

Original weight of shipment = 1000 lbs
Damaged portion = 500 lbs
Freight charges = $150.00
Pro-rata % = 500/1000 = 50%
Pro-rata Claim Amount = $150 x 50% = $75

This subject is covered in detail in *Freight Claims in Plain English* (4th Ed. 2009) at Section 7.4.9.

Freight Claims – Inclusion of Freight Charges

Question: We are in the midst of a claim for $23,000. The damaged shipment of wire was braced at the shipper's dock and was jolted and thrown around in the trailer when the truck was in route. The driver claims he had to swerve and brake suddenly to avoid an accident. The inspection reveals that the wire is totally damaged and unusable.

The claimant claimed the freight charges in the claim. The Independent Adjuster for the Insurance Company is disallowing the freight charges (says the bill of lading is marked prepaid) when in fact, the shipment is marked "freight collect". The carrier has not been paid, and will not be paid unless the Insurance Company reimburses claimant for damaged shipment. The damaged shipment is being sent to salvage. We are not being told any information about salvage, because we, as a broker, are the third party. In my opinion, the carrier needs to pursue this with his insurance agent. If the claimant is not reimbursed for freight, they will not pay us. If we are not paid, I cannot pay the carrier. Do you have any suggestions?

Answer: The claimant is entitled to the "destination market value", which would usually be represented by the seller's invoice to the buyer, i.e., a delivered price. Thus, the freight charges may be included in a claim if they are part of the delivered price.

However, the freight charges must have been paid (by someone) in order to include them in the claim.

My suggestion is for either the seller or the buyer to pay the freight charges, and then the claimant may rightly include them in the claim.

Freight Claims – Incorporating NMFC Package Rules by Reference

Question: I have two questions regarding a freight damage claim. I'm submitting this with the hope of feedback regarding the legitimacy of my case, and as an attempt to locate effective counsel. I am in a small town in Kansas, and as of yet I've been unable to find a knowledgeable transportation attorney. Any assistance you could provide would be extremely appreciated.

Background: Custom concrete and steel dining table shipped across country via less-than-truckload ("LTL"). Shipment arrived destroyed – so badly that initial instinct was that it was done purposefully. Everything that could be broken was broken. Damage claim filed, denied due to "improper packaging." Declared value of shipment: $32,000; damage claim: $18,750 (actual damage only.)

Facts: 1. Cargo was shipped with no crate or protective packaging, but on a custom fabricated skid designed to withstand deflection when lifted with a fork. Table was banded to skid, wrapped intermittently with stretch wrap.

2. Cargo was a custom, signed piece of functional art that was clearly expensive. Contents of skid were in plain and obvious view. Without supplying a picture, please accept that no reasonable person could come to any conclusion other than expensive.

3. Upon pick-up, discussed the packaging and its suitability with carrier's driver. His statement – "they will see what it is and treat it as such." This statement was exactly why it was allowed to leave with said packaging.

4. Shipper has sticker it applies to bill of lading ("B/L"); sticker incorporates carrier's tariff into B/L.

5. B/L created by freight forwarder, not carrier. Very simple B/L, DOES NOT have language incorporating tariff or any fine print, front or back. I print from website, one for me, one for carrier – not carbon copies.

6. Forwarder does not mention or offer on their website availability of insurance, nor offers or mentions an increased rate for increased carrier liability.

7. Carrier has sticker, printed on-site, that is attached to all B/Ls. Sticker has language incorporating tariff into B/L.

8. Loading procedure happens backward. Instead of application of sticker, signatures of both parties, and then receipt of freight, first the cargo was loaded, then both parties sign both copies of B/L, then driver prints and applies sticker. Also, sticker was applied only to his copy, never to mine.

9. Declared value and instructions on B/L were blank. One filled out completely (for driver), one left blank (for me to fill in later). I received driver's copy (declared value, instructions) driver takes mine (no declared value, no instructions).

10. Shipment arrives at terminal destroyed. Carrier refuses to return shipment unless I either "waive all rights to claim" or "repackage in accordance with NMFC [National Motor Freight Classification]." Keep in mind – the exact same, obviously visible method of packaging cargo was accepted in is now denied shipment.

11. Five witnesses, two of them impartial (not employees, at least) will attest to the veracity of the driver's statements, to that of the contents of the documents, and to process by which the cargo was loaded and sticker attached to B/L. The only carrier witness was the driver himself.

Obviously, many, many things went wrong, including my lack of packaging. Limiting myself to two questions, they would be:

1.) the backwards process seems to invalidate the carrier's attempt to incorporate their tariff. My copy has no sticker applied. Applying the sticker and therefore tariff happened after both parties signed the B/L. DOES THIS VOID THE INCORPORATION OF THEIR TARIFF IN TO THE B/L? (Please assume as truth that no other language in the B/L incorporates the carrier's tariff. It does not.)

2.) Would the clear and obvious content of the shipment require the carrier to take extra precaution and handle the cargo differently than the same cargo, unseen within a crate? I ask this specifically regarding their tariff and other tariffs I've read – they all have very specific rules for accepting shipments of "extraordinary value." If their tariff is found to be in effect, the argument could be made that the obvious nature of the shipment dictated that the shipment was one of "extraordinary value," with no additional recognition or action by the carrier.

3.) My final question, were I allowed three, would be this – which instance of the B/L would ostensibly take precedent? My thought process is along these lines – if the extra/additional information in each document is authoritative, then my copy and its "declared value" is valid, as is the sticker and incorporation of the carrier's tariff; if the extra information is authoritative, then no declared value is present, but the tariff incorporation sticker is also deemed invalid – no limit of liability. Of course, a judge could just say that mine is toast, next case…or the same for the carrier's.

Answer: Obviously you have a bunch of rather technical legal questions, and without reviewing all the shipping documents and other factual details I can only give you some general answers.

First, the question of packaging. As a general rule, if an item is unpackaged and only secured to a pallet or skid, the carrier shouldn't accept it if it can't be safely transported that way. In other words, by accepting the shipment, the carrier can be said to have "waived" any objection to the packaging.

Second, the question of which version of the bill of lading governs. Unfortunately, this really isn't clear. However, the carrier has a duty to "issue" a bill of lading or receipt to the shipper, see 49 USC §14706, so it would seem that the document that was handed to you by the driver should constitute the legal document. Stickers or notations that were applied afterwards should have no effect, and probably violate the Bills of Lading Act, which makes a criminal offense if one "falsely makes, alters or copies a bill of lading...", see 49 USC § 80116.

Third, you suggest that the carrier is declining your claim based on some packaging requirement in the National Motor Freight Classification ("NMFC") that was incorporated by reference either in the bill of lading or through the carrier's "sticker". In this regard, it should be noted that only carriers that "participate" in the NMFC are allowed to incorporate the rules and packaging provisions of the NMFC. If the carrier is not a "participant" it can't rely on the NMFC packaging requirements, see 49 USC § 13703, so this should be checked.

Lastly, for a qualified transportation attorney near you I suggest checking the website for the Transportation Lawyers Association http://www.translaw.org/.

Freight Claims – Industry Statistics

Question: We referred to you by John Langley Jr., Ph.D. at Penn State University who suggests that you might know the answer, or know how to obtain the answer to the following question: We are looking for some statistics relating to shipping refrigerated coolers/ice cream coolers and the amount of damages that occur for this product industry wide.

We appreciate any information or referrals that you might be able to provide.

Thank you for your time and consideration.

Answer: I am not aware of any source for specific loss or damage statistics for these commodities.

It is possible that some of the major less-than-truckload carriers such as ABF or Yellow-Roadway might keep track of claims by commodity.

The Commodity Classification Standards Board ("CCSB") of the National Motor Freight Traffic Association often considers loss and damage as one of the criteria in establishing the class of articles as published in the National Motor Freight Classification. You can get more information about the CCSB at http://www.nmfta.org/Pages/CCSB.aspx

Freight Claims – Informing Carrier of Cargo Value

Question: Does a truck broker have an obligation to tell the carrier the value of the load the trucker will be transporting so the trucker can make a decision as to whether or not he has enough insurance?

Answer: There is no law or regulation that requires a broker to tell the carrier the value of the shipment. However, it is a very good practice, IF the broker knows that it is a high-value shipment (or one that is very susceptible to theft, hijacking, etc.).

It is possible that the broker might have some liability to its customer (the shipper) if the loss cannot be recovered because the carrier's cargo insurance coverage is inadequate, or the carrier is financially unable to pay for the loss.

Freight Claims – Inspection and Salvage Requirements

Question: I need help regarding a claim issue please. We have contracted carriers that drop/swap on our distribution center ("DC") yard. Our contract states that we have 72 hours to notify the carrier of any discrepancies. If we encounter damage, we reference the National Motor Freight Classification ("NMFC") for clarification regarding the exact number of days for the carrier to inspect the damage and take or render possession. The latest information I have is 15 days for compliance but can you verify or give me the exact wording from regulations? Thank you.

Answer: The National Motor Freight Classification ("NMFC") contains the following provisions about inspection of damaged goods and salvage retention:

> Item 300140 INSPECTION BY CARRIER
>
> Inspection by carrier will be made as promptly as possible and practicable after receipt of request by consignee. Inspection will be made within five normal work days after receipt of request from consignee, excluding Saturdays, Sundays and holidays. A day will be considered as the passing of twenty four (24) hours from 9 A.M., local time from the date of receipt of request for inspection. Inspection of carrier will include examination of the damaged merchandise, the shipping container, and any other action necessary to establish all facts. If a shortage is involved, inspector will check contents of package with invoice, weigh the shipping container and contents, or conduct any other type of investigation necessary to establish that a loss has occurred. In either case inspection will be limited to factual report. Consignee must cooperate with carrier in every way possible to assist in the inspection. A written record of carrier's findings will be made at least in duplicate. The original of the report will be given the consignee for claim support. Any inspection report issued must be incorporated in claim file.

Item 300145 FAILURE TO INSPECT

In the event carrier does not make an inspection the consignee must make the inspection and record all information to the best of his ability pertinent to the cause. Consignee's inspection, in such case, will be considered as the carrier's inspection and will not jeopardize any recovery the consignee is due based on the facts contained in the report.

Item 300150 SALVAGE RETENTION

When visible or open damage to a shipment has been established by notation having been given at time of delivery or concealed damaged established by inspection report, it is the duty of the consignee to retain damaged merchandise and shipping container until carrier desires to take possession of merchandise as salvage. If record conclusively reflects carrier liability, carrier will take possession of the damaged merchandise as soon as possible and in any event, within thirty (30) days from date shipment was noted damaged on carrier delivery receipt or from date of inspection report, if damage was concealed. If carrier does not take possession of the damaged merchandise within the time prescribed above, consignee must contact delivering carrier and request removal of goods from his premises within fifteen (15) days from the date of such communication. The above applies only when the carrier and consignee agree that the carrier will handle disposition of the salvage, and does not in any manner affect the legal duty that the consignee, when there is substantial value in the salvage, must accept and handle it in such a manner as to mitigate the carrier's loss as much as possible. If there is doubt of carrier liability, the carrier will so advise consignee; in which even the consignee may hold the merchandise until liability of carrier is determined, or may dispose of it so as to mitigate the damage, and may file claim for such damage. Carrier will remove the damaged goods within the fifteen (15) day period or advise consignee that carrier liability is in doubt and that damaged merchandise is to be retained by the consignee until carrier has completed investigation of claim.

It should be noted that the federal claim regulations are found in 49 CFR Part 370, Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvge, and these regulations apply to all motor carriers and freight forwarders.

Items 300140, 300145 and 300150 in the NMFC are NOT part of the federal regulations, and therefore they only become applicable by contract (e.g., a bill of lading or a transportation contract), and when the motor carrier is a participant in the NMFC, see 49 U.S.C. 13703(G).

Freight Claims – Inspection of Damaged Goods

Question: We moved an less-than-truckload ("LTL") load via one of our preferred LTL carriers; the product was 1 skid of phosphor bronze strips, National Motor Freight Classification ("NMFC") #30740.

Upon arrival to consignee on 01/13/2010, it was determined that there was damage to the skid; the proof of delivery ("POD") was noted accordingly and a cargo claim was filed with the LTL carrier on 03/19/2010.

On 05/15/2010, the LTL carrier sent a letter stating that they had tried reaching me to schedule an inspection and due to my lack of response, they are denying the claim.

I never received a phone call regarding this; upon receipt of the letter, I contacted my customer to find out if the product was still available for inspection so that I could send an appeal to the LTL company.

If the product is NOT available for inspection, does the LTL carrier have the right to refuse/deny the claim?

Answer: You ask "If the product is NOT available for inspection, does the LTL carrier have the right to refuse/deny the claim?"

Based on the facts as you have described them, this would not be a sufficient basis for denying a claim -- if the claim has been adequately supported and documented.

The NMFC contains the following provisions about inspection of damaged goods:

> Item 300140 INSPECTION BY CARRIER
>
> Inspection by carrier will be made as promptly as possible and practicable after receipt of request by consignee. Inspection will be made within five normal work days after receipt of request from consignee, excluding Saturdays, Sundays and holidays. A day will be considered as the passing of twenty four (24) hours from 9 A.M., local time from the date of receipt of request for inspection. Inspection of carrier will include examination of the damaged merchandise, the shipping container, and any other action necessary to establish all facts. If a shortage is involved, inspector will check contents of package with invoice, weigh the shipping container and contents, or conduct any other type of investigation necessary to establish that a loss has occurred. In either case inspection will be limited to factual report. Consignee must cooperate with carrier in every way possible to assist in the inspection. A written record of carrier's findings will be made at least in duplicate. The original of the report will be given the consignee for claim support. Any inspection report issued must be incorporated in claim file.
>
> Item 300145 FAILURE TO INSPECT
>
> In the event carrier does not make an inspection the consignee must make the inspection and record all information to the best of his ability pertinent to the cause. Consignee's inspection, in such case, will be considered as the carrier's inspection and will not jeopardize any recovery the consignee is due based on the facts contained in the report.

FREIGHT CLAIMS – INVOICE DEDUCTIONS ON TRANSLOADED SHIPMENTS

Question: I purchased *Freight Claims in Plain English – 3rd Edition* but I cannot find legal references to address a predicament we are facing regarding concealed damages.

We are the producer/seller of various paper cartons used for food packaging. We ship to our customer/buyer (which is a distributor) either prepaid or freight collect, in full truckload quantities and the deliveries are both live unload and dropped trailers, depending on which location we ship to for our buyer.

After our delivery, our buyer will then bundle our goods along with our supplier's goods and deliver to their customer, which is typically a fast food restaurant.

Weeks or sometimes months after our initial shipment to our customer, we receive payment from our customer and it often includes invoice deductions. These deductions are for "Concealed Damages". It should be noted that we are not provided with timely or advance notice of damage issues. We find out about it when we receive short paid invoices.

Here is where it gets complicated. The alleged concealed damages are not the result of our shipment to our customer but rather they are due to our customer's shipment to their customer (the end customer which is a fast food restaurant).

When we ship to our customer, the bill of lading ("B/L") is signed "subject to inspection and count" and no damages are noted at that time when we fulfill our delivery to our customer. Additionally, our goods are rarely available for return to us for mitigation. We are led to believe the goods are simply "disposed of".

Our customer is claiming protection under terms of the Uniform Commercial Code ("UCC"). Our customer asserts that pursuant to sections 2-513 and 2-602 of the UCC they have the right to inspect the products they purchase from us "at any reasonable place and time and in any reasonable manner" before paying for them.

Further, they state, "product damage and failure to package products correctly are grounds on which we will reject product shipments for nonconformity". We would obviously agree to that statement but only to the extent it involves our direct shipment to our customer, but not to any subsequent transloaded shipment over which we have no control, visibility or oversight.

My question is, is it proper for our customer to apply invoice deductions for concealed damages on shipments between themselves and their buyer? If so, what recourse do we have to mitigate our losses with either our carrier, their carrier (when the shipment is a CPU from our location) or the transloading carrier that makes the final delivery to the end customer?

Answer: Let me try to address the issues that you have raised.

It is critical to distinguish between shipments that incur transit loss or damage, and merchandise that is "non-conforming". Non-conforming goods typically involve the wrong color, size, and quantity or otherwise are not what the purchaser ordered from the vendor.

The legal relationship between the vendor and purchaser is generally governed by the Uniform Commercial Code ("UCC").

Section 2-513, to which you refer, does state: "Unless otherwise agreed . . . where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after the arrival."

Sections 2-601 et. seq. specify the rights and duties of the parties where the goods or tender of delivery fail to conform to the contract.

For example, section 2-601 states that the buyer may (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest.

Section 2-602 states that rejection must be within a reasonable time after delivery or tender, and requires the buyer to seasonably notify the seller. If the buyer has taken possession of the goods, he is under a duty to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them.

This is not intended to be an exhaustive explanation of the relevant UCC provisions, only a caution that buyers have both rights and obligations when a shipment is delivered with non-conforming merchandise.

I do not think it would be "reasonable" for a buyer to accept and take possession of goods, hold them for some period of time, re-ship them to its customer, and then claim that the goods were "non-conforming".

The legal relationship between the shipper, consignee and the motor carrier is governed by the contract of carriage - a different contract from the contract of sale between seller and buyer.

As for any loss or damage that occurs during the course of delivering your goods to the buyer, the consignee normally has a duty to inspect the shipment upon delivery and to note any exceptions on the bill of lading or delivery receipt. Signing "subject to inspection or count" is never a good practice and makes it more difficult to establish carrier liability when loss or damage is discovered later.

From your description of the facts, it would appear virtually impossible to establish where the alleged loss or damage took place when your buyer makes these deductions. It could be on the original movement to your buyer, while in the their possession, or during the delivery to the their customer. Under the circumstances, you would not be able to meet the burden of proving carrier liability.

My recommendation is to advise your buyer to inspect all goods upon delivery, document any transit overage, shortage or damage ("OS&D"), and promptly report any OS&D to you. Likewise, if the goods are non-conforming within the meaning of the UCC, the buyer has an obligation to reject them and to notify the seller. If they fail or refuse to do this, you should not allow deductions either for transit loss/damage, or for non-conforming goods.

Freight Claims – Is 3PL Liable to Insurance Company For Claim

Question: I have been to several Transportation & Logistics Council, Inc. annual conferences and have made your acquaintance through One Stop Logistics at those events. I am hoping to be able to ask a question of you to gain clarity on a situation my department is facing. I have 2 claims being submitted to me from the same insurance company and I do not believe they should be filed directly with our company.

We are a logistics company ("LC") and provide transportation arrangements and supporting services, such as filing claims on our customers' behalf, as a third party broker. We have a customer, "D" who is a freight forwarder. When they submit claims to me, it is because they have had a claim filed against them. It complicates the claims process by making the true claimant 3 steps away, having to support all claims documents provided to us, and the claim file to D when submitting files to a carrier for processing. Also when arranging for inspections it is a challenging scenario as the freight has generally been forwarded on to destination at the point of notification which does not make for a fair evaluation for the first leg carrier. Trying to think of an amicable solution to that one also...

My situation regarding the insurance company and this customer, D, is that the shipment was insured. Now our customer has provided the documentation to the insurance company who is trying to file the claims directly with us. I felt that this claim is being filed independently of D's relationship with LC and should not be processed through us. We are not the carrier, so in my opinion the insurance company should file with the carrier directly. Am I wrong in thinking this is the correct processing? Should I be processing the insurance claim through to the carrier? The insurance company is currently filing the paperwork with us as though we are a carrier and I have responded with directive of filing with the carrier directly.

Please provide your thoughts on this scenario for me as I feel I need to back this up with legality. I truly appreciate your time taken.

Answer: Before answering your questions, please understand that my responses are without the benefit of reviewing any specific shipment information, claim documentation, etc. My answers and opinions may be different depending upon a review of the claim file. With that in mind, please consider the following:

My understanding of your situation is as follows (please correct any of my assumptions as needed). D is a freight forwarder ("FF"). D hired LC to arrange for transportation on behalf of D's shipper-customers. LC hires carriers to perform the actual transportation services. A shipment is lost or damaged and the shipper (D's customer) files a claim with D. D files a claim with its insurance company. D's insurance company files a claim with LC.

In a typical transaction involving a FF, the FF wears 2 separate hats. As far as the shipper-customer is concerned a FF is considered and deemed to be a **carrier**. However, as far as any brokers or carriers that are hired by the FF are concerned, the FF is considered and deemed to be a **shipper**.

Shipper → *[CARRIER]* -Freight Forwarder - *[SHIPPER]* → Carrier or Broker

When the shipment is lost or damaged, it is appropriate for the shipper to file the claim with the FF. The FF is directly and primarily responsible to the shipper for the loss and must satisfy the shipper's claim. The FF can pay this claim directly or files a claim with its own insurance

company. However, the FF also wears a "shipper's" hat in the transaction and, as such, the FF will file a claim with the Carrier or Broker it hired.

If the claim that is filed by the shipper against the FF is paid by the FF's insurance company, then the FF's insurance company has the right to subrogate the claim against any person that may be responsible. In other words, since the insurance company is paying for the claim, the insurance company is allowed to "stand in the shoes" of the FF with respect to this claim for all intents and purposes, and thus the insurance company can file a claim against the responsible party.

The essence of your questions revolves around whether LC, as a broker, is ultimately "the responsible party." The answers to these questions depend largely on the contracts that are in place between LC and D, and, to a lesser extent, the contracts between LC and the carriers it hired. In the absence of any written contracts establishing the roles, duties and obligations of the various parties, LC's level of liability, if any, will depend upon the facts and circumstances surrounding the relationships of the parties, the shipment and the prior custom and usage.

As a general rule, a broker is not liable for loss and damage claims because the transportation services provided by the broker are typically limited to making arrangements and do not include physical handling or transportation of the shipment. However, this rule is not absolute and there are exceptions, namely:

1. A broker can expressly accept the same liability as a carrier in a written or oral contract.

2. A broker can "hold itself" out to its customers as being a carrier. In other words, depending upon the facts and circumstances, including the broker's actions, the shipper's understanding, prior dealings, etc., the broker may be "deemed" to have acted in the capacity of a carrier.

3. A broker can be liable for any acts of negligence that caused or contributed to the loss. For example, if the shipper instructed the broker to make sure that a shipment was tarped and the broker did not convey these instructions to the carrier and the shipment sustained weather-related damage because the shipment was not tarped, then the broker could be held responsible for the loss.

In light of the foregoing, the answers to your questions are as follows:

1. Should D's insurance company file the claim directly with the carrier that LC hired? The answer depends upon whether you had a contract with D and the terms and conditions of that contract. In the absence of a contract to the contrary, I would fully expect D's insurance company to file its claim against LC. The insurance company is taking the position that D hired LC and therefore D's claim is against LC. Simply put, the insurance company does not care whether LC is a broker or not.

In the event this claim goes to litigation, I would expect that the insurance company will name LC as a defendant in the action. The insurance company may or may not also name the actual carrier that LC hired. Whether LC has exposure on this claim depends on a number of different factors (see above).

I would advise the insurance company that LC is only a broker, it merely made arrangements for the transportation of this shipment, you have forwarded the claim paperwork on to the carrier and any future efforts to recover this claim should be made directly with the carrier. Unfortunately, based on prior experience, even if you give the insurance company this type of notification, I doubt the insurance company will back off its claims against LC. Rather, the insurance company may simply seek recovery from both LC and the carrier itself.

2. Should LC pursue the claim directly against the carrier it hired? Absolutely. You should definitely make sure that a claim is timely filed with the carrier that LC hired and, to be safe, the delivering carrier (if different than the carrier LC hired). If a claim is not timely filed against the carrier, LC **could** be held responsible for the claim on the theory that it was negligent in processing the claim.

3. Some other things to consider are who issued the bill of lading, who was the carrier on the bill of lading, were there any limitations of liability, whether D had a limitation of liability in place that would have limited the amount of recovery D paid to the shipper-customer, and how much did D actually pay to its customer.

FREIGHT CLAIMS – ISSUE OF BROKER FAILING TO PROVIDE SERVICE

Question: We are a freight broker. Our agent quoted a price on an oversize/overweight. The shipper offered approximately $8,000.00 less. The agent said he would try to get a truck for that price but warned if he did the truck might drop off the load for a better paying load. On pick up day the truck claimed it was having a problem unloading and could not make the pick-up. The agent notified the shipper and told him. He also stated he may have a backup carrier but would be at least 6 hours away. The shipper became verbally abusive, said the agent was a liar, never had a truck and they'd have to get one on their own. The agent, in an email, supplied the shipper with the carrier's name and contact number to prove he did in fact have a truck for the load.

After being verbally abused on the phone, the agent gave up on supplying a truck. The shipper's attorney sent us notice that we were liable for $7,900.00 for a waiting crane service and may be liable for ocean charges because the freight missed its sailing. In addition, the attorney threatened that if we did not pay within 7 days, he would initiate legal action for breach of contract, negligence and fraudulent misrepresentation. There was no written contract, there was no signed confirmation. The only agreement was verbal and in that verbal agreement was the warning that the truck might make an alternate pick up for a better paying job. What recourse do we have? I appreciate your input.

Answer: You indicate that the attorney has threatened legal action for breach of contract, negligence and fraudulent misrepresentation.

Since you are a broker, and not a carrier, there would be no liability under the "Carmack Amendment", 49 U.S.C. 14706.

As for negligence and fraudulent misrepresentation, there is a recent line of cases in which such causes of action have been held to be "preempted" by a provision in the Interstate Commerce Act, namely 49 U.S.C. 14501(c)(1). This leaves the "breach of contract" cause of action. Since you say that there was no written contract of any kind, and that the agent warned the shipper that the truck might not pick up the shipment, the plaintiff would have a difficult burden to prove breach of contract.

There is also another possible defense. In an action for breach of contract, "special damages" for delay are not usually recoverable unless there is clear notice in advance as to the need to deliver by a certain date and time, and what the consequences will be for failure to do so. If the shipper did not make it clear that there would be damages for "a waiting crane service" and "ocean charges because the freight missed its sailing", such special damages probably would not be recoverable.

FREIGHT CLAIMS – JURISDICTION IN FEDERAL COURT

Question: Is there a rule that would change the venue from state district court to federal court if a claim were for over 10,000 dollars?

Answer: I assume that you are referring to a loss & damage claim.

If the claim is for loss and damage in interstate commerce, the Carmack Amendment, 49 U.S.C. §14706 (for motor carriers) or §11706 (for rail carriers), will apply. This is a statute

giving rise to federal jurisdiction under 28 U.S.C. §1337, Commerce and antitrust regulations; amount in controversy; costs. The minimum amount for jurisdiction for a Carmack claim is $10,000 for each receipt or bill of lading, 28 U.S.C. §1337(a). Multiple claims under $10,000 cannot be aggregated in order to meet the minimum amount.

This subject is covered in *Freight Claims in Plain English* (3rd ed. 1995) which is available from the Council.

FREIGHT CLAIMS – LIABILITIES AND RESPONSIBILITIES UNDER EXWORKS

Question: A shipment left our facility under "EXWORKS our Whse". Our overseas customer arranged through their forwarder to arrange pickup at our facility. The trucker picked the load up at our facility, but lost the shipment and it was never delivered to the forwarder. When our customer came back to us I notified him he had to put in a claim with the forwarder. He states that the forwarder is not responsible since there is no FCR (forwarders Cargo Receipt) from the forwarder. Since this was EXWORKS, isn't the responsibility our customer's as soon as the material left our warehouse and he should put in the claim?

Anyways, the customer refuses to pay for the material or to put in a claim. I submitted a claim through the forwarder, but their claims department denied my claim stating "Our records indicate that terms were EXWORKS. Under terms EXW, buyer pays all costs, and assumes all risks, from shipper facility. As buyer is rightful claimant claim denied". I have read about filing claims in your *Freight Claims in Plain English* (3rd ed.) books, but I'm not sure what recourse I have with the forwarder. Can you give me some insight/help?

Answer: 1. FILING A CLAIM

It is important to distinguish between who may *file* a claim and who may *recover* on a claim. The person who suffers or bears the loss or his legal assignee is the one who is entitled to recover from the carrier. However, since the requirement of filing a claim is to give notice to the carrier, either the shipper or the consignee may file the claim. "The matter of accounting between a shipper and consignee is of no concern to the carrier." *Thompson v. Rouw*, 237 S.W.2d 662, 666 (Civ.App. Tex. 1951); *Mo. Pacific Ry. Co. v. The H. Rouw Co.*, 258 F.2d 445 (5th Cir. 1958).

Most cases hold that it is of little consequence to the carrier which party makes the notice in writing as long as the notice is sufficient to meet the requirements of a written claim and demand. *Dillion v. Goldstein Refrigerator Line*, 268 P.2d 699 (Sup.Ct. Colo. 1954); *Franck v. Railway Express Agency*, 112 N.E.2d 381 (Sup.Ct. Ohio 1953). *Robinson v. Railway Exp. Agency Inc.*, 329 S.W.2d 242 (Mo.App. 1959). For example, *see Beltrami Co-op Creamery Ass'n. v. American Ry. Express Co.*, 160 Minn. 221, 199 N.W. 568 (Sup.Ct. Minn. 1924), in which the court stated that:

> The purpose is to give notice of the claim and of the transaction out of which it arises so that the carrier may make its investigation. If that purpose is accomplished, the notice is sufficient, even though it is given by the consignee, and the consignor is the real party in interest

2. STANDING TO SUE

The next question is who would have the right to bring a lawsuit to recover the claim. In a recent case, *OneBeacon Insurance Co. v. Haas Industries, Inc.*, ___ F.3.d ___, 2011 WL 802048 (9th Cir. March 9, 2011), the question was whether a beneficial owner of goods had standing to sue for cargo loss when it was not named as the consignor or consignee on the bill of lading. The Court explained the relationship of the parties as follows:

> OneBeacon is the subrogated insurer of Professional Products, Inc. ("PPI"). Around June 2005, PPI purchased three pallets of computer wafers from Omneon Video Graphics ("Omneon"). PPI requested that Omneon ship the wafers directly to the City University of New York, the end purchaser of the goods. Omneon and PPI agreed that Omneon would ship the wafers FOB Omneon's dock. Therefore, ownership of the wafers had passed from Omneon to PPI when the shipment left Omneon's dock.

In discussing whether OneBeacon had standing to sue under the Carmack Amendment, the court took a broad approach in concluding that the beneficial owner had standing to sue:

> A bill of lading is a contract between the carrier and the shipper. *Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co.*, 513 F.3d 949, 954 (9th Cir.2008). As we have noted in other contexts, we apply general principles of contract interpretation when construing a bill of lading. See *Starrag v. Maersk, Inc.*, 486 F.3d 607, 616 (9th Cir.2007) (interpreting a bill of lading in a maritime case). In this case, the bill of lading does not explicitly state who may sue, but OneBeacon offers a compelling argument that the bill of lading entitles PPI to sue.
>
> *5 Throughout, the Conditions of Contract Carriage reference the rights and duties of the "shipper." As OneBeacon notes, the Conditions of Contract Carriage define "Shipper" as "the party from whom the shipment is received, the party who requested the shipment be transported by Haas Industries, and [sic] party having an interest in the shipment, and any party who acts as an agent for any of the above." Because PPI is a "party having an interest in the shipment," it falls within the bill of lading's definition of "Shipper."
>
> We have previously found standing in admiralty and air transport cases that raised similar questions about who may sue under a bill of lading. See *Lite-On Peripherals, Inc. v. Burlington Air Express, Inc.*, 255 F.3d 1189, 1193-94 (9th Cir.2001) (air transport); *All Pac. Trading, Inc. v. Vessel M/V Hanjin Yosu*, 7 F.3d 1427, 1432 (9th Cir.1993) (admiralty). In each of these previous cases, the carrier's bill of lading imposed obligations on the "Merchant" and defined "Merchant" to encompass "a broad range of parties." *Lite-On*, 255 F.3d at 1193. In each case we held that the bill of lading entitled the plaintiff to sue because the plaintiff fell within the bill of lading's definition of "Merchant." *Id.* at 1194; *All Pac.*, 7 F.3d at 1432. In *Lite-On*, we reasoned that a carrier "cannot seek to include a broad range of parties within the contract's definition of 'Merchant,' and then claim that one of those parties has no standing to enforce" the contract. 255 F.3d at 1194.
>
> Although the facts and circumstances of *Lite-On* and *All Pacific* are not identical to those in this case, we find the reasoning of the cases persuasive. We conclude that PPI would have standing to sue because it is a "Shipper" under the bill of lading. As PPI's subrogee, OneBeacon has standing to sue under the Carmack Amendment, so we reverse the district court's standing determination.

In the situation you have described, the shipper-seller of the goods was clearly a party to the bill of lading and therefore entitled to file the claim with the carrier. However, since the shipment was "EXWORKS Our Whse", under the Incoterms, risk of loss passed to the buyer upon delivery to the carrier at your facility.

It would be my opinion that you would have a right to bring suit based on the broad holding in the OneBeacon case, but that you would need to prove that you suffered actual damages. In addition to establishing that your customer refused to pay for the goods, the carrier has the right to demand a letter of indemnity or equivalent to protect it against a possible duplicate claim from the buyer.

FREIGHT CLAIMS – LIABILITY AS BETWEEN TWO FREIGHT FORWARDERS

Question: We are a freight forwarder. We recently had a customer who wanted to do business with us who is also a freight forwarder. If a claim were to arise on a shipment in this scenario, who would ultimately be liable? As a freight forwarder, wouldn't our customer have a liability responsibility to their direct customer who is probably the shipper? And then would we in turn have a liability to our customer? I know this is a weird scenario, because in truth, we operate as a broker, we do not touch the freight in 99% of our transactions.

Answer: In a true freight forwarder transaction, the forwarder issues its bill of lading to the shipper and is liable vis-a-vis the shipper for any loss or damage in transit. That forwarder, in turn, is considered the "shipper" with regard to the actual carrier (or a second forwarder) that transports the goods, i.e., it is a separate contract of carriage. Thus, the carrier (or second forwarder) that transports the goods is liable to the first forwarder under the second bill of lading, and pursuant to its terms and conditions.

FREIGHT CLAIMS – LIABILITY FOR BUG INFESTED FOOD INGREDIENTS

Question: I refused a shipment (800 bags) that came in (FOB Origin), and it was a USP product (Food ingredient and/or processes). It was completely contaminated with multiple bugs (at least 6 different kinds) visible to the eye. All pallets had a lot of insect bugs in between the bags, inside the shrink wrap. The bags have valves, so the bugs can easily crawl in, and lay eggs, etc. To me the load is completely not usable or salable in food processes. We are a distributor, not a manufacturer. Now, what are my rights to refuse, (if any)? I cannot bring this contaminated load into a food grade warehouse and contaminate the warehouse.

The supplier shipper says it left their facility fine, and the driver signed for it in good condition. The carrier blames the supplier (of course), and will not accept any blame. Now, I do not see how that many bugs can get into the material in a short road trip (4 days), but I guess it is possible.

The only this that can be done to the material would be to de-bag and remove bugs, re-bag and sell as industrial material, but the cost of doing that would outweigh the cost of the original product.

Now they are telling me that it is racking up demurrage charges as it sits on the piggy back (rail trailer), as it was picked up by carrier, then dropped off for rail transfer.

Oh, yeah, it was set up by a broker as well.

To this day, no one will take any responsibility, and we have not heard a word from the carrier's insurance either. I am severely frustrated with the lack of acknowledgement.

What can I do, what should I have done?

Answer: From your description of the facts it is not entirely clear whether the infestation occurred during transit, or may have been present when the shipment was made. In any event, since this was food-grade product, it was clearly unsuitable for human consumption.

I suggest that you take action to have the product destroyed, and have the trailer returned to preclude additional detention charges, etc.

You should file a claim in writing with the carrier (if you have not already done so), with detailed description of the condition of the product when it was tendered for delivery, including photos, inspection reports, etc. You should also include a written statement from the vendor/shipper attesting to the fact that the product was in good order and condition when loaded into the trailer and was free from any infestation. Make sure your vendor/shipper also gets a copy of the claim as filed.

If the carrier still refuses to pay the claim, you may need to bring a lawsuit against the carrier. And if you do, remember that you will need to involve the shipper since one of the elements of your case is proof of good condition when tendered to the carrier.

And, lastly, if it should ultimately turn out that the carrier was not responsible, then your remedy would be with the vendor/shipper.

FREIGHT CLAIMS – LIABILITY FOR DAMAGE WHEN VARIOUS PARTIES LOADING

Question: When damage occurs during the process of loading at origin and both the driver and the consignor’s dock worker are helping, to what extent is the carrier liable? Same question for unloading at destination when damage occurs during unloading and both the driver and consignee’s dock work are involved? Finally, what if just the consignee is doing the unloading? Note: there is a section in *Freight Claims in Plain* English (4th Ed. 2009) titled loading and unloading but does not seem to address these points.

Answer: There are a couple of issues here.

1. Did this involve “heavy or bulky freight”? If so, the responsibility for loading and/or unloading would probably be governed by NMFC Item 568 which 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.

2. Which party has care, custody and control of the goods? This would be a factual question depending on exactly what happened. It would seem to me that if the goods were not yet on the carrier's truck, the shipper would most likely be the party having custody/control of the goods, and the carrier's liability, if any, would be based on negligence, and not a breach of the contract of carriage (which would be common carrier liability).

3. Who actually caused the damage? It could be the negligence of the shipper's employee, or the driver, or it could be joint liability if both parties were negligent. Of course, if the damage were clearly caused by the negligence of the carrier's driver (operating the forklift, dropping the package, etc.) the driver's negligence would be attributed to his employer and the carrier would be liable.

As you can see, there is no "black letter" rule on this question.

Freight Claims – Liability for Disposition of Damaged Food Product

Question: We have a carrier that sold our customer's Food Grade merchandise and forwarded $16.00 of the proceeds from the sale to our customer as payment in full for their outstanding claim in the amount of $6,507.93. Because this was Food Grade merchandise my customer had instructed the carrier to destroy the damaged and dirty bags when the consignee refused to accept 41 (50 pound bags) of a particular food additive.

Details: This order shipped on 1/28/11 and delivery was attempted on 2/4/11.

The consignee refused the shipment. On 2/8/11 the carrier attempted to return the freight to the shipper without the authorization of the shipper.

The shipping facility was a Food Grade warehouse, and when the freight arrived, the warehouse agreed that the merchandise was beyond recovery and they subsequently refused to take the merchandise in as well. On 2/9/11 the carrier called the shipper for a disposition. At this point things become a bit confusing. My customer would have instructed the carrier to destroy everything due to contamination. Whether the carrier was contacted by the transportation planner with the disposition on 2/9/11 cannot be confirmed.

That transportation planner is no longer with our company, and the customer insists that the "destroy" disposition was given to the carrier after the consignee refused the shipment on original delivery attempt, 2/4/11.

Then on 2/10/11 the carrier sent over a "Second and Final Request for Disposition" in the form of an "On Hand Notice". Storage charges began on 2/20/11 and continued to accrue until 3/22/11. On 3/23/11 the carrier sold the product.

I asked that the first On Hand notice be sent over for my review. The carrier advised that the first On Hand notice was the phone call that was made on 2/9/11. The carrier's tariff states that if the carrier does not receive disposition within 48 hour of the initial phone call (and NOT the formal On Hand notice that was labeled Second and Final the day following the phone call) the carrier has the right to charge storage. The carrier's tariff further states that the product can be sold 10 days after that.

Is this proper? I've read the requirements for Notice of Refused Freight in your publication *Freight Claims in Plain English*. The information provided in your book would seem to indicate a little more "due diligence" on the part of the carrier. My customer had instructed that the product be destroyed on 2/4/11. Can a carrier disregard these instructions and move forward as though

they were never instructed regarding the steps to be taken and then point to their tariff as evidence that their process was legal and proper? Is the carrier allowed to proceed as they wish based on the incorporation of their tariff via the bill of lading even though my customer had given a specific destroy disposition after the initial delivery attempt where the consignee refused the shipment due to contamination?

I don't like the fact that the carrier decided that because they didn't want to be stuck with the bill, they completely ignored the instructions that they were given and proceeded to make money on the damaged product while my customer received $16.00.

Answer: If a Uniform Straight Bill of Lading was used, and it had the usual language that incorporated the carrier's rules tariff(s), then the procedure set forth in the tariff would probably be enforceable as to the notice requirement, storage charges and sale of the goods. If not, then the tariff procedure would not be applicable or binding on the shipper, and if the carrier sold the shipper's property without authorization it could be held liable for conversion.

You indicate that the carrier sent a check for $16 as "payment in full" for the claim. First, the check should NOT be deposited, or it could be considered an "accord and satisfaction", i.e., an acceptance of that amount. Second, the claim should be for the value of the goods, usually the invoice price to the customer, less the salvage amount. The fact that the carrier may have sold the goods for salvage does not alter its liability for the loss or damage to the goods.

If the tariff provisions were incorporated through the bill of lading and were applicable, and the carrier complied with the procedure set forth in the tariff (and any other applicable provisions of the Uniform Commercial Code or state statutes), it probably had the right to sell the goods and to apply the proceeds to the shipper's claim.

On the other hand, if the carrier sold the goods for salvage instead of destroying them as requested by the shipper, the carrier could be liable for any resulting product liability claims or damages.

In any event, whether the goods were sold for salvage or destroyed does not change the carrier's liability for the loss of or damage to the goods, and it still remains liable for the shipper's full actual loss - the invoice value of the goods (less the salvage proceeds).

FREIGHT CLAIMS – LIABILITY FOR DROPPED TRAILER AFTER UNLOADED

Question: I downloaded some question and answer information from your web site, and one section is titled "Shipper Liability for Dropped Trailers". We are a carrier and are trying to determine who is liable if one of our trailers is dropped at a facility. There is an answer to this question in the document
I downloaded but I wonder if you could elaborate on it and give me more specific guidelines?

Would the same apply if the trailer was dropped then stolen? And, who is responsible for a missing trailer if it is stolen after delivery is made; specifically if the trailer is unloaded and then moved to a "dropped trailer" location on the property?

Answer: I assume that you are asking about the carrier's liability for loss, damage or shortage when the carrier has "dropped" a trailer at the consignee's facility for unloading at a later time. This practice often leads to disputes over liability because there is no carrier representative or driver present to verify the damage or shortage when the trailer is later unloaded and the goods are inspected and counted.

To minimize shortage claims, I recommend to carrier clients that all full trailer loads should be sealed by the shipper at origin and the seal number noted on the bill of lading; at destination the consignee should be asked to inspect the seal, note the seal number on the delivery receipt and the fact that the seal was intact. If the shipper's original seal is intact at the time of delivery,

and there is no evidence of tampering with the seal (or the doors, hinges, etc.) then there is a strong presumption that the shortage did not occur in transit, and the carrier should not be liable.

Common carrier liability does not end until transportation of a shipment is completed. Transportation is not completed until a shipment has both arrived at its destination and has been delivered; see *Danciger v. Cooley*, 248 U.S. 319, 327 (1919). The test enunciated in the court decisions is whether anything remains to be done by the carrier to effectuate delivery, see *Tokio Marine & Fire Ins. Co., Ltd. v. Chicago & Northwestern Transportation Co.*, 129 F.3d 960 (7th Cir. 1997). This subject is discussed in *Freight Claims in Plain English* (4th Ed. 2009), which is available through the Council.

If the carrier has "dropped" a trailer and the consignee has acknowledged receipt of the trailer, it would appear that there is nothing further to be done by the carrier. Accordingly, there has been a "delivery" so that the carrier's liability has ended. If the trailer is subsequently stolen, the carrier would not be liable for the goods.

With regard to a dropped trailer that has been unloaded, in the absence of any other agreement, the consignee would be considered a "bailee" and would have a legal obligation to exercise reasonable care over the equipment that is in its possession.

What would constitute "reasonable care" is a factual question that depends on the particular situation. The burden would be on the carrier to prove that the consignee was negligent in some way, i.e., failed to use reasonable care (inadequate security, etc.), and that the negligence caused or contributed to the theft.

FREIGHT CLAIMS – LIABILITY FOR FAILURE TO SEAL LOAD

Question: Receiver hires a carrier and promptly provides the carrier with a load confirmation (exempt perishable commodity) that states that the carrier must ensure the load is sealed. Carrier arrives at shipper's dock and is given a bill of lading that doesn't say anything about a seal. Driver inquires about the discrepancy and is told no seal is required on this load. Driver accepts this (it's after hours and he can't get a hold of dispatch) and pulls away without a seal. The rest is predictable---the receiver rejects because of a lack of a seal and suffers losses despite efforts to mitigate. Does receiver have a carrier claim? Also, is there any merit to the carrier's claim that the bill of lading must be considered "the contract" even though the receiver hired the carrier?

Answer: This is a tough question.

The carrier is right in pointing out that the bill of lading is normally considered "the basic contract of carriage", see e.g., *C.A.R. Trans. Brokerage v. Darden Restaurants*, 213 F.3d 474 (9th Cir. 2000).

However, it appears that this was essentially a "customer pickup" where the consignee made the arrangements with the carrier, which were confirmed in a written "rate confirmation". Thus, as between the consignee and the carrier, there was a separate "contract of carriage" that was binding on the parties.

The failure of the driver to insist on a seal for the trailer would be a breach of the contract between the consignee and the carrier.

The questions then become:

1. Did this failure justify rejection of the shipment?
2. Was there a duty to mitigate the loss?
3. What is the proper measure of damages?

As to the first question, it must be determined whether the carrier had actual or constructive notice that the consignee would reject the shipment if it arrived without a seal.

As to the second question, I am sure that the carrier will argue that there was no evidence of any damage to the produce itself, and that the consignee should have accepted the load, or at least arranged for salvage.

The third question depends on the answers to the first two questions. However, I would make the general observation that courts are very sensitive to situations involving food or food products intended for human consumption. Even the mere possibility of exposure to foreign substances or contamination may be sufficient to justify rejection of a shipment and/or destruction of the product. I am not aware of a court decision directly on point, but there are decisions involving broken or missing seals where the carriers have been held liable.

FREIGHT CLAIMS – LIABILITY FOR IMPROPER LOADING

Question: I ordered carts from my vendor and he was to ship them to my customer that was 1900 miles away. The customer sent in his own carrier to pick up the carts. When they received them, they were damaged.

The vendor did not block and brace the shipment and the driver for the carrier watched as they loaded the material, handed them a load bar and they put it across the shipment. When the materials arrived they were badly damaged and now the carrier refuses to honor the claim stating that the shipper did not secure the load and the shipper is stating that they did not order the truck. Who is responsible for this damaged material? Is it the carrier or is it the shipper or both?

Answer: There are a couple of issues here:

1. If the customer made the arrangements with the carrier, it is likely that the customer had a transportation agreement with that carrier, and that the contract would contain specific provisions governing loss or damage in transit. You should first check this out with the customer.

2. Under the court decisions interpreting the "Carmack Amendment" (49 U.S.C. §14706), the shipper need only prove that it tendered the shipment to the carrier in good order and condition, that it was delivered in damaged condition, and its damages. The burden is then on the carrier to prove that the cause of the damage was a specific exception such as the "act or default of the shipper", AND that it was free of any negligence. See *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 337 U.S. 134 (1964), *reh. den.*, 377 U.S. 948.

From your description of the facts, I don't see how the carrier can prove freedom from negligence in its handling of your shipment. I suggest that you remind them of the law, and demand payment of your claim.

I would further observe that the carrier has primary responsibility to ensure that the load is properly blocked, braced and secured. If the driver was present and had opportunity to witness how the goods were being loaded, and accepted the shipment with full knowledge of the conditions, the carrier has essentially "waived" any objection to the shipper's loading.

FREIGHT CLAIMS – LIABILITY FOR IMPROPER SECUREMENT

Question: A live load (full truckload) was shipped on a standard bill of lading ("B/L"). The load was not blocked and braced and during transit it shifts, falls over and is damaged. Who bears the responsibility, the shipper or the carrier? The shipper loaded the truck and the carrier was on hand during the loading. There were no loading or unloading agreements with the carrier.

Answer: Carriers are presumed to have the knowledge and expertise on the proper loading of freight. Therefore, even though a shipper loads or assists in the loading of a trailer, the primary responsibility for safe loading (blocking, bracing and load securement) is on the carrier. This is reflected in the federal safety regulations, e.g., 49 CFR 392.9, 49 CFR 393.100, etc.

As with any rule, there are exceptions and one is that the improper loading or defect be "patent" and not "latent". What this means is that the improper loading condition has to be apparent and visible to the carrier, and not hidden so that it can't be seen. From your description, however, the carrier's driver was present and observed the loading of the freight, so I don't think this exception would apply.

Lastly, under the "Carmack Amendment", a carrier is liable for loss or damage to goods in its possession unless it can prove that the sole cause was one of the basic exceptions such as an act of God, act or default of the shipper, etc. AND that it was free from any negligence. In this case, the carrier would not be able to show freedom from negligence if the driver witnessed the loading and still accepted the shipment.

FREIGHT CLAIMS – LIABILITY FOR LOSS FROM SEALED TRAILER

Question: Retailer A hires Carrier B to go to Television Vendor C to pick up 88 units of 44 inch plasma televisions. This shipment is a live load. Carrier B has access to validate the count and condition of the freight. The freight is loaded on the trailer and the vendor applies seal 123 to the trailer. The seal number is written on the BOL by the Television Vendor C and is signed by the carrier

The shipment arrives at Retailer A's distribution center. This shipment is a live off load. The distribution center validates that the shipment arrived with the original seal applied at origin intact. The shipment is off loaded. The shipment is short 48 units. The Bill of Lading is signed short.

Who is liable? In your experience, if this scenario were to occur numerous times, where would the loss be occurring?

Answer: We have actually had cases with similar facts.

There are three possibilities: (1) the merchandise was never loaded into the trailer (or was removed at the shipper's facility before the seal was attached; (2) the trailer was somehow opened during transit without breaking the seal; or (3) the merchandise was stolen after delivery at the consignee's facility.

Obviously, some serious detective work is needed - interviews and statements from representatives of the shipper, consignee and carrier that have actual knowledge of the facts, a careful review of original shipping documents, an inspection of the trailer, a review of inventory records, checking security cameras, background checks for criminal records of the people involved, driver's trip logs, etc.

As you know, the claimant's burden of proof ("prima facie case") is to establish, through credible evidence, that the merchandise was received by the carrier at origin, and was not delivered at destination. If this can be done, the burden shifts to the carrier, which has only limited defenses (act of God, act or default of the shipper, etc.) The carrier has to prove that one of these exceptions was the cause of the loss and that it was free from negligence.

The fact that a trailer or container was sealed at origin by the shipper, and the seal was intact when delivered to the consignee is usually considered good evidence that a shortage did not occur in transit. However, this alone is not a legal defense that would relieve the carrier of liability, if the shipper has established its prima facie case as stated above.

I would note that there have been many reports of thefts from sealed containers or trailers in which it was found that there was tampering with locks, locking bars, hinges, etc. and that some seals can be opened and re-sealed in a manner that is difficult to detect.

In the situations where the carrier drops trailers, and there is no live unload with the driver present, my suspicion is that most of those shortages occur at the consignee's facility. Otherwise, I would not give an opinion without specific facts.

FREIGHT CLAIMS – LIABILITY FOR LOSS FROM SEALED TRAILERS

Question: We are having some issues with trucking companies not wanting trailers to be sealed when they leave here. As of now we only seal full trailers and those that drivers request to be sealed. Our policy here is the driver must count and sign for the cases. Shipper load & count ("SL&C") and "Said to Contain" ("STC") is not permitted. Would sealing these trailers even after the driver counts the boxes and confirms the correct count still make our company liable for shortages?

Answer: I assume you do not have a formal transportation agreement with your carriers that covers subjects such as SL&C, sealed trailers, etc.

In the case of a true SL&C (truckload) shipment, that is loaded and counted by the shipper without the driver being able to observe the loading or count the goods, and the trailer is sealed by the shipper and delivered with the origin seal intact, there is a presumption that any shortage upon delivery did not occur during transit. (This can of course be challenged if there is any evidence of tampering with the seal or the locks, hinges, doors, etc.)

However, you indicate that all your shipments are witnessed and counted by the drivers, that they sign for the actual package count, and that they are not allowed to sign "SLC/STC" on the bill of lading.

If so, I can't see how applying a seal - whether it is a full truckload or an LTL shipment - would shift any liability back to your company as the shipper.

FREIGHT CLAIMS – LIABILITY FOR MISDELIVERY

Question: Here's the situation:

Our company manufactures industrial products transported via flatbed. Over the past few years our load mix has become increasingly multi-stop truckload. All units shipped have a large barcode label attached with all pertinent shipment and product information. Many of our products look similar so the labels are crucial to differentiating the products and shipments.

Last month we had a two-stop load to GA-- 4 units going to customer A and 4 units to customer B about 50 miles down the road. The deliveries were both made without exception. A couple days later we learned both customers had the opposite customer's freight.

We called our 3PL (broker) and asked them to correct the problem. They refused to do so. They told us they're not responsible for sorting the product and that our customers must confirm receipt of the correct shipment before signing the bill of lading ("B/L").

I disagree. I maintain the driver/carrier has responsibility for knowing what is loaded on their truck, and is responsible for making sure the units identified on the B/L, and noted on the shipping labels, are delivered to the correct customer. Furthermore, the customer should not be expected to hunt through the truck to find their product when the driver was present at the time of loading and should know what shipments are where on their truck. To say this carrier has no responsibility would be like saying it's OK for an LTL carrier to arbitrarily peddle the goods off the back of their truck without regard to who gets what. Absolutely not.

What say you? Are there legal grounds for this argument?

Answer: The law is clear that a carrier has a contractual obligation to deliver to the named consignee on a straight bill of lading (or holder of an order bill of lading), and is liable for damages if it does not do so. The Bills of Lading Act, 49 U.S.C. § 80111, provides:

§ 80111. Liability for delivery of goods

(a) General rules. - A common carrier is liable for damages to a person having title to, or right to possession of, goods when -

(1) the carrier delivers the goods to a person not entitled to their possession unless the delivery is authorized under section 80110(b)(2) [the consignee named in a nonnegotiable bill] or (3) [the person in possession of a negotiable bill] of this title;

(2) the carrier makes a delivery under section 80110(b)(2) or (3) of this title after being requested by or for a person having title to, or right to possession of, the goods not to make the delivery; or

(3) at the time of delivery under section 80110(b)(2) or (3) of this title, the carrier has information it is delivering the goods to a person not entitled to their possession.

For a further discussion and references to court decisions involving misdeliveries, see Sections 11.3.2 and 11.3.3 in *Freight Claims in Plain English* (4th Ed. 2009).

Freight Claims – Liability for Returned Product

Question: I have a liability question. A receiver rejected 3 pallets from a shipment. The receiver then wrote on the bill of lading the quantities rejected and a brief description of the product. The carrier brought them back to our customer. When our customer checked the rejected product, they did not find the same stuff or the quantity written down on the bill of lading. The driver said he took the bill of lading and just drove the product back to our customer. In this scenario where does the liability lie?

Our customer is telling us that the driver is responsible for checking product rejected against the bill of lading given to him. Does the driver have that responsibility to check correct product and quantity that is written on the bill of lading?

Answer: The first questions are:

1. Why were the 3 pallets rejected?
2. Is it possible that these were non-conforming goods (not what was ordered, wrong size, wrong color, etc.)?
3. Was there damage and if so, what was the condition noted at the time of delivery?

If there was damage and the nature and extent of the damage to the goods can be proven, then there would be a claim against the carrier for the damage to the 3 pallets of goods.

As for the return of different goods, I think you need to get more facts. You should check with the consignee to find out what happened -- it is possible that someone in the consignee's facility may have substituted different goods. It is also possible that the carrier may have mis-delivered 3 pallets from some other shipment.

It would certainly seem reasonable that a driver would check to see if the goods tendered match the bill of lading. However, in the circumstances you described, I don't see how it affects liability.

FREIGHT CLAIMS – LIABILITY FOR TARP FAILURE ON CROSS BORDER SHIPMENT

Question: A carrier picked a load up in U.S. on 12/17 for delivery in Mexico. The U.S. carrier dropped the trailer at the border crossing where it was then picked by another carrier for crossing the border and delivery to its final destination by that carrier. The bills we have when the U.S. carrier dropped the trailer at the customs broker are clean, but the paperwork at the final destination shows the product was wet.

The wet product appears to have been caused by a tarp that was in poor condition, a tarp that was provided by the U.S. carrier. It has taken the consignee in Mexico 8 months to determine which product was salvageable and which was not, and we are only now receiving the claim.

Which carrier, if any, would be liable for the damages? There were notes on the original B/L that stated, and is signed by the carrier, "...load must be fully tarped and I am responsible for any wet or damaged material.."

Answer: The answer could depend on whether the shipment moved under a through bill of lading ("B/L") or under separate B/Ls (one to the border, and a new B/L from the border to destination).

From the documents available, the first carrier issued a B/L to Nogales, AZ with a stop at Tucson, AZ. From Nogales the shipment was carried by a Mexican carrier to the final destination. There was no through B/L from the U.S. to the destination in Mexico.

Under the "Carmack Amendment", a receiving carrier is liable for loss or damage to goods while they are in its possession or in the possession of a connecting carrier. However, on a shipment to an adjacent foreign country (Mexico or Canada), the receiving carrier is only liable if there is a through B/L from the U.S. to the foreign destination.

If there was no through B/L, delivery to the Mexican carrier would end the liability of the receiving carrier. Since there is no evidence that the damage occurred before the shipment was delivered to the Mexican carrier, I don't see how the receiving carrier would be liable.

I don't think that you can sustain an argument that the notation on the bill of lading to tarp the load, and that "I am responsible for any wet or damaged material" can be extended to cover the loss if the damage actually occurred while the shipment was in the hands of the Mexican carrier.

You can file a claim with the Mexican carrier, but note that under Mexican law, a carrier's liability is very limited.

FREIGHT CLAIMS – LIABILITY FOR WET BOXES

Question: One of my colleagues gave me your name and thought you might be able to help me out.

My operation supports a retailer who sells a wide variety of products from many different vendors, direct to customers. Product arrives on day X and by date X+3 days is sold and out the door.

Many of the products they sell must be shipped to the final customer in the original retail cartons that they arrive in.

If the box is wet they cannot ship to a final customer and they can't repackage it. Due to the nature of the business they can't get a supplier to get them retail boxes (typically from overseas) in the small window of time they have (3-5 days) between receipt of product to when they must ship it.

With that in mind, when we file a claim on their behalf for product that arrived in wet boxes, the carrier refuses saying that the internal product is OK. Our customer's response is that because they can't sell it the carrier must pay for it.

I am in process of seeing if the customer returned it (not likely), sold it at their outlet store (possible), or are just sitting on it (most likely).

The carrier does not want the items as they can't do anything with them. At this point we have not attempted to settle for a reduced amount but may go down that path if we can't decide how strong our position is.

Does the carrier have any obligation to settle this claim?

Answer: Customers generally do not want to purchase consumer products if the retail packaging is damaged, and in many cases the goods are virtually unsaleable if the package is wet or otherwise damaged. Manufacturers are also concerned about their trade name, image, and exposure to product liability claims and don't want damaged goods to enter the stream of commerce.

The problem is that there is a duty to "mitigate the loss". In most cases, this means that there must be some reasonable effort to salvage the goods, in your case by repackaging the goods or selling them as distressed merchandise or through a outlet store. If the goods are to be sold as distressed merchandise, you do have the right to have them marked as "seconds" or "damaged", etc.

The legal test, as discussed in the court decisions, is whether the goods are "substantially worthless", i.e., there is no feasible way to repackage them at a reasonable cost or to sell them as distressed merchandise. If so, then the goods should be destroyed and the carrier should pay the full value.

FREIGHT CLAIMS – LIABILITY LIMIT ON RETURNS

Question: As an ICC Practitioner and College of Advanced Traffic claims instructor, I sure believe the attached Old Dominion claim rule is a violation of the Carmack Amendment. Our company is contesting Old Dominion's declination of our damage claim on shipment of strapping that was returned from a customer and damaged by Old Dominion. The customer was not returning damaged freight but perfectly good freight. May I have your opinion of this matter?

The tariff provision is ODFL 100-F, section 594 A (n)

MAXIMUM CARRIER LIABILITY - ARTICLES OF EXTRAORDINARY VALUE

> (n) Liability for loss, damage or destruction of property being returned to the original shipper, which was not initially transported by ODFL, from the original shipper, will be limited to lost freight only and ODFL will not be responsible for damages.

Answer: A carrier is liable for loss or damage to goods in its possession. It does not make any difference whether the goods are being returned from a customer to the shipper-vendor. The only thing to remember is that the claimant still has the burden of proving that the goods were in good order and condition when tendered to the carrier for the return movement, and that they were lost or damaged when delivered back to the vendor.

FREIGHT CLAIMS – LIABILITY LIMITATION BY CLASS

Question: We are a small freight brokerage firm. A customer asked us for a quote to move 7 pallets of "Aluminum Trays", class 55, that weighed 6,560 lbs. We quoted them $985.00 and

shipped it via a common less-than-load ("LTL") carrier (Old Dominion Freight Line ("ODFL")). We did not discuss the value of the shipment.

The receiver (our customer was the shipper) signed 6 boxes crushed. They never told our customer (the shipper) of the problem. The shipper sent them an invoice for the merchandise for $31,328.20 and they just short paid $830.70.

Our customer never paid us because of the short payment. We filled a claim with the LTL carrier, which was declined. This is what they wrote:

> Your shipment falls under the Old Dominion Freight Line maximum liability tariff 100 Item 594. This item covers shipments of extraordinary value based upon the class of the items shipped. The maximum value allowed will be that which is shown in Column B opposite the Class indicated in Column as follows:
>
> Class 55 Column B Max. Value per lb. $2.00.
>
> Your claim is declined as filed. Upon receipt of an amended claim the file will be reopened and brought to a conclusion. Please reference the ODFL Claim number on all correspondence. The amended claim amount would be 335 pieces by 6,560 lbs. = $19.59 lbs. each, then 19.59 x 6 (damaged) = $117.54, and 117.54 x $2.00 - $235.08, as this shipped at a Class 55.

So my question is this: Is our customer right not to pay us?

Old Dominion Freight Lines does offer us a "Choice of Rates" based on the freight class. In other words, the rates they quote us are based on the freight class. The higher the class the higher the rate.

So I believe our customer is wrong here. They should not expect to get such a high coverage for class 55. What do you think?

Answer: There are two issues here.

First, ODFL (and a few other carriers) has established liability limitations in the rules tariff that are tied to the NMFC class of the item as shown on the bill of lading. Item 594-A, sub.(a) contains a table of classes and maximum values per pound: class 55 has a maximum value per pound of $2.00. To determine whether the limitation is applicable, I would need to look at the actual bill of lading that was used.

Whether the limitation is enforceable is another question. As a general rule, established by numerous court decisions, a carrier must offer a "choice of rates" in order to have an enforceable liability limitation. ODFL's tariff Item 594-A, sub.(i) states:

> Carrier does not provide or furnish excess declared value insurance or excess liability coverage and declaring request for same on bill of lading shall have no effect to carrier.

In my opinion, a court would find that the liability limitations in this Item are unenforceable.

Second, if the shipper used a Uniform Straight Bill of Lading that incorporated the Classification and the carrier's tariffs by reference, the shipper was on notice that there could be a liability limitation, and that it should have checked the carrier's tariff. In other words, the fact that the carrier limited its liability for the loss does not justify failure to pay the freight charges.

The classification of an article is determined by the description of the article in the National Motor Freight Classification. I believe that "Aluminum Trays" should be under Article 13120, which has density ratings from class 70 to class 400. I don't know where you came up with class 55. If the shipper put class 55 on the bill of lading, it misdescribed the commodity (probably in order to get a lower freight charge). The carrier should have rated the bill of lading at the proper class in Article 13120 and charged the appropriate (higher) rate. If it had done so, then a higher liability limitation would have been applicable.

FREIGHT CLAIMS – LIABILITY LIMITATIONS

Question: We process claims for our customers. In our agreement with the customer under our rules it states that the "release value for cargo liability shall not exceed" a certain dollar amount. Can they file a claim for that liability limit for the product itself and then also file for the freight cost as well? So if the freight cost was $1200 can they file for the limit amount plus the $1200?

Answer: If the carrier has an enforceable liability limitation in its tariff, that amount is the maximum amount that can be recovered.

It doesn't make any difference whether the claim is for a delivered price (which includes the cost of transportation) or whether it is stated as an origin (cost) price plus freight.

FREIGHT CLAIMS – LIABILITY LIMITATIONS ON DOUBLE BROKERED LOAD

Question: We are a brokerage company and we recently brokered a load knowingly to another brokerage company. They, in turn, gave this load to a motor carrier, but we were not advised of who the actual carrier would be on the load. The product was a used piece of machinery that was purchased at an auction by our customer. Our customer was given a statement from the auction house that the equipment, although used, was still in good condition and in working order.

During unloading at the receiver, it was discovered that considerable damage had occurred. Pictures were taken while the machine was still on the carrier's trailer that clearly showed nuts and bolts from the machine all over the trailer. The machine was offloaded and tested and it was determined that it no longer worked and was not able to be repaired. The claim is for $18,000.

The receiver is still holding the machine so that it can be picked up for possible salvage. The brokerage company that we brokered the load to has decided to step out of the claim and has referred us to their carrier. Their carrier is now requesting that the claim be amended based on their tariff for Used Equipment and that the value will not exceed $.10 per pound, which in this case would total $390.

Neither party has shown any interest in trying to salvage this machine and we are prepared to try to salvage it ourselves in the interest of mitigating the loss. Now that we know who the carrier is, we know that we have used this carrier in the past independent of the broker used on this load, so we do have a carrier contract on file. Our contract states that tariff rules are only valid if both parties agree to them in writing - which we have not.

Since we did not book this carrier directly on this particular load, would our contract be applicable in this case? If not, is it possible that we would be required to abide by their tariff? Does the brokerage company we booked the load with have any liability in this case?

Answer: Although your company had a "carrier contract" with the motor carrier, this particular shipment moved under a different arrangement - between the second broker and the carrier. Under the circumstances, I don't think that you can rely on your carrier contract or enforce its provisions relating to tariff liability limitations.

Whether the second broker has any liability is another question. Apparently you did not have any formal contract with the second broker and did not explicitly tell the second broker that the shipment should not be moved at the carrier's limited liability for used equipment. In the absence of specific instructions, and unless the second broker had some similar provisions in its arrangement with the carrier that would preclude application of the liability limitation, the second

broker would normally be free to make the usual and customary arrangements for this type of shipment.

There is one other question, and that is whether the carrier's liability limitation is enforceable. This would depend on whether the bill of lading incorporated the carrier's tariffs, whether the carrier actually did maintain an applicable tariff, and whether there was a choice of rates, see *Freight Claims in Plain English* (4th Ed. 2009) at Section 8.0.

FREIGHT CLAIMS – LIABILITY LIMITS ON INTERNATIONAL SHIPMENTS

Question: We are a Canadian subsidiary of an American pharmaceutical company. We broker most of our loads (truckloads) that are moved from the U.S. to Canada. The value of the shipments usually average 6 to 7 million U.S. dollars. The values are never declared on the bill of lading ("B/L"). All the carriers used for these shipments are Canadian. The shipper in the U.S prepares the B/L and the freight invoices are paid in Canada.

In case of a claim, my understanding is that the maximum carrier liability will be $2.00 per pound. Our company has insurance covering damages with a $10,000.00 deductible. The broker has insurance covering damages up to $500,000.00. My question involves the possibility of a claim involving a loss of $4 million, for example. We will file a claim with the transport company for a value of $2.00 per pound and the difference will be claimed with our insurance company. Can our insurance company go back to the broker or the transport company and ask them to pay the difference? Do they have to take extra insurance to cover themselves in case such an event happens?

Answer: The insurance company will have a subrogation action against the transport company (carrier) for the loss (you should note that brokers are generally not liable for loss, damage or delay claims). The insurance company will only be able to collect to the extent the carrier is liable and will be bound by any applicable liability limitations the carrier has in place to cover such shipments.

Shipments originating in Canada (inter/intra provincial or from Canada to the U.S.) are subject to Canadian law and regulations. Truck bills of lading in Canada have a liability limitation ($2CD per pound) unless the shipper declares a value and pays an additional valuation charge.

Shipments originating in the U.S. and destined to an "adjacent foreign country" (Canada or Mexico) under a through bill of lading are governed by U.S. law, namely the "Carmack Amendment", 49 U.S.C. §14706.

Under the Carmack Amendment, a carrier is liable for the "actual loss" (full value) unless there is a written agreement to limit the carrier's liability. Such an agreement can be in a formal transportation contract, or it can be in the carrier's bill of lading and/or tariffs that are incorporated by reference through the bill of lading.

In any event, if a shipment moves subject to a "released rate" or some other form of liability limitation that complies with certain minimum legal requirements for enforceability, that amount is the most that a carrier will have to pay. It makes no difference if the claimant is a shipper, consignee or owner of the goods, or if it is an insurer that has subrogated to the rights of the claimant after having paid a claim under its insurance policy.

If you are shipping high value goods in the United States, it is imperative to check very carefully whether the carrier has a limitation of liability in its bill of lading or an applicable tariff. If so, you may be able to declare a higher value and pay an additional valuation charge. Another option is to accept the lower rate with the liability limitation and obtain sufficient insurance ("inland marine" coverage) to protect your interests.

Lastly, we always recommend that shippers have a properly drafted transportation contract with their carriers that clearly spells out the respective duties and obligations of the parties.

FREIGHT CLAIMS – LIABILITY LIMITS WITH THROUGH BILL TO MEXICO

Question: Our client uses a carrier to ship truckloads to a customer in Mexico from Albion, IL. Our client gets one bill from the carrier for the whole trip - from origin in U.S. to destination in Mexico. Their agreement with the carrier is that it can choose whichever Mexican carrier they want to move the load from the Mexican U.S. border to the customer in Mexico.

On a recent load while the freight was on the Mexican carrier's equipment the freight was damaged. My client filed a claim with its carrier. The carrier denied the claim stating that the freight was not in their possession and therefore they have no liability. Aren't they liable in this case?

Answer: Many U.S. carriers are now including provisions in their rules tariffs that purport to relieve them of any liability on U.S. - Mexico shipments if the loss occurs in Mexico.

The Carmack Amendment, 49 U.S.C. §14706, is applicable to any shipment moving under a through bill of lading FROM the United States to an adjacent foreign country (Mexico or Canada). Thus, the receiving carrier in the U.S. would be liable for loss or damage regardless of whether it occurred in the U.S. leg or the Mexican leg of the movement.

This principle is illustrated in the case of *Tempel Steel Corp. v. Landstar Inway, Inc.*, 2000 WL 528057 (7th Cir. 2000).

The Landstar 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 §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 Canada or Mexico - that carrier would be liable even if the loss occurred in the adjacent foreign

country on the lines of a connecting carrier. Furthermore, the issuance of a second bill of lading by the connecting carrier would not change this result.

This does not completely answer your question, because under the Carmack Amendment, a carrier may LIMIT its liability by written agreement with the shipper (this is most often done through the bill of lading that incorporates a limitation of liability in the carrier's tariff). Thus, if there is an enforceable tariff provision, the carrier could limit its liability to a specified amount - such as $10.00 per pound - but it cannot say that it has NO liability.

FREIGHT CLAIMS – LIABILITY OF BROKERS

Question: What is the liability of a broker for freight claims and what is the statutory basis?

Answer: Brokers are generally not liable for loss and damage claims in the same manner as carriers. The "Carmack Amendment", which is codified at 49 USC §14706, applies to the liability of carriers (motor carriers and freight forwarders) for loss or damage to goods in transit. It is <u>not</u> applicable to brokers, as such, see e.g., *Custom Cartage, Inc. v. Motorola, Inc.*, No. 98C5182, 1999 WL 965686 (N.D. Ill. Oct. 15, 1999) and the extensive discussion of broker liability in the 4th Edition of *Freight Claims in Plain English* at Section 13.2 (which you really should have for your reference library).

However, while brokers are generally not liable for loss and damage claims, they may become liable to the shipper under the following situations:

A) Where the broker holds itself out to be a carrier. Many brokers represent themselves or advertise in such a manner that the customer believes them to be a trucking company. Brokers are often reluctant to let their customers know that they are brokering freight, and are not really carriers.

B) Where the broker is negligent. Even though the broker does not physically handle or transport the goods, its acts or omissions can constitute negligence, giving rise to a cause of action by the shipper. Examples could include: failing to give proper instructions to the carrier for protective service requirements; failure to ascertain if the carrier has proper operating authority, insurance or a satisfactory safety rating, etc.

C) Where the broker has assumed liability by express or implied contract. Brokers and third party logistics providers often agree, in order to sell their services or retain a good customer, that they will be responsible for claims. Some brokers pay claims directly to their customers, and then seek indemnification from the responsible carrier.

To summarize: The legal cause of action for loss or damage against a broker is NOT based on the Carmack Amendment, unless the court should find that the "broker" actually acted as a motor carrier or freight forwarder. If the broker was not acting as a carrier or forwarder, its liability would normally have to be based on common-law negligence or breach of an express or implied contract.

FREIGHT CLAIMS – LIABILITY ON "MINIMUM CHARGE" SHIPMENT

Question: Many of the carriers are now limiting their liability to so much per pound. What is your opinion if a shipment moves under a limited liability provision; does it matter if the shipment was a minimum charge? Would we be able to collect the full amount of the product value or are we limited to the weight times the liability limit?

Answer: This is in response to your question about liability limitations on a "minimum charge" shipment.

I assume that you are suggesting that the rate is not "dependent on value" as that language is used in the Uniform Straight Bill of Lading. There is a reference to this in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 8.8.6.2 which states:

> 8.8.6.2 MINIMUM CHARGE
>
> It is important to determine when a shipment moves at a minimum charge, which is the same charge at either the full value rate or the released rate. Under such circumstances, there is no choice of rates and the carrier is liable for full actual loss despite the publication and selection of the released rate. *Kayser-Roth Corp. v. Arrow Carrier Corp.*, 207 N.Y.S.2d 748 (1960).

I have not found any later court decisions on this point, and I can't tell you whether a carrier would agree with this today and not try to enforce its liability limitation.

FREIGHT CLAIMS – LIABILITY ON INTERLINE SHIPMENT

Question: Our customer is a third party logistics provider ("3PL"). They hired another 3PL to arrange for the LTL pickup and delivery service of new product to their Agent. Their Agent acts as a carrier to make home deliveries to the consumer. As times, the Agent will take a questionable exception to the proof of delivery ("POD") at the time of interchange with the less-than-truckload ("LTL") carrier. Example: "small tear in box - no apparent damage to contents on inspection". Based on the notation on the LTL carrier's POD and the rejection of the product thereafter from the consumer to the Agent, our customer files a claim for $1,852.00 for a damaged 52" LED TV.

Our customer is stating that the claim is valid against the LTL carrier based on the notation provided on the POD. I am being told that the TV was never removed from the box during the interchange between the LTL carrier and Agent to ensure a thorough inspection. The Agent explains that the delivery to the consumer must be in the original sealed box. Once the Agent is at the consumer a more complete inspection takes place.

It seems that the Agent may have missed their opportunity to take exception to the TV based on their need to deliver the product in its original packaging. Who is liable?

Answer: Since this is an interlined shipment, the receiving and delivering carriers are jointly and severally liable to the shipper for loss or damage in transit. It is between the two carriers to apportion the loss based on the facts and their interline agreement.

FREIGHT CLAIMS – LIABILITY ON SHIPMENTS BETWEEN U.S. AND MEXICO

Question: What is the current carrier cargo liability for a shipment originating in Mexico and delivering in the U.S., and also for a shipment originating in the U.S. consigned to a Mexican consignee on a through bill of lading ("B/L")?

Answer: 1. Shipments from the U.S. to Mexico

Many U.S. carriers are now including provisions in their rules tariffs that purport to relieve them of any liability on U.S. - Mexico shipments if the loss occurs in Mexico.

The Carmack Amendment, 49 U.S.C. §14706, is applicable to any shipment moving under a through bill of lading FROM the United States to an adjacent foreign country (Mexico or Canada). Thus, the receiving carrier in the U.S. would be liable for loss or damage regardless of whether it occurred in the U.S. leg or the Mexican leg of the movement.

This principle is illustrated in the case of *Tempel Steel Corp. v. Landstar Inway, Inc.*, 2000 WL 528057 (7th Cir. 2000).

The Landstar 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. sec.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 Canada or Mexico - that carrier would be liable even if the loss occurred in the adjacent foreign country on the lines of a connecting carrier. Furthermore, the issuance of a second bill of lading by the connecting carrier would not change this result.

This does not completely answer your question, because under the Carmack Amendment, a carrier may LIMIT its liability by written agreement with the shipper (this is most often done through the bill of lading that incorporates a limitation of liability in the carrier's tariff). Thus, if there is an enforceable tariff provision, the carrier could limit its liability to a specified amount - such as $10.00 per pound - but it cannot say that it has NO liability.

2. Shipments from Mexico to the U.S.

On a shipment that originates in Mexico the Mexican motor carrier's liability is governed by Mexican law that provides: "When the user of the service does not declare the value of the goods, liability will be limited to an amount equivalent to 15 days of the minimum daily wage then current in the Federal District per ton, or the corresponding proportionate part of a metric ton that is damaged or lost." At U.S. Dollar/Mexican Peso exchange rates this is about six U.S. cents (.06) per pound.

Most shipments from Mexico do not move under a through bill of lading, and the law is not entirely clear as to what liability would govern if the place of the loss is in the U.S. instead of Mexico. However, in *Berlanga v. Terrier Transportation, Inc.*, 269 F.Supp.2d 821 (N.D. Tex.

2003) the court concluded that the Carmack Amendment applied to the portion of the transportation that was in the United States.

These subjects are covered in depth in *Freight Claims in Plain English* (4th Ed. 2009).

FREIGHT CLAIMS – LIABILITY RUNAROUND

Question: A non-asset based third party logistics provider ("3PL") gets a shipment from their customer. The shipment requires a reefer carrier due to the product being hauled. The 3PL contacts a reefer carrier to move the shipment. The carrier has insurance through an insurance broker with an insurance company. The carrier has equipment problems, which lowers the temperature too low so the product is ruined and there is a claim for $9,700.

The carrier admits to the equipment problems and believes their insurance company should pay for the claim. The insurance broker said he is just a broker so he can not be at fault to pay the claim or be involved to help resolve the claim. The carrier's insurance company asks the carrier to supply the maintenance records on the unit. The carrier said that they supplied the maintenance records to the insurance company. The insurance company said that the carrier did not submit the maintenance records and denies the claim. The insurance company also said that if the carrier unit is not maintained properly, the insurance company has the right to deny the claim. This is a case where the carrier, insurance broker, and insurance company all say that they are not at fault and will not pay the claim. In your opinion, who is responsible to pay this claim?

Answer: The carrier is liable for loss or damage to goods in its possession. This liability arises out of its breach of the contract of carriage (failure to deliver the shipment in good order and condition). For interstate transportation, the liability of the carrier is governed by the "Carmack Amendment", 49 USC §14706, which imposes liability for the shipper's "actual loss".

The 3PL that arranged the transportation probably is not liable for the loss or damage, unless it either assumed liability as a common carrier, or was negligent in selecting the carrier or failing to convey appropriate instructions for a shipment requiring refrigeration.

The insurance agent could possibly be liable to its insured (the carrier) if it was negligent, e.g., failed to get the proper coverage knowing that the carrier would be transporting refrigerated products.

As for the insurance company, you have no privity of contract with the carrier's insurer. Its contract (the cargo insurance policy) is an indemnity policy for which it is obligated to indemnify its insured for losses covered by the policy. You have no direct claim against the carrier's insurance company.

You should proceed against the motor carrier with your claim. If the carrier fails or refuses to pay a valid claim, your only recourse may be to take appropriate legal action.

FREIGHT CLAIMS – LIABILITY WHEN SHIPPER LOADS INTO DEFECTIVE REEFER

Question: We dropped a reefer trailer at a customer shipping fresh chicken. There was a Freon leak on the unit that was not known about prior to dropping the trailer there. The reefer unit was set at 15 degrees but while the shipper was loading the trailer, the unit stopped blowing cold air. The shipper, however, continued to load the trailer. It took them 3 hours to load the trailer and the supply temperature was at 58 degrees by the time they finished loading the trailer. The product spoiled and the shipper filed a claim.

Our contract says: "Carrier shall provide and maintain all equipment required for the services requested by Shipper and shall only use and provide equipment that is clean, in good operating condition and repair, in compliance with any and all Federal and/or State, Provincial/Territorial,

Municipal statutes and regulations, and is suitable and properly configured to safely load, transport, and unload the shipments of cargo tendered by Shipper."

Does the shipper hold any liability for loading a trailer that was obviously not working?

Answer: From your description of the facts it appears that the shipper may have been negligent in loading the trailer if it was obvious that the reefer wasn't working. However, it also seems that your driver would also have been negligent if he didn't realize that the reefer wasn't working, and still accepted the shipment.

One of the defenses to common carrier liability is the "act or default of the shipper". However, the burden is always on the carrier to prove that the shipper's "act or default" was the sole and proximate cause of the loss, AND that the carrier was not negligent, see *Freight Claims in Plain English*, 4th Ed. (2009) at Section 5.0. I don't see how you will be able to escape liability for this claim.

FREIGHT CLAIMS – LIMITATIONS ON INTERNATIONAL AIRFREIGHT

Question: We had an international airfreight shipment from Lima, Peru to Cypress, California that sustained damage. We filed a claim with the air carrier and they said "our liability is limited to .50 cents per pound per piece or $50.00 whichever is greater", because we did not declare any value on the air waybill. Is this correct?

Answer: The answer is quite clear. Both Peru and the U.S. are signatories to the Montreal Convention of 1999, and therefore the treaty is binding and supersedes any limitations that the air carrier or airfreight forwarder may include in its air waybill. The Convention provides that the carrier's liability is limited to 17 Special Drawing Rights (SDR's) per kilogram unless the shipper declares a higher value.

The last time I checked, 1 SDR was about $1.58, so 17 SDR's would be $26.86 and this would be multiplied by the weight of the damaged package(s) in kilos to determine the carrier's liability limitation.

FREIGHT CLAIMS – LOSS OF TIME SENSITIVE MATERIALS

Question: We are a freight forwarder - one of our lines of business is our Preprint division - we move preprinted materials (sales ads) for companies - we deliver them to newspapers throughout the country. This is extremely time sensitive material.

One of the carriers we hired to move a preprint load got into a major accident and as a result, the trailer was damaged. During the accident, it was raining and consequently, many of the inserts were damaged. One of the things we had to pay for was to have those damaged inserts reprinted and delivered in order to make the newspapers deadlines.

When I submitted the claim to the carrier's cargo insurance company, I included the costs of the originals, the reprints, and the cost to deliver those reprints.

The insurance company has responded, citing 49 U.S.C.§14706, which basically states that the motor carrier of goods in interstate commerce is liable for "the actual loss or injury to the property".

The adjuster has advised that this is a "consequential" loss and therefore, they will not be paying for it. I understand not paying for the reprints but I do not understand not having to pay for the additional delivery.

Are they within their rights to refuse?

Answer: The carrier's liability is for the loss or damage to the original shipment (normally the invoice price to the customer, which would include the freight costs for delivering the shipment).

As for replacing a shipment that is lost or damaged, shippers often do this because of a contractual obligation to the buyer, or to maintain good customer relations. While it may seem unreasonable, this is a separate and independent transaction, so expenses in connection with a second (substitute) shipment to the customer are generally not recoverable, except in very special cases where the carrier has been put on notice at the time of the original shipment and has accepted that liability.

I would note that the subject of Special Damages is extensively covered in *Freight Claims in Plain English* (4th Ed. 2009) at section 7.3 et. seq.

FREIGHT CLAIMS – LOSS ON RETURN OF REFUSED PRODUCT

Question: I am having difficulty with a claim. What I believe and what the carrier contends are not the same.

1) Shipment via carrier A, a truckload carrier only, arrived and 490 cases were refused. Ship date 4-19-07 claim filed 9-18-07. Shipped from Lithiaspring, GA to Jacksonville, FL.

2) Carrier A does not handle less than truckload returns. They requested we give them a carrier to use for return

3) We told carrier A to contact a third party provider who assigned the return to carrier B. The return shipment arrived back via carrier B with 65 cases short on 4-30-07. The claim was filed against carrier A. The delivery receipt shows shipper as carrier A Terminal, with F/B to third party provider.

4) Carrier A says the return claim should have been filed with carrier B for the shortage because they signed as receiving from carrier A all 490 cases and delivered only 425 cases. I do not believe this was a clear delivery to the consignee and that they later after delivery decided to return the 490 cases.

5) I told carrier A we gave them a return carrier merely as a convenience for them to use and this is a valid claim with carrier A even though the return shortage happened on carrier B.

6) We cannot re-file with carrier B because it is now beyond 9-month deadline.

7) I told carrier A this was not a re-shipment by the consignee, but a simple refusal of product for them to return and that carrier B was in essence an inter-line carrier and therefore carrier A is the correct carrier to settle the claim and they could subrogate against carrier B.

Is carrier A correct in their belief that we must file with carrier B?

Answer: You don't indicate whether there were two bills of lading issued (one for the outbound shipment and one for the return shipment), but I think that there were two separate shipments, see, e.g., *S.C. Johnson & Son, Inc. v. Louisville & Nashville Railroad Co.*, 695 F.2d 253 (7th Cir. 1982), which is discussed in *Freight Claims in Plain English* (3rd ed. 1995) at Section 10.9.1.

You therefore had two separate claims:

(1) A claim against carrier A for the damage to the 490 cases that were refused on the outbound movement. Of course, you must establish good condition at origin (Lithiaspring, GA), damaged condition at destination (Jacksonville, FL), and your damages. The only difficulty that I see is whether the missing 65 cases could have been salvaged.

(2) A claim against carrier B for the shortage on the return movement (which you indicate is now time-barred).

FREIGHT CLAIMS – MARKET DECLINE ON LATE DELIVERY

Question: Our company delivered a load of fresh broccoli from Laredo, TX to Philadelphia, PA. In Alabama, our truck broke down and we had to wait to get the truck fixed. The pickup was on 02/11/2011 and delivery was supposed to be on 02/14/2011. As a result of the breakdown, we delivered on 02/16/2011, two days later than anticipated.

The broccoli was received with no damages on 02/16/2011, but the bill of lading was noted for late delivery and now the shipper is making us liable for market change loss, which they claim is $6,048.

I have contacted my insurance company and they said I am not insured for these types of things. I was just wondering if there is any way in Carmack that the delay has to be reasonable and that it was beyond our control due to truck breakdown. I am just asking if I have any defenses in this case.

Answer: A motor carrier is required to transport goods with "reasonable dispatch". The court decisions define this as the usual and customary time to transport the goods from origin to destination. If the carrier does not deliver the goods within this time - regardless of equipment breakdown or other problems - it can be liable for damages resulting from the delay.

Where perishables, such as produce, are being transported to a produce market, the courts have recognized a form of damages known as "market decline". This is explained in my book, *Freight Claims in Plain English* (4th ed. 2009) at Section 7.4.12:

> MARKET DECLINE
>
> Where goods are shipped to a market which has daily price fluctuations, such as the Hunt's Point produce market in New York, a delay in transportation may mean that the market price has either gone up or gone down between the time the goods should have arrived and when they actually arrived. Where the price goes down, and there is evidence that the goods have not been delivered with "reasonable dispatch", a market decline claim may be in order. The court in Peter Condakes Co., Inc. v. Southern Pacific Co., 512 F.2d 1141 (7th Cir. 1975), described such claims as follows:
>
>> In the instant case there is no claim for damages due to a changed condition in the goods. Plaintiff bases its claim for damages solely on unreasonable delay in the transportation and delivery of the produce and the decline in wholesale market prices. Consequently the appropriate measure of damages for this case is the difference in the wholesale market value at the date they were contracted to arrive at their destination and the date on which they actually arrived. I therefore find that the United States Department of Agriculture Auction Sales Reports for the dates and markets in question are sufficient to establish the wholesale market prices for the contracted dates and the actual arrival dates.

I trust this answers your question. You should, of course, request appropriate evidence as to the market price for broccoli on the relevant dates, such as an official published price report for that market.

FREIGHT CLAIMS – MATERIAL HELD IN WAREHOUSE

Question: I have 6 claims dating back from 2009 with a single warehouse who was storing our customer's freight. They had our freight in their warehouse and then the freight was removed in January 2009 when for one reason or another business with them was discontinued and we needed to pull the freight from their facility. The freight was moved back to our

customer. It was noted that the material was reported missing prior to that time. We received the documents to file the claims against the warehouse between January and June of 2009.

The warehouse is stating that I am unable to pursue these claims and he states that he won't pay because right after the material was taken out of his warehouse (supposedly), the contract ended, therefore the 9 month rule would not apply. They are stating that being they discontinued doing business with us, that they are not held liable for missing material because their contract ended in January and we sent the claim to them starting July.

I was wondering being that they did stop doing business with us, but lost our material prior to it being shipped, I thought I had 9 months to still file a claim, even though they stopped doing business with us.

My question is can we still file a claim up to 9 months after the contract has ended?

Please let me know. I would really like to have these cleaned up.

Answer: If these goods were stored in a public warehouse, there most likely would have been a warehouse receipt since this is a requirement of the Uniform Commercial Code in order for the warehouse to limit its liability. A warehouse receipt usually contains time limits for claims and/or suits, or it may incorporate the warehouseman's terms and conditions or tariff containing time limits. Sometimes there is a written contract or agreement that substitutes or supersedes the warehouse receipt.

Unless there was a warehouse receipt or some other contractual document, there should be no time limit for filing claims or bringing a lawsuit, other than the applicable state statute of limitations.

There is no "9 month" time limit for filing claims with a warehouse - this is the usual time limit found in a motor carrier's bill of lading (the Uniform Straight Bill of Lading). A motor carrier cannot provide for a period of less than 9 months for filing a claim under the "Carmack Amendment", 49 U.S.C. § 14706.

I suggest that you demand a copy of the warehouse receipt or other contractual document that the warehouse relies upon in declining your claims, and see if it has any applicable time limits.

FREIGHT CLAIMS - MEASURE OF DAMAGES

Question: What is the law/rule for "double profit"? I am not sure on the exact wording – but if a load is refused, can the shipper file a claim for the loss including profit when they also replaced the product and received profit on the replacement also? I have heard so many different opinions/theories on this situation, but wanted to see if there was anything concrete on handling situations like this.

Answer: The following is from *Freight Claims In Plain English (4th Ed. 2009), Section* 7.2.3

Measure of damages is "destination market value"

In a situation where a consignee sustains the loss and is forced to go into the open market to procure like property, courts generally will look to market value at destination as the measure of damages. *See Atlantic Coast Line Ry. Co. v. Roe*, 96 Fla. 429, 118 So. 155; *National Beef Packing Co. v. Missouri Pacific R.R. Co.*, 479 S.W.2d 155 (Ct.App. Mo. 1972); *Chicago Milwaukee & St. Paul Ry. Co. v. McCaull-Dinsmore Co.*, 253 U.S. 97 (1920) and *Gore Products v. Texas & N.O.R.*, 34 So.2d 418 (Ct.App. La. 1948). The court in *Van Der Salm Bulb Farms, Inc. v. Hapag Lloyd*, 87 C.D.O.S. 1301 (1987), held that ". . . in the absence of contrary evidence, market value is adequate to show actual damage. Market value may be used when it is the nearest practicable approach to an ascertainment of actual loss."

In the ordinary sales transaction, where goods have been lost or destroyed in transit, the invoice amount is acknowledged as the measure of loss. Thus, where a consignee-purchaser has assumed the risk of loss in transit, he will still have to pay for the goods even though he has not received them, and his damage is the amount of the invoice price. Conversely, if the seller had the risk of loss, he would be unable to collect his invoice price, and his loss would be the same amount.

* * * * * *

Cases involving goods that had been sold to a customer, and which awarded the invoice price, include: *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); *Custom Cartage, Inc. v. Motorola*, Inc., No. 98C5182, 1999 WL 965686 (N.D. Ill. Oct. 15, 1999); *Paper Magic Group, Inc. v. J.B. Hunt Transport, Inc.,* 318 F. 3rd 458 (3rd Cir. 2003).

The *Philips* case involved a shipment of camcorders to a customer in Newburgh, New York. A portion of this shipment was never delivered and was later converted by the trucker, Arrow, which sold the camcorders as salvage. One issue was the measure of damages. Arrow argued that, because Philips had sent a replacement order to its customer, it was not entitled to a “double profit”. The court rejected Arrow’s argument, and held that the invoice price was the proper measure of damages.

Corning involved a shipment of glass panels from Corning to a customer which was damaged en route. The carrier argued that since Corning had later made a replacement shipment to its customer, it was only entitled to its manufacturing cost. The court rejected defendant's theory and awarded Corning's invoice price, less the net salvage proceeds.

In *Paper Magic Group v. J.B. Hunt Transport,* 2001 U.S. Dist. LEXIS 13494 (E.D. Pa. 2001), aff'd, 318 F.3d 458 (3rd Cir. 2003), the District Court awarded the shipper's contract (invoice) price, stating:

> The measure of actual damages is the contract price. See *Illinois Cent. R. Co. v. Crail*, 281 U.S. 57, 64-65 (1930) (the market value test may be discarded when another more accurate measure of actual damages exists); Robert Burton Assoc., Inc. v. Preston Trucking Co., Inc., 149 F.3d 218, 221 (3d Cir. 1998) ("ordinarily when the carrier is responsible for the loss of the goods in transit, the shipper is entitled to recover the contract price from the carrier."); John Morrell, 560 F.2d at 280("[t]he only way to reimburse [a] shipper [whose goods were delivered late] for its `full actual loss' is to use the contract price method."). It is undisputed that the contract price for the goods was $130,080.48. Paper Magic has evidence to prove the third element of its prima facie case.

The Court of Appeals noted that under principles of contract law, the measure of damages is “designed to put the injured party back in as good a position as it was before the contract was breached”, and that:

> ...Given this purpose, the general rule is that when goods are lost or destroyed the shipper is entitled to damages in the form of the payment of the entire invoice price.

FREIGHT CLAIMS – MEASURE OF DAMAGES

Question: Most carriers pay the claimed amount. However, we do get some carriers who say their insurance companies tell them that they are only responsible for the manufacturing costs. Since this is not in our contract, what is a good argument? I have a carrier, who has 3 claims and they are declining to pay anything more than the manufacturing costs on each load.

Answer: This is a common question as carriers generally seek to reduce their liability. However, 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* (4th Ed. 2009) at Section 7.2.3. See also *Custom Cartage, Inc. v. Motorola, Inc.*, No. 98C5182, 1999 WL 965686 (N.D. Ill. Oct. 15, 1999); *The Paper Magic Group v. J.B. Hunt Transport, Civ.* No. 00-5590, 2001 WL 1003052 (E.D. Pa. Aug. 29, 2001), aff'd, 318 F.3d 458 (3rd Cir. 2003).

The rationale of this rule is that the seller is entitled to be "made whole", i.e., to recover the same amount as it would have received from its customer if the shipment had been delivered in good order and condition.

FREIGHT CLAIMS – MEASURE OF DAMAGES

Question: I am in the middle of a claim on a shipment that was a total loss because of an accident. The claimant, my customer, has produced the bill of lading ("B/L") and invoice for the loss as well as the replacement load. The insurance provider isn't satisfied with this and they are asking for additional information such as how the price is determined. The claimant has completed their obligation by supplying the invoice and feels that how the price is determined is confidential information between their customer and themselves, which I agree. My question is, how much information is an insurance company allowed to request and isn't the invoice valid proof of value?

Answer: If the goods in question had been sold and were lost or damaged enroute to the seller's customer, the measure of damages is the "destination market value", and the court decisions interpret this as the invoice price to the customer. Other considerations such as the seller's cost to manufacture the goods, etc. are irrelevant. Likewise, whether there was a "replacement load" or not does not affect the carrier's liability for the load that was lost or damaged.

Assuming that these inquiries are coming from the motor carrier's insurer, a certified copy of the invoice should be sufficient, since the insurer is obligated to indemnify the carrier for its "legal liability" with respect to the shipment that was involved in the accident.

FREIGHT CLAIMS – MEASURE OF DAMAGES

Question: A motorcycle is delivered to the ordering dealer with damage caused by the carrier. Dealer submits a claim for repair. With the claim he provides a repair invoice stating the cost he is charging for the parts and labor.

Carrier demands that the original invoice for the parts that proves the dealer is not charging profit on the parts used for the repair and the cost of labor must be shop cost not the cost that the dealer would charge on a normal repair job.

Am I correct in assuming the dealer is entitled to his market price as it represents the return on his costs? In reality he is selling his services to the carrier to repair the damage caused by the carrier thus mitigating the loss of a $12K bike with a $3,700 repair.

Answer: The following is a quote from Section 7.3.3 of *Freight Claims in Plain English* (4th ed. 2009) that specifically addresses the question you have raised:

> 4) Another "general damages" case is *Vacco Industries v. Navajo Freight Lines, Inc.*, 63 Cal. App. 3d 262 (1976), cert. den., 431 U.S. 916. Vacco was the consignor of goods allegedly damaged in transit on an interstate move by Navajo Freight Lines. The bill of lading showed a declared value for a piece of machinery to be $130,000. At trial, Vacco sought damages in the nature of its itemized repair costs,

as well as overhead and administrative costs for the repair work, inspection costs, freight, packaging, the evaluation trip and lab fees.

The California appeals court upheld the finding of liability by Navajo and went on to discuss the appropriate measure of damages, most specifically the overhead, administrative and general costs and profit element sought by Vacco in connection with the repair. The court noted the testimony of various experts on behalf of the plaintiff as to usual and customary overhead, general and administrative costs in the industry. The court specifically held that the consignor could recover a profit element for the repair work it performed and that the profit element, like normal costs of repair, was a recoverable item of general damage.

The full text of the *Vacco* decision may be found in the appendix to *Freight Claims in Plain English* (3rd ed. 1995).

FREIGHT CLAIMS – MEASURE OF DAMAGES FOR PROMOTIONAL ITEMS

Question: Our carrier was involved in an accident causing two of our shipments significant damage. The merchandise was cosmetics and some of the cartons were a complete loss, which the carrier disposed of. My question is there were a few orders on these shipments that were promotional samples/testers in which we will need to have reordered. There was no cost to these promotional items when ordered initially, but now that we have to reorder these goods, there is a cost/value.

The vendor has to reproduce and ship the goods again, plus there is a value to our stores in having these products on hand as they aid in the sale of the retail merchandise that was also shipped. From a legal stand point, can I put a dollar value on these items and file a carrier claim? I would of course have to work with the vendor to obtain such a figure.

Answer: Your question essentially involves the "measure of damages" for the promotional samples/testers that were lost/damaged.

Even though these were originally provided at no cost by the vendor, they did have a value and there would be a cost to replace them. I don't know of any court decisions that involve the identical issues, but I think that, under the circumstances, the consignee can file a claim for the replacement value.

The loss from not having these promotional items on hand to aid sales, however, would be considered "special" or "consequential" damages and unless the carrier was on notice of the potential loss, would not be part of a claim.

FREIGHT CLAIMS – MEASURE OF DAMAGES ON RETURNED GOODS

Question: We had a shipment being returned from a customer due to their project being cancelled and not needing the product. We had a customer that was in need of the same product so we told the customer it was OK to return it to us. They loaded the trailer up and sealed the trailer. At one point the carrier broke the seal and transferred the load to another trailer. Upon delivery to the destination, several rolls of material were found to be damaged.

I filed for invoice value on the damage. Carrier denied the claim stating that I needed to adjust the claim to manufacturing cost seeing a sale was not in place at time of damage. I challenged the carrier with the fact that they broke a seal on the trailer and transloaded the shipment and that this should make them liable for invoice value. The carrier came back with this excuse - The load was tendered to them as a less-than-truckload ("LTL") shipment and no additional request for sealed service or exclusive use was noted on bill of lading ("B/L"). Therefore, they had a right to break the seal and load more material on top of our goods. This

was plastic film that was not to be top loaded and was so marked on the packaging. However, before making a delivery, they resealed the trailer.

Was my claim at full invoice value valid and did the carrier have a right to break the seal?

This claim is still ongoing so an answer quickly would be appreciated.

Thank you for all the good information in Q&A section of the TRANSDIGEST. Have been referring to these Q&A's for many years and find them very helpful.

Answer: I don't see how sealing the trailer has any bearing on the carrier's liability or the measure of damages.

As to your damages, the question is what was your "actual loss" as provided in the Carmack Amendment, 49 U.S.C. §14706. I presume that you gave the customer some kind of credit or allowance for the returned goods, so that would be the value of the shipment for purposes of your claim (less salvage, if any).

FREIGHT CLAIMS – MEASURE OF DAMAGES ON WAREHOUSE SHIPMENT

Question: Can you please answer a question that I have not been able to find an answer for?

Scenario: A warehouse makes an agreement with a carrier that all loads that the carrier hauls will be hauled as shipper load and count ("SL&C"), (warehouse will be liable for shortages or damages on these loads). The carrier makes a delivery and one of the orders has a shortage, the warehouse's customer files a claim for the shortage. The warehouse pays the customer's claim under the warehouse receipt based on a per pound cost instead on the customer's invoice cost.

Doesn't the warehouse receipt liability end when the product is loaded onto a trailer and is listed on a bill of lading?

Wouldn't the customer be entitled to recover their invoice cost and not the reduced rate based on the warehouseman's receipt?

Answer: 1. Ordinarily the warehouseman's liability ends when it delivers the goods to a carrier or other third party in accordance with the instructions of the bailor (owner). Of course, this presumes that the goods (description, condition, quantity) are actually delivered in good order and condition. With a "SL&C" shipment, there can be a question of fact as to what was actually delivered to the carrier.

2. Where goods are lost in transit, the usual measure of damages for goods that have been sold to a customer would be the invoice value of the goods. I would think that the same measure of damage would apply if the loss occurred while the goods were still in the possession of the warehouseman. However, you mention a "reduced rate based on the warehouseman's receipt" -- if there is some other measure of damages in the warehouse receipt or the warehouseman's tariff, that measure of damages would be applicable in the event of a claim by the bailor (owner) against the warehouseman.

FREIGHT CLAIMS – MEASURE OF DAMAGES WHEN GOODS RETURNED

Question: I have an LTL carrier that delivered a load with damaged product. Damage was noted on the bill of lading ("B/L") and the carrier called the shipper for disposition. The carrier was instructed to return the product back to the shipper. The shipper filed a claim for full invoice value for the damaged product. The carrier is now stating the claim should be for destination value of the product and since the destination is now back to the shipper it should be manufacturer's cost. We have argued that the product was still sold to the consignee and

should be full invoice value. The carrier is basing their theory on the fact the shipper has noted on the B/L to call them for disposition. Who is correct?

Answer: The damage occurred on the original outbound shipment to the customer. If the goods had been delivered in good order and condition, the customer/consignee would have had to pay the invoice value to the vendor/shipper. Therefore, the invoice value is the correct measure of damage.

Now you do indicate that the damaged shipment was returned to the shipper. I would assume that this was done so the goods could be inspected for possible salvage. If there was any salvage, then the net salvage amount should be credited against the claim.

FREIGHT CLAIMS – MEASURE OF VALUE OF GOODS SOLD

Question: We had a shipment of rice, sold FOB destination, move from our distribution center in PA to the customer in NJ that was stolen. Our claim is for the product cost and profit. The carrier's insurance agent is declining the profit stating that since it wasn't delivered we hadn't earned it. I say we had earned it and the carrier had the responsibility to deliver the goods in whole and damage free. If the trailer hadn't been stolen the customer would have paid the invoice. The claim amount should be the value at destination, the invoice amount (which would have included profit.) It was a contract truckload carrier but the contract does not include language concerning the proper amount of any future claims. Isn't the carrier the "virtual insurer of the goods"? Do you have a good defense against this sort of thing?

Answer: This is a relatively common issue. 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* (4th Ed. 2009) at Section 7.2.3. See also *Custom Cartage, Inc. v. Motorola, Inc.*, No. 98C5182, 1999 WL 965686 (N.D. Ill. Oct. 15, 1999); *The Paper Magic Group v. J.B. Hunt Transport*, Civ. No. 00-5590, 2001 WL 1003052 (E.D. Pa. Aug. 29, 2001), aff'd, 318 F.3d 458 (3rd Cir. 2003).

The rationale of this rule is that the seller is entitled to be "made whole", i.e., to recover the same amount from the carrier that it would have received if the shipment had been delivered in good order and condition to the customer.

FREIGHT CLAIMS – MEDIATION

Question: Does the Transportation & Logistics Council mediate freight claims? If so can you provide me with information on the procedures, forms, cost, etc. Also, do I have to be a member of the Council -- our company is a motor carrier.

Answer: There are two services that we generally recommend:

> The Transportation Arbitration Board ("TAB") is jointly sponsored by the Transportation & Logistics Council. and the Transportation Loss Prevention and Security Association. TAB has an inexpensive arbitration program for loss & damage claims. The arbitrators are knowledgeable transportation professionals that are selected from carrier and shipper backgrounds. For information about the program, see the Council's website: www.TLCouncil.org.

As far as membership in the Council, I strongly urge you to join this excellent organization. As a carrier, you would join as an associate member. Please contact Diane Smid, our membership secretary, for further information at 631-549-8964.

FREIGHT CLAIMS – MINIMUM FILING REQUIREMENTS FOR RAIL

Question: I have filed a claim with a rail carrier for $127.60 for valid damages incurred. The carrier disallowed the claim due to an internal minimum filing requirement amount of $250.00.

I have not come across a minimum filing requirement before with a carrier and question its legality.

Could you shed light on the validity of this requirement?

Answer: I can think of two explanations. It could be that the shipper has a contract providing for a minimum claim amount or a deductible, i.e., that claims below a certain amount will be waived or shall not be filed with the carrier, OR, it might be a provision in the carrier's exempt rail circular for either a deductible or a minimum amount that is incorporated by reference in the bill of lading or rate quotation.

I would suggest that you ask them for their tariff or other authority for their declination of the claim.

FREIGHT CLAIMS – MIS-DELIVERED FOOD SHIPMENT

Question: We move refrigerated shipments and delivered a shipment to someone other than the consignee named on the bill of lading ("B/L"). After investigation we located the product, but it is now 6 months old. The wrong location has kept this shipment under temperature protection but the shipper will not take the product back now that is has been found.

All I want is for them to take it back and do some type of inspection to see if the integrity of the product is still intact.

I would like to avoid paying this huge claim if at all possible. What can I do to protect the company and what recourse do I have to make the shipper take the product back?

This is a branded butter extract/flavoring packed in cartons. The B/L simply said to keep it refrigerated and it has been kept at 35 degrees F. The claim is for $27,875. There has been no inspection made.

Answer: Transportation of food and food-related products is a very sensitive subject.

The quality of a refrigerated product may be affected and/or degraded if it is exposed to improper temperatures, or held for a prolonged period of time, and many items have specified limits on shelf life. 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.

While there is a general duty to "mitigate damages", the manufacturer or seller has a legitimate concern about the product quality, potential product liability, and injury to its reputation and trademark, and probably doesn't want to accept any risk by taking the mis-delivered shipment back.

I doubt that a branded product such as this butter extract flavoring could easily be sold at a public salvage sale. About the only thing I can suggest is to get an opinion from the regional FDA inspector or a qualified testing lab and provide the report to the manufacturer/seller with a request that they take the shipment back with some reasonable salvage allowance.

FREIGHT CLAIMS – MISDELIVERY WHEN WRONG DOCUMENT USED

Question: We are an international freight forwarder (non-vessel operating common carrier or "NVOCC") located in Torrance, CA. We use freight brokers to handle our less-than-truckload ("LTL") shipments. We used "Freightquote" and used their system to issue a bill of lading ("B/L") using a LTL carrier. Since we are an international freight forwarder all of our shipments will come in via ocean or air freight, and cargo will be located at a CFS (container freight station) for ocean shipments, or airport for airfreight. These are bonded customs facilities and require the trucker to bring a copy of the freight forwarder's "delivery order" in order to make a pickup; a trucker's B/L will not work.

On the particular shipment in question we booked through Freightquote and put in special instructions that it was very important that driver must bring a copy of our delivery order so as to make the pickup at the bonded facility in Houston, TX for delivery to Corpus Christi, TX. Rather than follow the instructions, the carrier made the pickup from the bonded facility with an international air waybill provided by the air carrier. The problem is the product was then misdelivered to our facility in Torrance, CA based upon the information on the international air waybill, which was different from the information on the delivery order.

The broker and the motor carrier are now denying liability for the misdelivery because they used the information on the air waybill provided by the air carrier, despite the fact that we provided specific instructions as to where the product was supposed to be delivered. Who is liable?

Answer: From your description of the facts, you are an international freight forwarder that issued a "house air waybill" ("HAWB") for a shipment from China to Corpus Christi.

You apparently engaged a broker (Freightquote) that arranged with a carrier for the domestic movement from the air carrier in Houston to the consignee in Corpus Christi, but the shipment was misdelivered to Torrance. It isn't clear which party was responsible, but if there is a claim from the shipper in China (or the consignee in Corpus Christi) for any damages resulting from the misdelivery, your liability is governed by the terms and conditions of your HAWB applicable to the domestic surface portion of the movement.

You may, of course, have a claim against your subcontractors (Freightquote and/or the motor carrier) depending on your contract(s) with them.

You said you gave them written instructions on the delivery order. Did they give you a written rate quote or rate confirmation for the move from Houston to Corpus Christi? If they breached your contract, I don't see how the air waybill has any relevance as far as the misdelivery.

FREIGHT CLAIMS – MISDESCRIPTION ON BILL OF LADING

Question: We had a less-than-truckload ("LTL") shipment for our customer. When the load was tendered it was described as automobile parts and so states on the bill of lading ("B/L") that was signed by the shipper. In actuality, there were several household goods (CD rack, dresser). There was damage to the product. Had we known it was household goods, we never would have hauled the product. Do we have a basis for refusing the claim based on intent to deceive regarding the true nature of the product?

Answer: I don't think that would be a proper declination, even if you were able to show that the misdescription was intentional.

However, I would suggest the following:

1. You might check the applicable tariff to see if there is a liability limitation on the actual commodity (household goods) that was damaged.
2. If the shipment was rated using the NMFC, there may be a basis for re-rating the freight charges.

FREIGHT CLAIMS – MITIGATING DAMAGES

Question: When a damaged item is not repairable, should the salvage value be subtracted from the full value of item when filing a damage claim?

Answer: As a general rule, the claimant has a duty to "mitigate the loss", which means that damaged goods should be repaired if it is reasonably cost-effective to do so, or that reasonable efforts should be made to salvage usable parts, collect scrap value, etc.

If an item cannot be repaired, when filing a claim for damaged goods, the proper measure of damages is the invoice price to the customer, less the actual net value of any salvage that may be recovered. See *Freight Claims in Plain English*, (3rd Ed .1995) at Section 7.1.4.

I would note that it is important to document your efforts and keep track of the actual salvage value when presenting your claim to the carrier.

FREIGHT CLAIMS – MITIGATING THE LOSS AND MEASURE OF DAMAGES

Question: I work for a 3rd party logistics company and we are stuck in the middle of a damage claim and could use some advice. The load was comprised of six retail kiosks that were going to two different Major League Baseball stadiums - four at the first drop and two at the second. The two kiosks at the second drop delivered with damages and the damages were clearly noted on the Bill of Lading. The carrier is not disputing that he was the cause of the damages and has actually turned the claim into his insurance company. They are prepared to cover the loss, but the quandary lies in the cost of the claim.

The kiosks are made of an aluminum composite material ("ACM") which, according to our customer, cannot be repaired. To quote the customer's email "It is not metal - it is two thin sheets of aluminum with a poly core. Depth of material is 4 mil." The insurance company has had the kiosk inspected and they contend that it can be repaired and the repair cost would be the customer's loss. The customer has stated that although she disagrees that the product could be repaired, even if it were repaired, she is not in the business of refurbished products and would have no use for a repaired kiosk.

Our fear is that the insurance company is only going to cover the repair cost, and although as a freight broker we should not have any liability in this case, our customer will hold us responsible for the full cost of two kiosks. I think your assessment could help us resolve the matter with one party or the other depending on which way you lean, so I look forward to hearing your opinion!

Answer: As you indicate, you acted as the broker in this transaction and therefore shouldn't have any liability for the loss or damage. However, it is not uncommon for shippers to try to hold brokers responsible for claims, and many brokers get "caught in the middle".

In any event, the carrier's insurance company is apparently taking the position that there is a duty to "mitigate the loss", and that the damage should be repaired. The duty to mitigate loss is subject to a "reasonableness" standard, which is a factual question. In your case, the consignee has stated that although she disagrees that the product could be repaired, even if it were repaired, she is not in the business of refurbished products and would have no use for a repaired kiosk (you should get this in writing if you have not already done so).

While this may be true, you probably should look into the possibility that the damaged units could be returned to the manufacturer/vendor of the kiosks and that the manufacturer might be able to repair or refurbish the kiosks and find a buyer in order to reduce the loss. An alternative would be to ask the insurance company if they would take the damaged units and repair or sell them for salvage.

Obviously, if it is not possible to repair or salvage the damaged kiosks at some reasonable cost, they would then be worthless for their intended purpose, and the insurance company should pay the full value (invoice price). Note that this subject is discussed in *Freight Claims in Plain English* (4th Ed. 2009) at Section 7.1.4.

FREIGHT CLAIMS – MITIGATION OF DAMAGES

Question: We purchased 18 gray file cabinets (each one shipped on a pallet) from a vendor to ship to our Texas warehouse, informing the vendor to use our carrier. The carrier in error shipped the cabinets to our Florida warehouse instead. Our Florida warehouse received delivery and reshipped under a new bill of lading (with Florida warehouse as the shipper) to Texas using the same carrier. Our Texas warehouse refused 3 cabinets due to black scuffmarks from the cardboard packaging around the units being torn and probably the units being bumped around in the trailer during transit.

Going to the vendor for replacement units for these damaged units is not an option since during this move we are both shipper and consignee. The carrier is still in possession of the units. The receiver in Texas thought by refusing the units they would go back to the vendor (thinking they were shipped directly from the vendor) and since they were damaged new replacements units would be sent by the vendor. Am I correct that our only recourse is to have the carrier deliver the units to Texas and put in a claim with the carrier?

Answer: From what you say, it appears that there may be little actual damage to the cabinets. If so, there would be a duty to “mitigate the loss” -- in other words to make any minor repairs or touch-up that might be required, and deliver them to the customer. If this is done, then you would still be able to file a claim for the labor, materials, and related expenses required for the repairs. If the cabinets are severely damaged (essentially “worthless”), then you should be able to file a claim for the invoice value to the customer.

FREIGHT CLAIMS – MITIGATION OF DAMAGES

Question: I have filed a number of claims against a motor carrier in which the damaged material has been sent to them for salvage because our manufacturers were unwilling to take back the damaged material for salvage credit. Let me add that we are a supply company and not the manufacturer of these items. The motor carrier has begun denying this claims stating that we have failed to mitigate the claim. However, I replied using case law from *Eastman Kodak Co. v. Westway Motor Freight, Inc.*, 949 F.2d 317, 10th Cir. 1991 and *Hidalgo Properties, Inc., v. Wachovia Mortgage Co.*, 617 F.2d 196, 200 (10th Cir.1980) to show that we fulfill our obligation in attempting to mitigate the claim by trying to have the damaged items returned to the original manufacturers and then by giving the freight to the carrier for salvage.

Additionally, we have a contract with the carrier specifying that damaged material will be given to the carrier for salvage except in cases where the manufacturer is willing to take back the material for salvage credit and items such as ladders which due to insurance liability reasons we are not permitted to give as salvage. I have informed the carrier of our contract, but they responded stating “While we understand your contract indicates merchandise will be returned to Carrier for salvage, it also notes that acceptance of salvaged goods by Carrier shall

not indicate an acceptance by Carrier for liability of a claim. Liability is not necessarily in dispute; however, the measure of liability is. The contract does not state that if the supplier does not accept back, carrier liability will be for the full actual value even if there are minimal damages. The fact that McMaster Carr is a supply company does not alleviate them from their responsibilities of mitigating a claim. In order to move forward with the processing of your claim, we would ask that you contact a qualified third party to complete the repairs, thus satisfying your obligation to mitigate."

Is the carrier correct?

Answer: I'm not sure there is a "legal" answer to your question.

First of all, both parties (shipper and carrier) have an obligation to mitigate the damage. From your description of the facts, it appears that the parties have agreed that the carrier would handle disposition of the salvage.

It would seem that if the carrier is in possession of the damaged item, and the damage is "minimal", it would be more efficient for the carrier to have the repairs made and then sell the item at a salvage sale. Then the carrier would pay the full value of the claim, and keep the net salvage proceeds, thus reducing its loss.

If the carrier does not have capability for repairing the damage, or does not know of a facility that can do this, I see no reason why you could not advise them as to a suitable repair company.

FREIGHT CLAIMS – MITIGATION OF DAMAGES AND FOODSTUFFS

Question: I have three questions in regard to claim handling I have puzzled and argued for some time now. I was wondering if you could aid me in the correct answer.

The first is one I have seen from one particular less-than-truckload ("LTL") carrier, but now see it with a couple of other carriers. It is when a shipment is refused due to damage and is considered to be worthless by the shipper and the consignee due to either the mitigation costs exceed the value of the product or contamination is now an issue. The problem is that the carrier views the product as minimally damaged or suitable for mitigation. They then place the shipment on-hand either formally or informally. Then when a claim is filed, they deny the claim stating the product was sold to offset incurred storage charges for the on-hand shipment. It seems no amount of argument will budge the carrier's determination. I view this as theft, what do you think?

My second question has to do with contamination of foodstuffs. On some of the bills of lading I have reviewed, it details that the product is a foodstuff and cannot be loaded with poisonous and/or odor emitting articles. I have 3 claims in which the foodstuff was loaded with non-poisonous but odor-emitting product (i.e. ammonia smell). The carrier denies the claim based on the DOT regulation as not loaded with poisonous product. I have argued that poison is not an issue, but rather that the governing bill of lading prohibits loading with odor-emitting product. The carrier refuses to respond to this issue. Am I wrong to think that the terms detailed on the bill of lading should determine these claims?

My last question has to do with the proper procedure that allows the inclusion of storage charges. I was of the belief that written notification must be given to the proper parties and proof of service of that written notification. I recall years ago sending such notifications by certified mail. So many times I seem to run into situations where a carrier has left product sitting somewhere until someone traces for it and then when a claim is filed for now stale product, the carrier tries to offset the claim with storage charges.

Answer: 1. When a shipment is refused or the carrier is unable to deliver, the provisions of Section 4 of the Uniform Straight Bill of Lading would normally govern the rights of the parties:

> Sec. 4. (a) 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.
>
> (b) 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.
>
> (c) Where carrier has attempted to follow the procedure set forth in subsections 4(a) and (b) 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.

A carrier could be found guilty of conversion if it failed to issue an “on hand notice” or otherwise comply with the notification requirements, or sells the goods in violation of the procedures specified above.

2. Federal regulations do prohibit the transportation of foodstuffs in the same vehicle with certain poisonous substances; see, e.g., 49 CFR Section 177.841. However, they do not specifically deal with possible contamination by odors from non-poisonous substances.

On the other hand, there is no question that foodstuffs could be damaged and become unsuitable for their intended use if they were to absorb any strong or foul odors. Assuming that the carrier has notice that the goods are foodstuffs and/or intended for human consumption, it would have a duty to provide suitable equipment and to protect the goods against contamination by odors, and would be liable for the damage.

3. Question of storage charges is discussed in # 1 above. Note that Section 4 of the bill of lading contemplates that storage charges be set forth in the carrier’s tariff. Quite often, particularly with smaller carriers and truckload shipments, the carrier does not maintain a tariff that spells out its storage charges. In such cases, the amount of the storage charges is often disputed and presumably would be subject to a reasonableness standard.

FREIGHT CLAIMS – MITIGATION ON DAMAGE TO BEVERAGES

Question: This is a question about the legal mitigation requirement on freight claims. I have a customer that shipped out one full pallet of food grade beverage. This product is ordered from China and imported in pallet quantities. This item is purchased as one handling unit and once inside of the U.S. it is sold exactly as it was received. When the carrier tried to deliver it, the pallet was refused by the consignee as "damaged, broken shrink wrap, and too much misc. damage". It looked as though the carrier put another pallet on the top of our customer's merchandise and the weight of the top pallet caused our customer's merchandise to be crushed.

The bottles are plastic with plastic cartoon heads as the lid. It appears that the lids screw off. There are 5 bottles in two rows packaged as a selling unit for the retailer. We filed our claim for the full pallet. The carrier is requesting mitigation or our claim will be denied in full. There is no way to mitigate this damage except to order additional retail units from China to add to the pallet.

This is simply not feasible due to the cost of importing from overseas and the fact that China only sells this product in pallet quantities. It is apparent from the pictures that not all of the individual bottles or even all of the 10 pc retail units are damaged beyond use; however these individual bottles and retail units are worthless to my customer. Your thoughts please.

Answer: Damage to shipments of food products, drugs, medicines or other items intended for human consumption are viewed differently from damage to other ordinary merchandise.

There are 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. For example, there are provisions governing contaminated food under the Federal Food, Drug and Cosmetic Act - 21 USC 342(a)(4) and 342(i).

Section 342(a)(4) states, "A food shall be deemed to be adulterated ... if it has been prepared, packed, or held in insanitary conditions whereby it may become contaminated with filth, or whereby it may have been rendered injurious to health." This provision has been used in the past to support damage claims.

Section 342(i), entitled "Noncompliance with sanitary transportation practices." This provision states, "food shall be deemed adulterated ... if it is transported or offered for transport by a shipper, carrier by motor vehicle or rail vehicle, receiver, or any other person engaged in the transportation of food under conditions that are not in compliance with regulations under section 350e of this title."

It is quite common for receivers of food products to refuse or reject product if there is a broken seal or the packaging itself shows signs of damage or tampering. Shippers often will take the position that it would be an unacceptable risk to allow the product to enter the market for human consumption, or that it would be impossible to adequately sample and test all of the food product to ensure that the quality had not been compromised.

One recent case, *Atlantic Mut. Ins. Co. v. CSX Lines, L.L.C.*, 432 F.3d 428 (2nd Cir. 2005), involved an ocean shipment of containers holding phosphoric acid solution — a concentrate from which caffeine-free Pepsi is produced — that had been submerged in ballast water. The language of the decision illustrates how these situations are considered by the courts:

> Atlantic Mutual has submitted evidence that the 720 pails of Pepsi Free concentrate shipped in the fully-submerged container retained no market value because the concentrate could not, as a practical matter, be sold. Thus, in his deposition, Silver (Pepsi's Senior Manager of Quality) explained that even if the results of the specific gravity test had suggested that seawater had not infiltrated the concentrate, he nonetheless would have been unable to guarantee the integrity of

> the product to Pepsi's bottlers and consumers, and without such a guarantee, the product would not have been bought by bottlers.[fn12] Bottlers, concededly connected with Pepsi, seconded that conclusion.[fn13]
>
> Nor is this testimony fanciful. After all, the Pepsi Free concentrate was ultimately destined for human consumption. As Atlantic Mutual avers, the mere possibility of contamination arguably rendered the Pepsi Free concentrate “adulterated” under federal law, see 21 U.S.C. § 342(a)(4) (stating that “food shall be deemed adulterated . . . if it has been prepared, packed, or held under unsanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health” (emphasis added)), and such potentially adulterated food may not be given out for human consumption, see *United States v. Gel Spice Co., Inc.*, 773 F.2d 427, 429 (2d Cir. 1985) (finding that federal law “prohibits distribution of ‘adulterated’ food, which is defined, in part, as food which may have become contaminated with filth, regardless of whether filth is actually found in the food itself” and explaining that violators could be subject to civil seizure and criminal prosecution (emphasis added)). Atlantic Mutual has submitted uncontroverted evidence that the pails containing Pepsi Free concentrate, which were not designed to be watertight, were submerged in sea water, that they were subjected to pressure which might caused their caps to loosen, and that the tab caps on the pails were rusted. Because this combination of factors creates a possibility that the contents of the pails may have been contaminated, Pepsi is precluded from being able to distribute their contents without fear of civil or criminal liability under 21 U.S.C. § 331(a) (prohibiting “[t]he introduction . . . into interstate commerce of any food, drug, device, or cosmetic that is adulterated”)....

See also the discussion in *Freight Claims in Plain English* (4th Ed. 2009) at Section 11.5.

You have also raised an additional point, that this product is imported and sold in pallet quantities only. If there is a duty to mitigate the loss, that duty must be "reasonable" under the circumstances. Since it is the carrier's burden to prove that the shipper has failed to mitigate the loss, I think you can easily establish that it is not possible with any reasonable expense to re-package any undamaged product into a saleable unit, I would say, from the information you have provided, that this shipment should be considered a total loss, without any obligation to salvage or mitigate the loss.

FREIGHT CLAIMS – MUST BROKER PAY FOR LATE DELIVERY?

Question: Is a freight broker responsible for late delivery penalties? If so, can those charges be passed onto the carrier?

The question of penalties was not addressed prior to pick up with customer or carrier. Now the customer is requesting that all freight charges be waived because the load delivered 20 hours late.

Answer: Ordinarily a motor carrier is only required to deliver with “reasonable dispatch”. Unless there is some agreement or notice at the time of the shipment that delivery must be made at or by a certain time, the carrier would not be liable for “penalties” - these would be considered “special damages”, see *Freight Claims in Plain English* (4th Ed. 2009) at Section 7.3.

As to your liability as a broker, unless you had some instructions from the shipper and were advised that late delivery would result in penalties, and failed to tell the carrier, I don’t see how you could be responsible either.

In the future I suggest that you should always ask if there are any special requirements for delivery. Make sure the instructions are passed on to the carrier in writing in your rate confirmation, and included on the bill of lading.

FREIGHT CLAIMS – NOTICE OF DAMAGE ON DELIVERY RECEIPT IN 24 HOURS

Question: Thank you for your website (http://www.transportlaw.com/articles/howtofile.htm). I find a lot of the information very useful.

I have a question I'm hoping you are able to answer.

Our carrier has a tariff with our consignees that says that the delivery receipt must be returned within 24 hours noting any exceptions. Our carrier denies claims based on the fact that even though a delivery receipt shows loss or damage it was not returned to them with the 24 hour time frame. Is this correct? Isn't the tariff a contract between the carrier and the consignee? Why then are we liable for the shortage/damage?

I hope this makes sense and that I'm able to get a response.

Answer: I am assuming that the damage was not discovered at the time of delivery, so that the driver was not present to acknowledge that the goods were damaged. If so, this falls into the category of "concealed damage" and carrier liability, if any, will depend on the specific facts.

First, the claimant has to prove that the shipment was tendered in good order and condition to the carrier, and then must prove that the damage existed at the time of delivery, and could not have occurred afterwards. This is usually established by statements from witnesses that have actual personal knowledge of the situation (loading, unloading, etc.). In some cases the claimant may need to bring in an expert that can inspect the damage and determine whether it occurred during transit or otherwise.

The claim regulations at 49 CFR Part 370 require the carrier to "promptly and thoroughly investigate" the facts, not merely disallow the claim because of a "clear" delivery receipt, or that a delivery receipt was not returned within 24 hours noting the exceptions.

I suggest that you investigate the facts and if carrier liability is indicated, provide your findings to the carrier.

FREIGHT CLAIMS – OBLIGATION OF CARRIER TO RESPOND TO TIMELY FILINGS

Question: I have 7 freight claims that are 60 days past the 120-day time frame for the carrier to research the submitted claims. I have tried contacting the freight claims supervisor and even the supervisor will not reply back to me with any information as to the current status on these claims. What can I do to get these claims resolved?

Answer: You can try reminding them that there are federal regulations that govern the filing and processing of claims (49 CFR Part 370 - PRINCIPLES AND PRACTICES FOR THE INVESTIGATION AND VOLUNTARY DISPOSITION OF LOSS AND DAMAGE CLAIMS AND PROCESSING SALVAGE) and they are violating the law if they do not respond as required under the regulations.

Unfortunately, the Federal Motor Carrier Safety Administration ("FMCSA"), which is the federal agency that has responsibility for the enforcement of these regulations, won't be of any help. You might have to turn the matter over to a qualified transportation attorney.

FREIGHT CLAIMS – OBLIGATION TO PAY FREIGHT CHARGES

Question: Our company hauls a load of freight for a freight broker. There is damage noted on the bills of lading at the receivers. The freight broker calls and tells us that their customer

deducted money from their payment for this load for the damages and that they in turn were going to deduct this same amount from our freight payment. No freight claims have been filed by any party.

My question is this—aren't the freight charges to be paid in full to the carrier and then a freight claim filed for the damages or can damages be deducted off the freight payment to the carrier and no claim filed?

Answer: The obligation of a shipper to pay freight charges and the obligation of a carrier to pay cargo claims are legally independent and involve different legal considerations.

Yes, the shipper (or broker) should have paid the freight charges and filed a claim in writing for the loss or damage. And, if the claim is proper, the carrier should pay the claim.

However, it is not "illegal" for a shipper (or its representative such as a broker) to withhold or setoff payment of freight charges against a claim for loss or damage. You do, of course, have the right to bring a lawsuit to collect your charges if they are not paid. Beware, then, that there will probably be a counterclaim for the loss or damage.

FREIGHT CLAIMS – OCEAN CARRIER TIME LIMITS

Question: I have a question about Steamship claim deadlines. This is governed by maritime law, and I need some clarification on when and how a steamship line ("SSL") claim becomes "time barred".

I received notification that one of my claims with a SSL which imports product for one of our customers was time barred due to the claim being more than 1 year old. Our claim was originally filed within one month of the warehouse delivery date. When does the one year liability begin counting down? There are multiple dates associated with an imported shipment, the overseas ship date, the delivery date at the destination port, the date of the delivery to the destination warehouse, the filing date of the claim, and even the SSL's first denial of our claim. The fact that we continued to rebut the SSL's grounds for their denial and advised the SSL on multiple occasions that we disagreed with their declination didn't change the one year time line in any way. Per our customer's request our claim continued to remain "open and payable" as presented. This sort of language didn't make any difference when it came to the claim becoming time barred.

Now my customer is asking why we do not have the 2 years to rebut the declination as is the law with over the road transportation. I did explain that maritime law and imported merchandise regulations are significantly different than the laws that are in place for a routine common carrier or even a contract carrier. I have several other SSL claims open at this time that are coming up on one year of the ship date. The SSL has been completely quiet on all of our requests for updates or current status information. Is there anything that I can do to extend the expiration time line? If we dispute the SSL's determination, how do we get them to reopen and more fairly evaluate the situation?

These claims were filed due to the seals on several containers being broken while on the ship and replacement seals being put into place after the off loading of the container at the port. In every situation some number of cases had been removed from the pallet just inside the container doors.

Answer: On ocean shipments to or from the United States, the time limits for claims and suits against the ocean carrier are governed by the Carriage of Goods by Sea Act ("COGSA"). This is explained in Freight Claims in Plain English (4th ed. 2009):

17.2.2.4 TIME LIMITS FOR CLAIMS AND SUITS

Section 1303(6) of COGSA provides:

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: Provided, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

Authors' Note: This is very different than the situation for surface carriers where the failure to file a claim (or to start a suit) within nine months cuts off the right to sue.

It should be noted that ocean carriers can, and often do (upon request), waive the one-year time limit for bringing suit. See, e.g., *Marine Office of America Corp. v. NYK Lines*, 638 F.Supp. 393 (N.D. Ill. 1985). Such requests should be made and confirmed in writing. Additionally, in this case, the failure to file a timely written claim with an inland carrier was excused when written notice had been given to the initial ocean carrier, oral notice had been given to the inland carrier and the inland carrier had actual knowledge of the loss.

TIP: Make sure that the extension of the one-year time limit is obtained in writing and BEFORE THE ONE YEAR PERIOD EXPIRES!

It is always important to understand that the rules are not the same for the different modes, particularly for ocean and for domestic and international air freight.

FREIGHT CLAIMS – OCEAN SHIPMENT DAMAGED ON DOCK

Question: We had a large machine shipped into the U.S. from Spain. At the terminal in New Jersey the crane operator over stroked the crane into the crate and damaged the machine.

We sent service techs to the site to view the damage but they could not gain access to the machine. We then had the machine uncrated and sent a technician again and inspected the machine for damage; so did the terminal.

The cost to repair this machine was in excess of $25,000. The customer (end user) has refused to pay us for the machine until he had an additional run-off and time to run the machine in production. It has now been over 120 days since the customer received the machine and the lack of payment is causing us severe cash flow problems.

The freight line and terminal have offered $500 each. The export-import broker, who would not ship the damaged machine section in until they had full payment from us, is saying that the limit of liability with our insurance is also $500. What action can we take as this machine was damaged while at the shipping terminal dock storage area?

Answer: Without reviewing all of the shipping documents I can only give you a general answer.

I am assuming that this shipment moved under an ocean bill of lading from Spain to the U.S. If so, the ocean carrier's liability is limited under the Carriage of Goods by Sea Act ("COGSA") to $500 per package or $500 per customary freight unit, unless a value was declared and an additional excess valuation charge was paid. Under most ocean bills of lading, the COGSA liability limitation is also extended to stevedores, terminal operators, inland carriers, etc. through what is known as a "Himalaya clause". Most likely, your machine would be considered a "package" and thus subject to the $500 limitation.

You did not provide any information as to your terms of sale (usually "Incoterms") with the vendor in Spain. The terms of sale would determine which party (vendor or purchaser) had risk of loss in transit and whether there was any obligation to provide insurance. This should be investigated.

Lastly, most importers and exporters carry some form of transit ("ocean marine") insurance, or insurance is obtained by the freight forwarder for the benefit of its customer. If you have not yet done so, you should check with your forwarder.

Freight Claims – Offsetting Against Warehouse Charges

Question: We are a single corporation that performs trucking, warehousing, and distribution. A large customer that uses all of our services is taking an offset against our storage and handling invoices for shortages and damaged product and did not file any claim until we attempted to collect on invoices aged over 90 days. Although they have just provided documentation on the specific identity of the product, after the fact, the claims do not discriminate when or how damage occurred. Their assertions are absent of clear knowledge of whether transport or warehousing handling is at cause. We have not had the right of inspection or salvage value offered on the damaged product and need to know:

1. Under Uniform Commercial Code ("UCC") and with use of Standard American Warehousemen's Association warehouse receipt contract terms, can our customer offset these claims against warehousing invoices without our express consent? There is no other contract or PO for services in place.

2. Although we can trace inventory movements from plant to warehouse on our own trucks, is it safe to presume that without any exceptions noted on freight bills, bills of lading ("B/Ls"), or proofs of delivery ("PODs") our "common carrier" segment is not part of their potential claim? I.e., I read that with ICCTA carrier invoices may be subject to claims offset without tariff or other protections.

Answer: I'm not sure I can give you a definitive answer to your questions, but...

First, the liability of a warehouseman versus that of a motor carrier is governed by different laws and regulations.

As you observe, warehouseman's liability is governed by the Uniform Commercial Code and the terms and conditions of the warehouse receipt (assuming that one was issued). A warehouseman's liability is based on negligence, i.e., the shipper/owner would need to prove that the loss occurred while the goods were in the possession of the warehouseman, <u>and</u> that the cause of the loss or damage was the negligence of the warehouseman. Usually warehouse receipts contain terms and conditions as to filing of claims and liability limitations.

The liability of a motor common carrier is governed by the "Carmack Amendment", 49 U.S.C. Section 14706, the case law interpreting and applying that statute, and also the Federal Motor Carrier Safety Administration's ("FMCSA's") claim regulations at 49 CFR Part 370. Basically, a common carrier has a much higher standard of liability than a warehouseman, often referred to

as that of an "insurer" of the goods. With a claim against a common carrier, the shipper/owner has only the burden of proving that (1) that the shipment was in good order and condition when tendered to the carrier at origin and (2) that it was damaged at the time of delivery, see *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 337 U.S. 134 (1964), reh. den., 377 U.S. 948. Once the claimant has established these two elements, the burden then shifts to the carrier to prove that the loss was caused by one of the recognized exceptions to liability such as act of God, act or default of the shipper, etc. AND that the carrier was not negligent.

It seems to me that there are serious questions as to whether the alleged loss or damage occurred while the goods were in the warehouse, or while they were being transported. In any event, the shipper/owner would still have the duty to submit a written claim that contains the necessary basic information to properly investigate the loss or damage, and to determine liability.

It is not clear from your question whether you have sufficient information in your warehouse management system, or in your shipping and receiving records, to identify whether the alleged loss or damage took place in the warehouse or in transit. You really need to know this because in the one case your liability would be governed by the warehouse receipt and in the other it would be governed by your bill of lading and applicable tariffs (if any).

As far as your customer's taking "an offset" against your storage and handling invoices, unless there is a specific prohibition against this in your warehouse receipt (or in your tariffs), there is nothing "illegal" about this, and it is a fairly common practice. From a legal standpoint, the shipper's obligation to pay freight charges and the carrier's obligation to pay legitimate loss and damage claims are separate and independent matters. Thus, in the event of litigation the opposing party can assert a counterclaim, but each party must sustain the burden of proving its claim.

FREIGHT CLAIMS – OFFSETTING CHARGES AGAINST BROKER

Question: I am a freight broker who had a shipper file a claim for damaged freight. The shipper has yet to be paid for the claim and wants to deduct for the amount of the claim against a different invoice. Can a shipper legally deduct for a claim in progress against a previous invoice? I need to know from a legal stand point if they can do this and if you can show me legal information for this problem.

Answer: The shipper's claim for the loss or damage is against the carrier pursuant to the contract of carriage (usually in the form of a bill of lading), and not the broker, unless the broker has somehow assumed liability. The broker's claim for its freight charges is against the shipper pursuant to its brokerage agreement with the shipper. In other words, they are legally independent contractual relationships.

Notwithstanding, shippers often withhold freight charges due to a broker when there is a cargo loss, even though the broker itself may not be liable for the loss or damage. It is not "illegal" to do so, but it is somewhat unfair to the broker, and has been the cause of some brokers actually going out of business because they have paid the carriers, and have not been paid by their customers. Also, if the broker were to sue the shipper for its freight charges, the shipper's cargo claim would probably not be a valid counterclaim in the action.

FREIGHT CLAIMS – OFFSETTING CLAIM AGAINST FREIGHT CHARGES

Question: If a carrier is slow paying a claim or denies paying a claim, can we deduct the amount of the claim from invoices, for loads other than the claimed load, to get our money reimbursed to us?

Answer: It is not illegal to offset a claim against freight charges owed to a carrier, and many shippers do this. The only problem is that the carrier may sue you for its unpaid freight charges (and ask for interest, attorney fees, etc.). If so, you can then assert a counterclaim for the cargo loss or damage.

In any event, you should ALWAYS file a proper claim in writing with the carrier for any loss or damage to protect your interests in the event the carrier tries to collect its freight charges.

FREIGHT CLAIMS – OFFSETTING DAMAGE CLAIMS AGAINST FREIGHT CHARGES

Question: Our customer is invoicing us for product that was not delivered by a carrier we hired to deliver the load. Can we deduct this amount from his invoices of other loads not related? And, can we submit to the carrier our customer's invoice as proof of reason why we are deducting that amount?

Answer: It is not "illegal" to offset freight charges against freight loss & damage claims. However, you may be exposing your company to a lawsuit from the carrier to collect its charges.

Also, your should not be "in the middle" if you are acting as a broker. You should insist that your shipper customer file a formal written claim with the motor carrier for the loss or damage. And if the customer files the claim with your company, then you should submit it to the carrier on behalf of the customer, and advise the customer that you have done so.

FREIGHT CLAIMS – OFFSETTING FREIGHT CHARGES AGAINST CLAIMS

Question: Would you be so kind as to provide me with a response in regards to the below mentioned questions.

We are a freight broker; as part of our customer service we assist our clients in resolving freight claims on shipments we book.

These questions are based on the above-mentioned statements.

1) Can we offset freight charges against unpaid motor freight charges?

2) Can we hold payment to a carrier pending the conclusion of a claim?

3) Do we have the right to obtain a carrier's insurance terms and conditions as an insurance certificate holder?

Answer: Questions 1 and 2.

It is not "illegal" of offset freight charges against unpaid cargo claims (unless this is specifically prohibited in the transportation agreement between the shipper and the carrier). Be aware, however, that the carrier may have a loss of discount or other penalty provision in its tariff for late payment of freight charges.

If the carrier should bring suit for its freight charges, it would probably able to collect them (plus any penalties). Your freight claim would not be a legal defense to the carrier's claim for freight charges since they are independent causes of action. You would need to interpose a counterclaim, and would have the burden of proving your cargo claim, damages, etc.

Question 3.

You can request a copy of the carrier's cargo legal liability insurance policy, but the carrier does not have any obligation to furnish one (unless it is specifically required in your transportation agreement with the carrier). Most carriers don't like to do this, and will only provide a Certificate of Insurance, which only gives very basic information as to coverage. A certificate, for example, will not tell you what deductibles, exclusions, exceptions, etc. may be in the policy.

FREIGHT CLAIMS – OVERAGES AND SHORTAGES

Question: When we deliver loads to the consignee in some cases we have overages and shortages that offset or seem to offset a claim. But I am being told that the exception to this rule would be seafood loads and that we are also responsible for item count as well as case count for these loads. I don't understand why these loads should be handled any differently then the non-seafood loads we do now. Is there something in the law that makes this different?

Answer: First of all, you shouldn't mix apples and oranges: "overages" from one shipment do not offset "shortages" from a different shipment.

A carrier is responsible to deliver the quantity and description of goods that it signed for on the bill of lading. If there is a shortage, the carrier is liable. Sometimes, part of a shipment goes astray and is later found and delivered. If so, this would complete the delivery of that shipment and there would be no shortage claim.

It would not make any difference whether the shipment is seafood or non-seafood.

FREIGHT CLAIMS – PARTIAL LOSS ON INTERNATIONAL SHIPMENT

Question: I recently moved to England and had some household goods shipped via less-than-container-load ("LCL") ocean freight. I dealt directly with a forwarding agent (licensed by Federal Maritime Commission) who arranged shipment with a non-vessel operating common carrier ("NVOCC"). I am listed both as the shipper and consignee for the shipment, and I packed my boxes and delivered them to the carrier's terminal/warehouse in Boston, where I placed them on a pallet and took a photo of the full pallet for good measure. The bill of lading is "Non-Negotiable" and lists the shipment as 1 pkg "SHIPMENT STC 14 PIECES S.T.C. PERSONAL EFFECTS ABD HOUSEHOLD GOODS. NO SED REQUIRED-NO INDIVIDUAL SCHEDULE B NUMBER VALUED OVER $2500 FREIGHT PREPAID." The gross weight listed is 645.00 LB and the measurement is 34.000 cubic feet ("CF"). The largest among the 14 boxes I shipped was one containing a 37" LCD HDTV monitor, which I packed in its original carton since the user manual said it must be so packed in order to protect it during shipping. That box accounted for about 10 CF of the 34 total. In addition to the freight charges, which were assessed according to the volume of the shipment, I also opted to take the additional Marine Insurance that my agent offered, which he described as covering "total loss only" and not "damages." He gave the example that if the entire container fell into the ocean and was lost at sea, I would be covered, but if my shipment got wet for any reason and was damaged, it would not be covered.

After clearing my shipment through UK customs, I went to the terminal in London to collect my shipment. When the pallet came out of the warehouse, I immediately noticed that the largest box containing the monitor was missing and in its place was a much smaller box in very poor condition containing what appeared to be a cheap generic-brand bicycle frame. I had never seen that box before, though it had a sticker on it labeling it as part of my shipment "8 OF 14." All of my 13 other boxes appear to have arrived untouched. I refused to accept the one box that did not belong to me, since, aside from the fact that I did not want it, I did not believe I could legally import it into the UK since it was not mine and I had not listed it on my packing list for customs clearance. Before leaving the terminal in London, I had to sign a form acknowledging receipt of my shipment, but I did so only after noting that one box had been changed for another. The workers at the terminal also accessed CCTV logs from when the shipment arrived, and showed me video of it being loaded out of the container and into the warehouse. In that video it appeared that the monitor box was not present and that the bicycle box had been in its place when it first came out of the container.

As soon as I got home from the terminal, I contacted my forwarding agent in Boston and notified him of the problem. He says he has contacted the NVOCC and that they are conducting an investigation into the matter. I asked him about my insurance, and he told me that it would not be covered since it was not a total loss, explaining that a total loss meant all the items in the shipment were lost, and since some of mine had arrived, it was a partial loss. Does that seem correct?

In the event that the NVOCC cannot locate my box (it seems very likely to me that it was stolen and replaced with a random box that was lying around before it was loaded into the container, especially since the sticker had been moved from my box to the new box -- that does not seem like it is likely to happen accidentally), to whom should I appeal for reimbursement for my lost item? Should I expect to get the full value of the items? I have found documentation of the original purchase price, which comes to $1,979.95, but I don't know where I should make a claim. How long should I wait for their "investigation" to be complete before I take action and arrange to replace my item? Should I file a police report or a report with some other entity? Who has jurisdiction over theft of goods in NVOCC possession?

Also, since significantly less volume was actually shipped in the container than what I paid for (24 cubic feet vs 34 cubic feet), can I pursue a reimbursement of part of the shipping charges separately, or is that done as part of the loss/theft claim?

I am also concerned that I will have issues with UK customs, since I have already received clearance for the monitor as part of this shipment, but I don't know how to notify them that it did not actually arrive, or how to avoid having to pay the full fees again when I eventually get a replacement and have it shipped here. Also, a new replacement monitor would not actually qualify to be imported under the terms the rest of my belongings were because they need to have been in my possession for at least 6 months before coming to the UK (I am a student and am only importing these items temporarily). As a result I may wind up needing to pay duty on a replacement monitor. Can I expect any additional fees or taxes I end up having to pay customs in order to bring a replacement monitor into the UK to also be reimbursed by the carrier?

Finally, because I was expecting the monitor in its large box, I had to rent a large van in order to go pick up my shipment from the terminal. Since the monitor was not there to be picked up, the van was totally useless and I could have easily picked up the other boxes in my car. Can I appeal to have the van rental reimbursed by the carrier as well?

Answer: I'm not sure I can answer all of your questions, but:

If you have not yet done so, you should immediately file a claim in writing against the NVOCC that issued the bill of lading.

You should also file a claim against the Marine Insurance policy (I do not think the forwarder's statement about the "partial loss" is correct).

Most likely, your measure of damages would be limited to the value of the missing monitor. The other expenses that you incurred are "consequential" damages and usually are not recoverable.

I can't help you with the questions about customs and duty.

FREIGHT CLAIMS – PARTIAL REJECTION

Question: If a motor carrier fails to maintain proper transit temperatures and therefore delivers a warm load of perishable product, does the consignee have the right to accept delivery of some of the product while rejecting the remainder to the carrier? Or, must the load be accepted or rejected as a commercial unit? If the load must be accepted or rejected as a unit, and a partial rejection occurs, what is the remedy?

Answer: There are provisions in the Uniform Commercial Code that govern the relationship between a seller and a buyer of goods. For example, the disposition of goods that are non-conforming (wrong item, color, size, etc.) would be covered in Section 2-601 which states the general rule that "if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole, or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest."

However, this does not necessarily govern the relationship between the shipper, carrier and consignee. As a practical matter, a consignee has a duty to "mitigate damage", see *Freight Claims in Plain English* (3rd ed. 1995) at Section 7.1.4. Thus, if only part of a shipment is damaged, and the remainder is undamaged, the consignee usually should accept the undamaged goods.

Of course, there may be other considerations, particularly with food and food-related products, if there is any possibility of contamination, etc.

FREIGHT CLAIMS – PARTIALLY DAMAGED SHIPMENTS

Question: My first question concerns receiving damaged freight from less than truckload ("LTL") carriers: If shipment is partially damaged, but some pieces are clearly intact, is there clear guidance that says we CANNOT refuse the damaged pieces and keep the undamaged, providing we annotate the delivery receipt clearly? Are we required to receive the entire shipment, sign the delivery receipt and note the damages, and keep the damaged freight? If we have to keep the damaged freight, our receiving docks clog up pretty quick. If the cargo is leaking (like paints) we do refuse the entire shipment...that's pretty clear.

Second question - I've always understood that LTL carriers will pay damage claims only to the debtor of the freight charges. That's been our experience with a few of them. Is this correct? Much of our freight ships prepaid, thus when it arrives damaged, we sign the delivery receipt with damages noted and file the claim with the vendor, rather than the LTL carrier. When freight ships FOB collect, we as consignee, file the claim with the carrier. No issues there. But we are having the discussion about freight claims where we are NOT the debtor, and whether or not we can legally refuse that part of a shipment that is damaged, and keep the rest...as long as we note the delivery receipt properly. I can find no real guidance in the rules of various LTL carriers.

Appreciate your help and clarification.

Answer: 1. To the extent that a portion of the shipment is damaged to the point where it is clearly worthless, I see no reason why you can't accept part and reject the rest. The question that comes up is whether the damaged goods can be salvaged - repaired, repackaged, etc. The reason is that there is a "duty to mitigate loss", so that there may be an obligation to accept the damaged goods if it is reasonable under the circumstances to salvage anything.

2. Some carriers may have their own practices regarding claims, and there may be provisions in a formal Transportation Agreement that would be applicable.

However, from a legal standpoint, either party to the bill of lading (shipper or consignee), as well as the beneficial owner of the goods, has the right to file a claim, see *Freight Claims in Plain English* (4th Ed. 2009) at Section 10.5.2. It does not matter which party pays the freight bill.

I would also note that under the Uniform Commercial Code ("U.C.C.") the "risk of loss" as between a seller and a buyer is determined by the terms of sale, e.g., FOB Origin or FOB Destination. Thus, if the terms of sale are FOB Origin, the risk of loss passes to the buyer when the goods are tendered to the carrier, and the buyer should normally be the party to file a claim against the carrier.

FREIGHT CLAIMS – PASS-THROUGH OF GOODWILL PAYMENT

Question: We are an insurance company, and in addition to providing cargo legal liability coverage to our insureds (mostly smaller truckload carriers), we also act as their cargo claim handling agent when cargo claims are filed against them. A great majority of our insureds have transportation contracts with freight brokers who in turn have contracts with their customers.

We need help in determining how we should approach a specific claim situation. You noted in your January 2009 issue of TRANSDIGEST ("Carrier Liability Limitation Upheld") that the Supreme Court's decision in *Norfolk Southern Railway Co. v. Kirby* established the carriers' liability as that (when an intermediary/carrier contract is involved) to which the intermediary and carrier agreed. We have no problems with claims filed directly against our insureds by the brokers' customers, as we use the liability noted above.

However, what is our insured's cargo liability for any claim filed against our insured by the freight broker who proves in a subrogation action that he (the freight broker) has paid his customer and is now the party suffering the (monetary) loss? I must point out that our insureds have two types of contracts with their freight brokers. The first makes our insured liable to the freight broker for any cargo loss/damage claim. And the second makes our insured liable to either the freight broker or the freight broker's customer.

The problem I have involves the situation where the freight broker wants payment from our insured. My concern is that without a copy of the freight broker/customer contract, which may contain a limit of liability on the part of the freight broker, we may pay more than that required by this contract. A freight broker may make a higher payment than is required in his contract with his customer because 1) the customer is a highly valued account and the freight broker wants to maintain the business or 2) the broker expects to get paid in full from the carrier (our insured) since the broker/carrier contract provides for full liability on the part of the carrier.

My question is, as I do not believe under the circumstances described above that our insured should be required to participate in such a "goodwill" payment, can we legally demand a copy of the broker/customer contract and, in the event there is a limit of liability, can we take advantage of this lower limit and legally pay this amount rather than the full liability required in the freight broker/carrier contract?

NOTE: Our insured's contract with the freight broker provides the following paragraph under the contract heading "Carrier's Cargo Liability and Claims" ---

> Carrier shall be liable for the full, actual value of the shipments tendered by BROKER to CARRIER. No released value rates, or other limitation of cargo liability, shall be valid or enforceable against BROKER or its customers unless expressly agreed to by BROKER in a signed writing separate from any bill of lading or other delivery receipt issued by CARRIER.

Since the freight broker represents their customer, I contend that the agreed to "… writing separate from any bill of lading or other delivery receipt issued by CARRIER" portion of the sentence could be interpreted as a contract (in addition to one between the freight broker and the carrier) between the freight broker and their customer which may contain a limitation of liability and that this limit of liability should apply to the carrier (our insured).

Answer: Brokers sometimes assume liability for loss or damage in transit and voluntarily pay a claim to a shipper-customer (even though the broker may not be legally obligated to do so), and then subrogate to the shipper's claim against the carrier. Such an assumption of liability may arise out of a formal broker-shipper contract in which the broker has assumed liability, or may just be done to retain a valuable customer relationship.

Although I have seen many broker-shipper contracts in which the broker has assumed liability for loss or damage, I have never seen or heard of one where the broker's liability is subject to a liability limitation. In other words, the scenario that you have described is very unlikely.

In any event, you ask whether you would be entitled to a copy of the broker's contract with its shipper-customer.

The Federal Motor Carrier Safety Administration ("FMCSA") does have regulations that are applicable to brokers. 49 CFR Section 371.3 states:

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.

As you can see, under sub-section (c) the motor carrier (a party to the transaction) would have the right to information pertaining to the freight charges, the broker's compensation, etc. However this section does not really address the handling of a loss or damage claim.

You can, of course, demand a copy of the broker's contract with its shipper-customer, but I don't think the regulations would require the broker to provide information about its liability for loss or damage that may be contained in its broker-shipper contract. I would note that in the event of litigation, you would probably be entitled to disclosure of any such documents.

I am only aware of one court decision that involved issues similar to the ones you have described, *Covenant Transport, Inc. v. Liberty Mutual Insurance Company*, No. 1:01-CV-224 (E.D. Tenn. March 20, 2003). However this case is distinguishable because the intermediary was a freight forwarder (not a broker), and the legal relationship between a freight forwarder and the motor carrier is different, namely the relationship of shipper to carrier.

FREIGHT CLAIMS – PAYMENT BASED UPON GROSS WEIGHT OR NET WEIGHT

Question: Although I understand and appreciate carriers paying claims based upon released rates and limited liability, i.e. $25 per pound, certain carriers have started to add a new twist by attempting to pay based upon net weight rather than gross weight of claimed product. Is it proper for carriers to further reduce recovery amount in this manner?. Maybe shippers should start paying freight based upon net weight too!

Answer: We are aware of this problem.

As you indicated, for the purposes of billing, less-than-truckload carriers use the "gross weight". Item 995 of the National Motor Freight Classification provides:

> Unless otherwise provided, charges shall be computed on actual gross weights... A shipping carrier, container or package, or pallet, platform or skid constitutes part of the gross weight.

It would certainly seem that liability limitations should be based on the same weight that is used for billing, but some carriers are starting to use the net weight of the actual goods that are in the package or carton.

For example, I checked the Fedex Freight tariff 100-F and found the following language:

> Carrier's maximum liability shall be the actual cost of goods supported by certified copy of original invoice not to exceed $25.00 per pound per package or $100,000 per incident, whichever is lower. In all cases, the weight of packaging and/or shipping container, pallets, skids and the like shall not be included when determining Carrier's maximum liability.

Obviously, the best way to correct this situation is to include appropriate language in a properly drafted transportation agreement.

FREIGHT CLAIMS – POOR PACKAGING DECLINATION

Question: We are seeking feedback on freight claim issues. We are a full service 3rd party provider and part of acting as our clients off-site "Traffic Department", we file claims against carriers on behalf our clients. We have one claim worth $10,000 where carrier is declining due to poor packaging. There must be other members in the same boat, where carriers have no complaints and accept freight, but use the packaging as a defense. Can you provide any feedback or support?

Answer: Under the court decisions interpreting the "Carmack Amendment" (49 U.S.C. §14706), the shipper need only prove that it tendered the shipment to the carrier in good order and condition, that it was delivered in damaged condition, and its damages. The burden is then on the carrier to prove that the cause of the damage was a specific exception such as the "act or default of the shipper", AND that it was free of any negligence. See Missouri Pacific R.R. Co. v. Elmore & Stahl, 337 U.S. 134 (1964), reh. den., 377 U.S. 948.

Each case must be examined on the specific facts involved. "Poor packaging" is one of the defenses that falls under the exception of "act or default of the shipper", so the carrier must do more than allege that the packaging was the cause of the damage, it must also prove freedom from negligence. In other words, the declination must specifically identify what was wrong with the packaging, and the carrier also must establish that the damage was not caused in whole or in part by some negligence on its part, such as rough handling, dropping the package, etc.

These subjects are covered in *Freight Claims in Plain English* (3rd ed. 1995) which is available from the Council, in the event that you don't already have a copy.

FREIGHT CLAIMS – PRODUCT DAMAGED IN WAREHOUSE

Question: A roof leak in our warehouse leaked water on a skid of merchandise. Both the loader in our warehouse and the truck driver picking up were aware of the water soaked product on the skid, but the product was loaded and accepted by the trucker clean anyway.

The customer received the product wet and damaged and has put in a claim to us.

I say even though our loader knew it was wet the carrier is at fault because he knew of its condition and accepted and delivered it and should pay our claim.

Answer: A carrier is liable for loss or damage to goods that occurs in transit, i.e., while in its possession, and that is caused by the carrier. The claimant has the burden of proving (1) good condition when tendered to the carrier at origin, (2) damaged condition when delivered at destination, and (3) its damages.

A bill of lading without exceptions is usually considered evidence that the goods were in good order and condition when received by the carrier. However, it is a rebuttable presumption that can be challenged if there is evidence to the contrary. While the carrier may have signed "clear" when it picked up the goods, from what you say there is no question that the goods were damaged (wet) when it received the goods.

A claim could be filed with the carrier, but based on these facts, the carrier would deny the claim and then cross-claim back to your company as the responsible party.

FREIGHT CLAIMS – PRODUCT DESTINED FOR DESTRUCTION

Question: Our outdated/unsaleable returned goods program allows for 100% credit on the invoice value of returned products. Our field sales personnel perform an exchange of good product for outdated product at retail. They then consolidate these outdated products at selected customers (distributors) at which time they provide 100% credit to the distributor. The consolidated return products are then shipped back to a 3rd party returns processing center for destruction. At no time are these products refurbished or recycled for resale. Their only disposition is destruction.

Considering this process, if a carrier were to lose either the entire shipment or a portion thereof when transporting the goods back to the returns center, at what value would we be justified in file a claim? Since there is no tie back to the original invoice under which these products were originally sold, what documentation would we use to substantiate the value of the loss?

Answer: As I understand your question, you want to know the value of claim for outdated product that is lost en route to the 3rd Party Returns Processing Center ("3rd Party RPC"). If the product reached the 3rd Party RPC it would be destroyed and you would receive nothing.

If my understanding of the situation is correct, then it appears that the value of the return shipment is zero, except for the cost of transportation. Therefore, if the entire return shipment were lost, then your claim would be for the amount of the freight charges only. The only other possible element of the claim would be any costs paid the 3rd Party RPC relating to this shipment.

Another issue that you did not raise involves possible liability if this product should enter the market. If a consumer were to be injured by this outdated/unsaleable product with your name on it, clearly, you would be named in any resulting litigation. While this possible liability is speculative, and therefore not compensable from the carrier at this time, it surely should be a consideration if the scenario arose.

FREIGHT CLAIMS – PRODUCT FROZEN BUT DELIVERY RECEIPT SIGNED CLEAR

Question: We received product that clearly stated product was not to be frozen on the bill of lading. Unbeknownst to us the product had been frozen but the freight bill was signed clear. When the vendor finally acknowledged the product had been frozen we contacted the carrier. How much time is allowed for a possible claim?

Answer: Initially, I see that your company is not currently a member of the Transportation & Logistics Council, Inc. Please consider the benefits of membership.

With respect to your freight issue, I note that you do not mention whether there exists a contract between your company and the carrier. Therefore, for purposes of responding to your question, I will assume that there was no written contract and that the shipment moved under a bill of lading only.

Also, I assume this is a domestic, U.S. truck or rail shipment. If this is correct, you have at least 9 months from the date of delivery (and possibly longer) to file a claim.

Since you have a clear delivery receipt, the carrier may take the position that the damages are concealed damages. The carrier will probably also assert that all concealed damage claims must be filed within a certain time period (usually 15 days).

First, based on the facts you have given me, it is not entirely clear that the damages should be considered "concealed" damages. Presumably the carrier had control over the temperature and could have, or should have, known if the temperature dropped to an unacceptable level.

Second, assuming your claim is truly for concealed damages, then you need to look at your contract and/or the carrier's tariff to find out how concealed damages are handled. Typically, most less-than-truckload carriers participate or refer to the 15-day rule that exists in the National Motor Freight Classification ("NMFC"). To paraphrase, this rule states that if a claim for concealed damages is filed beyond 15 days from the date of delivery, the claimant has a greater burden of proving that the damage occurred in transit (i.e., while in the possession of the carrier) and not after delivery of the product to the consignee.

Please note this 15-day rule simply places a greater burden of proof on the claimant; it does NOT alter the 9-month claim filing rule. In other words, a concealed damage claim that is filed beyond 15 days, but within 9 months, from the date of delivery CANNOT be declined on the basis that the claim was untimely filed.

Lastly, the carrier can only use the NMFC 15-day rule if that carrier is a participant in the NMFC. If the carrier is not a participant in the NMFC, the carrier must have its own tariff rule governing concealed damage. Therefore, you will need to request a copy of the carrier's tariff rule (or terms and conditions) that addresses concealed damages. But, keep in mind, no matter what the carrier's rule states, the time period to file a claim for damages (concealed or not) on a U.S. truck or rail shipment can never be shorter than 9 months from the date of delivery.

FREIGHT CLAIMS – PROPER FORMS FOR FILING

Question: We are a third party logistics company who as a service to our various customers files and recovers their loss and damage claims with the various carriers who we use. Over the past forty years I have used our own form that has been accepted by hundreds of carriers nationwide as it meets all the requirements of a claim as outlined by the National Motor Freight Classification rules for filing claims.

One carrier we use insists that we use their claim form before they will entertain any claim. Are we required to use their form?

Answer: I reviewed the "Claim Brief" form that your company uses and also the claim form that the carrier in question is requiring you to use.

The federal regulations in 49 CFR Part 370 state in relevant part:

> § 370.3 Filing of claims.
>
> (a) Compliance with regulations. A claim for loss or damage to baggage or for loss, damage, injury, or delay to cargo, shall not be voluntarily paid by a carrier unless filed, as provided in paragraph (b) of this section, with the receiving or delivering carrier, or carrier issuing the bill of lading, receipt, ticket, or baggage

check, or carrier on whose line the alleged loss, damage, injury, or delay occurred, within the specified time limits applicable thereto and as otherwise may be required by law, the terms of the bill of lading or other contract of carriage, and all tariff provisions applicable thereto.

(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.

Your claim form certainly complies with the minimum filing requirements set forth in the federal regulations. I do understand why a carrier might want to require a standardized format for its convenience in processing the information. However, I believe that ANY "written or electronic" claim that contains the required minimum information specified in the regulations would be sufficient to constitute a valid claim. There is nothing in the regulations that requires claimants to use any particular form.

I suppose it could be argued that the language in subsection (a): ". . .and as otherwise may be required by law, the terms of the bill of lading or other contract of carriage, and all tariff provisions applicable thereto. . ." could be construed as authorizing a contractual or tariff provision that claims must be submitted in a particular manner or on a particular form, if the parties have agreed to do so. However, I don't think that failure to do so would be a valid reason for declining an otherwise valid claim.

Note that the regulations at Part 370 apply to motor carriers. Since you are dealing with a parcel carrier, it is possible that some shipments might move in part by air. If so, then these regulations would not apply to "transportation of property (including baggage) 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", which is exempt under 49 USC Section 13506(a)(8)(B).

FREIGHT CLAIMS – PROPER IDENTIFICATION OF PRODUCT

Question: We ship many SKU/item numbers to our customers. We receive proof of deliveries listing XX amount either short, damaged or over. Is it the carrier's responsibility to ensure the customer is detailing which SKU/item number is actually over, short or damaged?

Answer: From the limited information provided, it seems that your problem is with the consignee.

Obviously, it would be best if the consignee would made specific notations as to what SKU/item number is over, short or damaged. I don't see how the carrier's driver can control what notations the consignee makes on the delivery receipt. If the consignee only notes that XX number of cartons were short or damaged, you probably need to get the required SKU/item number information from the consignee.

FREIGHT CLAIMS – QUESTION OF DAMAGES AFTER CLEAN DELIVERY

Question: We were hired to pick up a load of lumber, but the dispatcher did not inform the driver to tarp the load. The shipper stamped on the bill of lading ("B/L") that the load was "not tarped" when the driver finished loading the truck. When the driver arrived at the consignee, the driver was given a clear delivery no exceptions noted. However, because of the "not tarped" stamp, the customer filed a claim for damages. I denied the claim based on no proof of loss, but the customer states their proof is the stamp. Would this be correct?

With clear delivery and no proof of loss, other than the notation "not tarped", should these types of claims be honored? I have always been under the impression that with a clear delivery receipt, the claimant must prove it was us (the carrier) in order to support a claim.

Answer: It isn't really clear from your description of the facts, as to what the problem is. First off, if there is no loss, no damages, there is no claim regardless of whether the load was tarped or not.

Ordinarily a requirement to "tarp" a load should be spelled out on the bill of lading, and there is usually an additional tarping charge. The charge can be agreed upon at the time the rate is negotiated, or it can be an accessorial charge from the carrier's tariff (if there is one applicable).

If the driver was not requested to tarp the load, and there were no instructions on the bill of lading, I don't think the carrier has an obligation to do so. Of course, if there is a course of dealing where this particular type of shipment (lumber) has been handled a number of times, and the loads were always previously tarped, it can be argued that the carrier should have known that tarping was required.

In any event, if there were damages discovered some time after the load was delivered, this would fall into the category of "concealed damage". The consignee would then have the burden of proving that the damage did occur in transit and not after delivery, and the amount of its damages. This would be true regardless of whether there is a "not tarped" stamp.

The claimant always has to prove that there was actually some damage to the goods. The fact that there was a "clear delivery" and no notation of damage on the bill of lading or delivery receipt at the time of delivery only places a greater burden on the claimant to prove that the goods were damaged at the time of delivery and not afterwards.

FREIGHT CLAIMS – QUESTION OF SEAL ON SL&C

Question: Our company has a vendor that only tenders their freight shipper load & count ("SL&C") on full loads. Normally our consolidator schedules the pick-up of the goods with one of their contracted carriers. Upon pick-up at the shipper/vendor the driver is not asked to acknowledge that the trailer is sealed and to put the seal number on the shipping documents so that the receiving entity can verify the seal is intact.

Recently one of our distribution centers ("DC") received one of these SL&C shipments with significant carton shortages. The bill of lading ("B/L") shows this was tendered as SL&C. When the shipment was received at our consolidator they broke down the load and counted all the freight. The shortages were found by the consolidator and noted on the B/L. The consolidator also notified the shipper of the shortages. The problem is nowhere along the way have any notations been made that the seal was intact by either the pick-up carrier or consolidator. The shipper/vendor is demanding payment on their short invoices.

Normally we do not file claims on SL&C shipments if our consolidator has counted the shortages and notified the shipper. Because this loss is so significant and high in value the vendor is seeking payment, so our DC filed a carrier claim. Our consolidator filed the claim with the pick-up carrier, which declined as the driver did not sign or acknowledge a particular seal

number and cannot be held responsible. Should the pick-up carrier be liable since they didn't take proper seal notations at pick-up?

Answer: From what you have said, you do not know whether the shipment was delivered with the origin seal intact. I will assume, for the sake of answering your question, that the seal was intact.

The fact that a trailer or container was sealed at origin by the shipper, and the seal was intact when delivered to the consignee is usually considered good evidence that a shortage did not occur in transit. However, this alone is not a legal defense that would relieve the carrier of liability, if the shipper has established its prima facie case.

As you know, the claimant's burden of proof ("prima facie case") is to establish, through credible evidence, that the merchandise was received by the carrier at origin, and was not delivered at destination. If this can be done, the burden shifts to the carrier, which has only limited defenses (act of God, act or default of the shipper, etc.) The carrier has to prove that one of these exceptions was the cause of the loss and that it was free from negligence.

Obviously, some detective work is needed - interviews and statements from representatives of the shipper and consignee that have actual knowledge of the facts as to what was shipped and what was received. I suggest that you obtain written and signed statements, and submit them to the carrier in support of your claim.

In any event, while it may be a good practice for the carrier's driver to note seal information on the bill of lading, failure to do so does not, by itself, create carrier liability.

Freight Claims – Rail Carrier Statute of Limitations

Question: While looking for another item in the BNSF Rules Book (Tariff) 6100-A, I came across the item below that I found strange. Are they no longer subject to the federal statute of limitations in the Interstate Commerce Act?

> Item 1165 - Statue of Limitations - Issued: October 1, 2009 - Effective: October 21, 2009 (New Item) Unless otherwise provided, interpretation and enforcement of the Price Authority shall be governed by the laws of the State of Texas.

Following is what I found in the Texas Statutes regarding Statute of Limitations:

> Sec. 2.725. STATUTE OF LIMITATIONS IN CONTRACTS FOR SALE. (a) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> (b) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.
>
> (c) Where an action commenced within the time limited by Subsection (a) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.
>
> (d) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this title becomes effective.

Acts 1967, 60th Leg., p. 2343, ch. 785, Sec. 1, eff. Sept. 1, 1967.

Based on what I see, the statute of limitations in Texas is four (4) years. Based on the BNSF's rule change, their statute of limitations for filing of overcharge claims is 4 years. Do you agree?

Answer: There are two federal statutes of limitation that are most often involved:

1. 49 USC 11705 covers actions by carriers to recover freight charges, by shippers to recover overcharges, etc. and provides:

> 49 U.S.C. § 11705. Limitation on actions by and against rail carriers
>
> (a) A rail carrier providing transportation or service subject to the jurisdiction of the 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.
>
> (b) A person must begin a civil action to recover overcharges under section 11704(b) of this title within 3 years after the claim accrues, whether or not a complaint is filed under section 11704(c)(1).

2. The "Carmack Amendment" for rail carriers governs loss & damage claims:

> 49 U.S.C. § 11706. Liability of rail carriers under receipts and bills of lading
>
> * * * * * * *
>
> (e) A rail carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice...

While it could be argued that the parties could contract for different (longer or shorter) time limits than those set forth in Section 11705, the language of Section 11706 is significantly different. It says the carrier cannot "provide by rule, contract or otherwise" for any periods less than those specified. In my opinion this section applies to all rail transportation, including "exempt" or "contract" transportation, and that it prohibits any time limits shorter than those specified.

In most states the limitation period applicable to actions based on a contract would be longer than those in the Interstate Commerce Act (New York is 6 years). I'm not sure whether this Texas statute, which appears to be a version of the Uniform Commercial Code, would be applicable since it covers "contracts of sale", i.e., sale of goods. Transportation services are not really the sale of goods.

I would note that there are one or two court decisions that have upheld time limits for suits on loss/damage claims in "exempt" circulars that are less than two years, notwithstanding the clear wording of section 11706.

FREIGHT CLAIMS – REASONABLE DISPATCH

Question: Does a carrier have any liability for delay in delivery? We had a carrier move a full load from Coventry, RI to Salem, OR. During transit they had a breakdown and were delayed for 7 days in making the delivery. Do they have any liability for this?

Answer: A carrier has a general legal obligation to deliver with "reasonable dispatch". Carriers can also be liable for failure to meet particular dates or other delivery requirements if there is a more specific agreement between the parties.

A failure to do so is a breach of the contract of carriage for which the carrier may be liable for any damages that are reasonably foreseeable at the time the contract is made.

The question of what damages are foreseeable and recoverable depends on the particular facts of the movement, and whether the carrier has actual or constructive notice of the consequences of the delay. For an in-depth discussion of damages for delay, see Section 7.0 of *Freight Claims in Plain English* (3rd ed. 1995), which is available from the Transportation & Logistics Council.

FREIGHT CLAIMS – REASONABLE DISPATCH

Question: How long does the carrier have to deliver a load? What is "reasonable dispatch"?

Answer: The term "reasonable dispatch" is defined in court decisions over the years as the "usual and customary time" that it takes to transport a similar shipment via the same route, between the same points and in the same quantity, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 11.2.

What is considered reasonable dispatch may vary depending on the commodity, e.g., perishables vs. non-perishables, or on the mode, e.g., truck, rail, air, etc.

FREIGHT CLAIMS – RECORD RETENTION BY 3PLS

Question: I am having a great deal of difficulty in locating an answer to the following question:

How long does a third party logistics provider ("3PL") company need to retain closed cargo claim files? We file loss & damage claims on behalf of our customers and have been keeping the closed claims in storage. I would like to know what the law states on this matter in order to determine if we can destroy any of the closed claims that are in storage. Thank you very much.

Answer: The federal requirements governing record retention are found in the Federal Motor Carrier Safety Administration's ("FMCSA's") regulations at 49 CFR Part 379 - Preservation of Records, and apply to all motor carriers and brokers. The regulations specify various time periods depending on the type of record - as a general rule, records relating to claims, delivery receipts, etc. must be retained for one year.

Technically, these regulations do not apply to the claimants (shippers or consignees) but I would suggest that the one-year rule would be a good guide for retention of closed claim files.

FREIGHT CLAIMS – RECOVERING CARRIER INSURANCE DEDUCTIBLE

Question: I have 2 claims with two different carriers and 2 different insurance companies. Each claim has been accepted for the full amount is what is owed. The insurance companies are paying the claims LESS the carriers' deductible. My contention is that I should be paid for the full amount regardless of the deductible that the carrier has with the insurance company. It is not my responsibility as the claimant to go after the carrier for their deductible. Can the insurance company do this? I have worked for a motor carrier in the past and the insurance company always paid the agreed upon amount for the claim and whatever we, the carrier owed, as our deductible was charged to us. We also had a large deductible, $25,000, making us almost self-insured. Thanks for your time.

Answer: Assuming you have a proper claim, the motor carrier is obligated to pay for your full actual loss resulting from its breach of the contract of carriage.

However, the insurer's liability under a cargo legal liability policy is to indemnify the motor carrier for claims covered under the insurance policy, and according to the terms and conditions of the policy, which usually provides for a deductible. The shipper is not a party to the contract of insurance between the motor carrier and its insurer.

If you have a situation where the insurance company has paid you less than your claim because of a deductible, you still have the right to collect the balance from the motor carrier.

Just one word of caution: if you execute a release, make sure that you only release the insurance company, and not the carrier as to the balance of the claim.

FREIGHT CLAIMS – RECOVERING FREIGHT CHARGES ON LOST PALLET

Question: If three pallets are shipped and one is lost in transit and the other two are delivered without incident, can the transportation costs be recouped as well as the cargo loss? If so, how is this calculated? It is just 1/3 as 1/3 of the product was lost? Or, if it is based upon a tariff, should the shipment be rerated based upon the delivery of the two units and the difference between the original rate and the cost to ship the two units that delivered without fail would be the amount of the claim?

In this case our customer was shipping from a vendor to their distribution center ("DC") when the loss occurred. The shipping is not included in the cost of the goods; therefore, we pay the carrier for the transit of the three items from the vendor to the DC. The customer was looking to not only recoup the cost of the item, but also a portion of the transportation costs as the carrier was paid to deliver three pallets and only two were delivered.

Answer: I assume you are filing the claim based on the invoice price to the customer and that the shipment was "prepaid". If so, then the invoice price would include the cost of transportation and delivery to the customer, and the claim would be for the invoice value of the goods on the pallet that was lost. You don't need to consider how the freight is calculated or pro-rated.

If the invoice price does not include transportation and delivery, and the freight charges have been separately paid, then you can recover the freight charges for the portion of the shipment that was not delivered. Normally, less-than-truckload freight charges are based on weight, so the total freight charge would be pro-rated based on the weight of the pallet that was not delivered divided by the weight of the total shipment.

If the freight charges have been paid, I don't think you need to speculate on what they might have been to ship only two pallets.

FREIGHT CLAIMS – RECOVERING PORTION OF FREIGHT CHARGES PAID TO 3PL

Question: We are a service provider for a large third party logistics provider ("3PL"). We offer claim-filing service to the 3PL and their customers. When the carriers pay a claim which involves freight charges, (even when the claim is filed directly by the shipper or consignee) they will only reimburse the amount that they billed the 3PL leaving the actual claimant short paid.

The shipper is instructed to go back to the 3PL and request a refund for the balance of the freight charge or the freight charge portion of the claim was not paid, and a request is made for the 3PL to file a separate claim for the freight charges. Why should the 3PL lose out on their profit and/or the claimant lose out on the amount of freight charges that they had to pay the 3PL?

Answer: The carrier should not have to refund more freight charges than was actually paid - whether by the 3PL or the shipper. Whether the 3PL can keep its "profit" is a matter between the shipper and the 3PL.

FREIGHT CLAIMS – RECOVERING PREPAID FREIGHT CHARGES

Question: I have an urgent question regarding recoverable, prepaid freight charges.

I filed a claim for damage to a shipment of doors with glass windows. The entire shipment was refused by our customer and returned. The exception noted on the delivery receipt states that the shipment was refused due to damage and has "glass broken" in quotation marks. Our company makes specialty glass products so this is not your ordinary window glass. The wooden frames are about a quarter of the cost on the doors. Obviously the glass portion is quite costly.

The shipment consisted of 6 doors and we credited our customer for them. The claim filed was for 5 doors plus freight. We were able to repair 1 of the doors and place it back in stock. On the original invoice where we billed our customer, we did not bill the freight separately and we did not bill our customer later for freight.

My question is this: Can we and/or how do we go about recovering our prepaid freight charges?

Clearly the carrier did not earn them because they failed to transport and deliver our shipment in the same good order and condition as they picked it up in. I have researched my claim books (*Miller's Law*, *Freight Claims in Plain English*, *Manager's Guide to Freight Loss and Damage Claims*) and cannot find a clear answer. From what I have gleaned, on total loss shipments, prepaid freight is recoverable. However, the submitted claim was for only 5 of the 6 pieces returned to us. Would that be our way of mitigating the claim and we can collect our prepaid freight charges from the negligent carrier? Or, are our prepaid freight charges not recoverable due to the fact that we did not claim for the entire shipment and our customer was not separately billed for them?

Please consider my question and respond as soon as you possibly can. Thank you for your insight and assistance in this matter.

Answer: You say your claim was filed "for 5 doors plus freight", and that you repaired one of the doors.

I would suggest that you amend your claim and file it for the invoice price to your customer for the entire shipment (a delivered price that includes the cost of transporting all six doors to the customer), and to deduct a salvage allowance for the one door that you were able to repair.

If so, you should be able to recover your freight charges.

FREIGHT CLAIMS – RECOVERING SPECIAL DAMAGES

Question: Under Carmack, can any member of the group point to case law regarding the recovery of costs which are incidental to the repair? It's clear that a shipper can recover the cost of materials and labor for the repairs. Do you have a case citation where travel, lodging, rental cars, meals, etc. were recovered for the engineers and the work crew who did the repairs?

Answer: Carriers will usually argue that most of these expenses are "special damages" that are not recoverable because they were not "foreseeable" at the time the carrier received the shipment. However, at least one court considered similar expenses to be "general damages"

and awarded the damages to the claimant. This is the Vacco Industries case that is discussed in *Freight Claims in Plain English* (4th ed. 1999) as follows:

> Another "general damages" case is *Vacco Industries v. Navajo Freight Lines, Inc.*, 63 Cal. App. 3d 262 (1976), cert. den., 431 U.S. 916. Vacco was the consignor of goods allegedly damaged in transit on an interstate move by Navajo Freight Lines. The bill of lading showed a declared value for a piece of machinery to be $130,000. At trial, Vacco sought damages in the nature of its itemized repair costs, as well as overhead and administrative costs for the repair work, inspection costs, freight, packaging, the evaluation trip and lab fees.
>
> The California appeals court upheld the finding of liability by Navajo and went on to discuss the appropriate measure of damages, most specifically the overhead, administrative and general costs and profit element sought by Vacco in connection with the repair. The court noted the testimony of various experts on behalf of the plaintiff as to usual and customary overhead, general and administrative costs in the industry. The court specifically held that the consignor could recover a profit element for the repair work it performed and that the profit element, like normal costs of repair, was a recoverable item of general damage.

As to the question of when similar types of "special damages" are recoverable, the case of *Marjan International*, also discussed in the book, is instructive:

> In *Marjan International Corp. v. V.K. Putman, Inc.*, 1993 WL 541204 (S.D. N.Y. 1993), a shipment of oriental rugs was intended for an auction in Tacoma, Washington. The shipment was delayed, missed the auction, and the rugs ultimately returned to the shipper in New York, with two valuable rugs missing. The plaintiff claimed for the value of the missing rugs, plus the expenses of sending its employees to Tacoma for the auction (wages, air fare and hotel accommodations), and also sued for the return of the freight charges, which the carrier had demanded before releasing the shipment upon its return to New York, see Section 7.4.9.

In awarding the plaintiff's expenses in connection with the auction, the court stated:

> The court is fully satisfied that the prerequisite to recovery of special damages has been established in this case. Major repeatedly and emphatically advised Putman's driver on the date of loading in New York that Marjan required delivery of the rugs to their destination no later than Friday, November 29 at 2:00 p.m., Pacific time. Major specifically informed Westfall: that the rugs were to be sold at an auction in Tacoma, and that failure to deliver on time would prevent the auction sale; that three or four Marjan employees would be flying to Tacoma with Major to receive and unload the cargo and to assist in the sale; and finally, that considerable advertising and other expenses would be incurred by Marjan in connection with the auction. Furthermore, Westfall acknowledged the urgency of prompt delivery before leaving Marjan's store in New York.

FREIGHT CLAIMS – REFUSAL OF CONTAMINATED FOOD PRODUCT

Question: I have a shipment of food product that the consignee refused product when carrier attempted delivery due to gas/oil spilled on product. My customer (the shipper) refuses to have freight sent back stating that they cannot accept contaminated product back into their facilities (both shipper and consignee are food distributors). The carrier is saying that the shipper has to receive freight back to inspect refused shipment and mitigate claimed items, but the shipper wants the carrier to dispose of the freight. What recourse does the shipper have being that he believes the shipment is not salvageable and that this is the carrier's issue?

Does the shipper have a leg to stand on in refusing to receive freight back? Is the carrier in line with requiring shipper to receive freight back? What other options are there if this impasse can't be overcome?

Answer: I would assume that the shipper does not want the damaged food product sold or salvaged because of product liability concerns, etc.

First, it should be remembered that the shipper is the owner of the product, not the carrier. The carrier can't sell, salvage or destroy the product without the shipper's authorization. The product should be inspected to verify the damage and you should ask the carrier (in writing) to do the inspection.

Assuming an inspection would show that the product is contaminated, you have already identified the obvious options: the shipper can tell the carrier to destroy the product, or it can let the carrier bring the product back and the shipper can destroy it. (In either event there probably will be some dispute as to whether there should have been some salvage allowance.)

There is no "legal" answer to this problem, but it would seem to me that the safest course of action would be for the shipper to take the product back and have it destroyed.

FREIGHT CLAIMS – REJECTING NON-CONFORMING GOODS

Question: I contract to move product from one destination to a second destination. If this product is rejected for a defect not caused by me moving the product, can the receiver place the product back on my truck and keep some of the product that he wants to accept?

Answer: It is important to distinguish between shipments that are "non-conforming" and goods that have been damaged in transit.

Non-conforming goods typically involve the wrong color, size, and quantity or otherwise are not what the purchaser ordered from the vendor.

The legal relationship between the vendor and purchaser is generally governed by the Uniform Commercial Code. Sections 2-601 et. seq. specify the rights and duties of the parties where the goods or tender of delivery fail to conform to the contract. For example, section 2-601 states that the buyer may (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest.

The legal relationship between the shipper, consignee and the motor carrier is governed by the contract of carriage - a different contract from the contract of sale between seller and buyer. If a portion of the shipment is so damaged as to be "substantially worthless", the consignee has the right to reject the damaged goods to the carrier. Otherwise, there may be a duty to "mitigate the damage" and the consignee should normally accept the goods and make a reasonable attempt to salvage them (inspect, segregate, repackage, repair, etc.) This subject is discussed in Section 7.1.4 of *Freight Claims in Plain English* (4th Ed. 2009).

In your case, if the consignee rejected part of the shipment because it was "non-conforming", you should immediately issue an on-hand notice to the shipper and request instructions as to what should be done with the goods. If the shipper does not respond or abandons the goods, you have the right to sell them - on written notice to the shipper - and apply the proceeds to your freight and/or storage charges. Any excess proceeds belong to the shipper.

FREIGHT CLAIMS – REJECTING PART OF A SHIPMENT

Question: I was wondering if I could ask a question on less-than-truckload ("LTL") shipments. We are a grocery store chain and 99.9% of our inbound is shipped to us prepaid. Sometimes the warehouse will want to refuse part of a LTL shipment (wrong color, size, etc). I

always believed you couldn't refuse just part of an LTL shipment. You had to take all or nothing and send back to the vendor the refused items freight collect with a proper return authorization. Is that true or can you pick and choose what you will or won't take in off a shipment from a LTL carrier?

Part of my concern involves the Bill of Lading ("B/L") Rules in sections 4a and b dealing with undelivered freight and refusals. With the B/L as a contract it might indirectly bind you to a carrier's tariff, which may have rules such as guaranteeing all charges on returns & refusals (warehousing and transport).

Furthermore, the consignee refusing the shipment in part may never know if the shipper responded to disposition notices within the time limit or not. A way to avoid storage, additional charges or possible sale of goods by the carrier might be to accept the freight and obtain a return authorization.

Do you think these considerations are correct?

Answer: First, you have to distinguish between rejecting goods that are damaged in transit (subject to the contract of carriage with the motor carrier) and refusing to accept goods that are non-conforming (subject to the contract of sale with the vendor).

Usually, goods that are damaged in transit should only be rejected to the carrier if they are "substantially worthless" since there is a duty to mitigate damages (repair, repackage, salvage, etc.).

The disposition of goods that are non-conforming (wrong item, color, size, etc.) is governed by the contract of sale between the parties and the Uniform Commercial Code. Some of the relevant Code sections are:

- Section 2-601 states the general rule that "if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole, or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest."
- Section 2-602 states that "Rejection of goods must be within a reasonable time after their delivery or tender" and further provides that if the buyer has taken physical possession of the goods "he is under a duty 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 states that "when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods..."

It usually is not a good practice to reject non-conforming goods to the carrier, since the carrier is not at fault. This also increases the risk that the goods will not be returned to the seller, or that they may become damaged in the course of returning them, or that there will be a dispute as to which party must pay the return freight charges.

It is a better practice to accept the goods, to promptly notify the seller that the goods are non-conforming, and to request instructions and/or authorization to return them at the seller's expense.

I should note that many vendors do include specific instructions in their contracts of sale that govern procedures for the rejection and/or return of both damaged and non-conforming goods.

I think you are correct in your observations regarding the B/L..

If the carrier treats the return shipment as a new movement from the buyer back to the vendor, there could be liability for the freight charges since the buyer would be considered as the "shipper" on the return movement. Note that a shipper can be liable for freight charges on a "freight collect" bill of lading unless the shipper executes the non-recourse section ("Section 7") on the uniform straight bill of lading.

While the carrier should normally notify the shipper of any refused or rejected goods with an "on hand" notice, the shipper's failure to respond to the notice could result in the goods being sold at auction to satisfy the carrier's lien for freight and/or storage.

Following the suggested procedure would avoid such problems and potential disputes.

FREIGHT CLAIMS – RELEASED VALUE ON USED FURNISHING

Question: I shipped 3 granite counters less-than-container load ("LCL") with a national motor freight company. The counters were packaged within a wood crate. When the truck came to deliver the crate it was grossly damaged. I took pictures within the truck, before the granite was unloaded. One of the counters was broken in half. I do not have an invoice since the counters were fabricated almost a year ago and were a gift to me. I provided the shipping company with an estimate to replace the counter for $2270. The declined my claim saying that since I do not have an invoice it is a "personal effect" and falls under NMFC 100240. So I should resubmit a claim for a released value of 0.10 cents per pound.

Do I have a case for Small Claims since they grossly damaged the crate and I have pictures?

Answer: I'm not sure I can give you a definite answer.

First of all, I am assuming that the counter top would be considered as a "used" furnishing for a residence.

NMFC Item 100240 does cover household goods and has released values ranging from $0.10 to $5.00 per pound. However, to trigger a liability limitation (released value), Item 100292 requires that the release must be entered on the bill of lading in the following form: "The agreed or declared value of each article in this shipment is hereby specifically stated by the shipper to be not exceeding ___ per pound." In other words, the liability limitation does not apply unless the shipper has entered a value in the space provided on the face of the bill of lading.

I would note that it is possible that there may be some other provision in the carrier's tariff that does not require a value to be specifically entered by the shipper. You should ask for a full copy of the tariff that the carrier is relying on.

FREIGHT CLAIMS – REOPENING PAID CLAIM

Question: I filed a claim against a carrier within the time frame. The carrier paid the claim in full within three months. I received an e-mail from one of our facilities stating that we did not include one of our vendors in this claim.

All of the vendors on this purchase order (Claim#) were paid, except for one vendor. The vendor was not reconciled into the claim program that shipper, carrier and the vendor all access and use for the specific information for the shipment origin to destination. Shipper enters all the movement, conversations, quotes for fuel and freight given to the shipper for each load.

If I can file against the carrier on the same Claim# stating that the specific vendor was not calculated into the original claim, but now that the shipment has been reconciled we want to file for this vendor, even though we already filed and the carrier has paid the claim in full. Is the right thing to do?

If so, how do I list the Claim # that I used? Original, Claim # plus an alpha at the end of the Claim#, to show that the additional vendor charges and freight is being billed against the carrier again, or am I not allowed to do so?

Have I passed the statute of limitation for an amended claim. I filed and the carrier paid the original claim.

Answer: I'm not sure I understand all the facts, but it would appear that there were multiple shipments involved in a single truckload delivery.

There are two issues:

(1) Did the subject vendor's shipment move under a separate bill of lading?

(2) Has more than 9 months elapsed since delivery?

If the subject shipment moved under a separate bill of lading and less than 9 months have elapsed, I would suggest filing a new claim for the loss or damage to that shipment. You can, of course, explain that this claim is related to the same truckload delivery, but was not included in the prior claim.

FREIGHT CLAIMS – REPAIRS RESULTING FROM WATER DAMAGE TO TABLE TOP

Question: I have to file a claim against a carrier for water damage to a crate containing furniture valued at $3,125. The trailer had caught fire due to a blow-out which was extinguished with water. I went to the terminal to inspect the crate and found that the table top would have to be resurfaced and refinished. The crate is in possession of the carrier. I can estimate my cost in hourly labor charges and expenses to repair the table top in the claim form. Can I claim the shipping cost as well, or any other loss, e.g., delay of shipment?

Answer: You can file a claim for your out-of-pocket expenses to repair the damaged item. This includes labor, materials and overhead. If it is necessary to transport the damaged item to and from the place of repair, you should be able to recover that expense also.

As a general rule, you cannot recover for "delay", since this is considered "special damages". I would note that the subject of special damages is extensively covered in *Freight Claims in Plain English* (4th ed. 2009), which is available through the Transportation & Logistics Council, Inc.

FREIGHT CLAIMS – REPLACEMENT COST HAS INCREASED

Question: We are a multi facility manufacturing company, we recently had a full truck load of product (intercompany stock transfer) lost due to a traffic accident.

Since the time of the accident, raw material costs have risen and that price variance of raw materials was included in the claim to replace the product lost.

The insurance company involved has now declined payment of that portion of the claim as the recovery is limited to "the acutal cash value of covered property on the place and date of shipment".

I disagree with their position, can you set me straight on this please?

Answer: Courts generally apply the "destination market value" of goods that are lost or damaged in transit as the usual measure of damages, see e.g., *Chicago Milwaukee & St. Paul Ry. Co. v. McCaull-Dinsmore Co.*, 253 U.S. 97 (1920).

Depending on the circumstances, the destination market value can be determined by the cost of procuring a replacement for the lost or damaged goods at the point of destination, see e.g., *Illinois Central R.R. Co. v. Crail*, 281 U.S. 57 (1930).

A case involving this measure of damages is *Brockway-Smith Co. v. Boston & Maine Corp.*, 497 F.Supp. 814 (D. Mass. 1980). Brockway purchased a quantity of frames, windows, doors and other related items on June 19, 1974 at a net invoice price of $25,436.56. The railroad car containing the shipment was involved in a fire on August 6, 1974 which destroyed the shipment.

As to the measure of damage, the court held that Brockway was entitled to the cost of replacing the shipment, plus interest and court costs.

In explaining the computation of damages, the court stated:

> The cost of replacing the shipment in this case would equal the net invoice price adjusted for the difference in the cost of the goods on August 6, 1974, the date the shipment was destroyed, and on June 19, 1974, the date the original shipment was purchased, minus salvage value.

Applying this principle, the destination market value of the shipment on the date it should have been delivered (or was lost or damaged) is the correct measure of damages. If the cost of replacing the shipment on this date is more than the original cost of purchasing the material, you should be able to recover the higher amount.

FREIGHT CLAIMS – REQUESTING PROTECTIVE SERVICES

Question: For many years we have stamped some our bills of lading with "protect from freezing". We discontinued that practice last year, because some of the less-than-truckload ("LTL") carriers were not picking up our freight. We ship food products that can separate under 32 degrees. However, I have been working 8 years for this company, and I have not had any issues with damages due to the weather.

This year, I wanted to continue with the stamp, mainly to let the carriers know what orders need to be handled with extra care. I sent an e-mail to one of the carriers that I had the issue with last year, stating that my company will not file a claim if the product gets damaged due to the cold weather. However, I still need them to protect the freight in order to minimize the risk of damages. They responded back stating that they have to follow their freezable policy, so they will not pick up any orders that go to a destination that is under 18 degrees Fahrenheit. I understand what the law says. However, can my agreement with the carrier override the law? That was the main purpose of my e-mail to them.

Answer: At one time common carriers were said to have a duty to provide service under their Interstate Commerce Commission ("ICC") certificates, but those obligations were essentially eliminated by the ICC Termination Act of 1995. In other words, a motor carrier can refuse to accept a shipment that it does not want to transport.

I suggest that you inquire before using a carrier whether they provide protective service and only use carriers that do provide such service in extremely cold weather. And, I would recommend in any event that you continue to stamp your bills of lading with a notice to "protect from freezing". That way you would have a reasonable likelihood of collecting on a claim if the carrier accepts the shipment and the product is damaged by freezing.

I would note that most of the larger LTL carriers do provide protective service upon request, and have rules in their tariffs that govern "protect from freezing" or other temperature requirements. You should request a copy of the rules tariff if you are shipping under a bill of lading and do not have a formal transportation contract with the carrier.

Lastly, we always recommend that shippers have written transportation contracts with the carriers that they use that set forth all of the applicable rates, charges, terms and conditions of the agreement between the parties. A qualified transportation attorney can help you with this.

FREIGHT CLAIMS – REQUIRED NOTATION ON DELIVERY RECEIPT

Question: The facts are as follows -

Shipper has a "Consignee Unload" agreement with the carrier and exceptions are to be reported within 24 hours of unloading. Carrier drops a trailer on 9/18. The driver does not note

"drop" on delivery receipt ("DR") nor does he provide a manifest, instead driver signs and dates DR and leaves copy with our dock. The driver does not make any "drop" notation on the DR. Our dock unloads, finds damage and notes same day - 2 cartons damaged, refused, and put back on trailer for carrier pickup. The carrier is denying the claim stating trailer was not returned until 9/24. However, other than telling me verbally, the carrier has no proof.

The verbiage in the Consignee Unload Agreement reads as follows:

1) Carrier will provide sealed trailers with the carrier seal number documented for security purposes. Failure to seal a load will not affect the terms and conditions outlined in this agreement

2) Carrier will provide 2 copies of the delivery manifest that will serve as a delivery receipt and a discrepancy reporting form for each shipment in the trailer. Upon receipt of the trailer, the consignee will sign and date the delivery manifest. The consignee's signature on the trailer delivery manifest represents receipt of the trailer, contents and condition of contents unknown. Carrier will retain a copy of the signed trailer delivery manifest to establish the date the trailer was dropped for consignee unloading.

3) The consignee agrees to notify carrier by fax of any exceptions within 24 hours of the trailer being dropped on their provided copy of the trailer manifest.

Carrier did not provide a trailer manifest upon delivery and cannot provide any proof of when it was reported. Therefore, would it not default to the date on the delivery receipt?

Answer: It would seem to be a simple factual question as to whether the notice of damage was given within 24 hours, and the answer really does not depend on when the carrier returned to pick up the trailer.

In any event, failure to give notice would not affect the carrier's liability if there was loss or damage to the shipment. The reason is that the Carmack Amendment (49 USC 14706) provides:

(e) MINIMUM PERIOD FOR FILING CLAIMS-

(1) IN GENERAL- A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice.

FREIGHT CLAIMS – RETENTION OF CLAIMS RECORDS

Question: Per Title 49 Regulations, Chapter 370, Section 370.5(b), the carrier shall create a separate claim file and keep all related documents contained within.

My question is two parts -

1.) How long do we need to keep the physical files before destroying?

2.) As stated above, the regulation states that a separate file must be created - can the file be electronic or must we keep the original documentation as it was received (i.e. formal claim filing received via US Mail)?

Thank you in advance for your assistance! Your website is extremely useful - I wish I had found it a long time ago!

Answer: The federal requirements governing record retention are found in the Federal Motor Carrier Safety Administration's regulations at 49 CFR Part 379 - Preservation of Records, and apply to all motor carriers and brokers (available online at

http://www.access.gpo.gov/nara/cfr/waisidx_04/49cfr379_04.html). The regulations specify various time periods depending on the type of record - as a general rule, records relating to claims, delivery receipts, etc. must be retained for one year.

The regulations permit preservation "by any technology that is immune to alteration, modification, or erasure of the underlying data and will enable production of an accurate and unaltered paper copy". Thus, it is clear that originals may be copied, scanned, microfilmed, etc. for this purpose.

FREIGHT CLAIMS – RISK OF LOSS

Question: Shipper/vendor's shipping terms are FOB origin, freight collect our facility. Our facility refused 20 cartons. The carrier gets a disposition from shipper/vendor to return the refused cartons (even though we are paying freight). The shipper/vendor accepts the return of the damaged goods but refuses to file a claim.

We debited the vendor/shipper but it is refusing to file a claim stating it is our responsibility, even though the goods were returned back to their facility.

What are the legalities? I have been told that since shipper/vendor accepted the cartons back they would now have to file any claim.

Answer: As between the seller and the buyer, the risk of loss in transit is usually determined by 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, and the buyer would be the proper party to file a claim for loss or damage with the carrier. I am not aware of any reason why the risk of loss would shift back to the seller because it accepted a return of the damaged goods.

I assume that the goods were returned to the seller in order to determine whether there was any salvage. If so, there should be some adjustment for the salvage, and the carrier would be entitled to have the claim reduced by the amount of the net salvage proceeds.

FREIGHT CLAIMS – RISK OF LOSS AND FOB TERMS

Question: Product was received and signed as damaged. The shipping charges were prepaid. Regarding who files the freight claim, since the product was received (buyer took possession), does it matter if it was FOB origin or destination? Does the buyer assume the responsibility of filing the claim by accepting damaged, FOB destination product?

Answer: For commercial sales transactions the Uniform Commercial Code ("UCC") establishes certain presumptions about "risk of loss" in transit based on the terms of sale specified in the sales contract. UCC 2-319 covers FOB and FAS terms. It essentially provides that where "FOB Origin" is specified, risk of loss passes to the buyer-consignee once goods are put in possession of the carrier at origin. On the other hand, if the contract of sale is "FOB Destination" or equivalent, the seller retains the risk of loss in transit.

Risk of loss depends on the contract of sale between the seller and the buyer, and the presumptions established by the UCC can be changed if the parties wish to specify different provisions. In any event, it does NOT depend on which party contracted with the carrier or which party pays the freight charges.

If the terms of sale were "FOB Destination" the risk of loss did not transfer to the buyer-consignee until delivery at destination. Thus, the seller should normally be the party to file the claim against the carrier.

This is not to say that the buyer can't file the claim -- it could, for example, still deduct from the seller's invoice and file the claim with the carrier, but it does not have a legal responsibility to do so.

FREIGHT CLAIMS – ROLE OF BROKER

Question: We are a freight broker and one of our customers is asking for help in filing a claim for damages against the carrier that hauled their shipment.
How do we help them and where do we start?

Answer: You should advise the customer to file the claim directly with the carrier. If you should "volunteer" to assist the customer, make sure that you tell them that you are acting solely as a broker and are only assisting them as an accommodation. Do not assume any liability for the loss/damage and make that clear to your customer.

FREIGHT CLAIMS – RULE 11 RAIL SHIPMENTS

Question: In the ancient past when working for a rail carrier claims department, we processed and paid claims, for value of the damaged freight and proportionate freight charges and distributed the amounts with all carriers involved in handling of the shipment. Now as a customer to the rail carriers, we are forced to negotiate freight rates with all rail carriers involved in a shipment individually to get the best freight rate and the shipment moves on a single shipment rail waybill.

We are now having a problem with a shipment. It was a deregulated boxcar shipment of inbound raw materials from one of our vendors to our bean plant in Newport, TN. The shipment was purchased FOB Origin and we arranged for the transportation with the carriers. The shipment is actually a through billing of the boxcar from Cavalier, ND to Newport, TN routed BNSF to Memphis and NS beyond. The carriers each bill us the freight charges for their individual portion of the shipment.

A little more than half of the product was wet and moldy on delivery due to defective equipment. There is no argument as to liability and the carrier that we filed the claim with is more than willing to pay us for the value of the damaged product as well as the proportionate freight charges that we paid to them. The only thing is that they refuse to pay us for the other carrier's freight charges, even though the amount of the charges and proof of their payment were included in the supporting documents.

Because freight rates were negotiated with each carrier individually, carriers term this a Rule 11 shipment. With a Rule 11 shipment there is not a through rate and the shipper negotiates confidential freight rates with each carrier (or at least is free to do so). Now when we submit a claim, the paying carrier refuses to make payment of the proportionate freight charges for the other carrier involved in the shipment. They do not have any problem paying and distributing the portion of the shipment that is for the actual product value but will not pay the other carrier's Rule 11 freight portion, even though we have provided proof as to the amount that we were billed in freight charges by that other carrier. They say we must file a separate claim for the freight portion with the other participating carrier(s). Can they force us into filing with all carriers involved for the refund of the freight charges?

Answer: In view of the fact that the shipper negotiates separate rates with each of the connecting carriers and is billed by each carrier for its own freight charges, I can understand why the railroad has adopted this policy with respect to claims. I would observe that it does

raise some interesting questions depending on whether the place of the loss (such as a derailment on one of the lines) is or is not known.

However, I still believe that this is contrary to the basic principles establishing joint and several liability of the origin and delivering carriers under basic principles codified in the "Carmack Amendment" (49 U.S.C. §11706 for rail carriers). Under Carmack, either the origin or destination carrier is liable for your full actual loss, which would include the freight charges to deliver the goods to your customer. Thus, the carrier should pay the full amount of the invoice value, and seek indemnity for both the value of the cargo and the freight charges from the responsible carrier(s). As the court stated in *Beautifax v. Puerto Rico Marine Management*, 611 F. Supp. 537 (D.Md.1985):

> The [Carmack] Amendment was enacted to "relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods," *Reider v. Thompson*, 339 U.S. 113, 119, 70 S.Ct. 499, 502, 94 L.Ed. 698 (1950), and allows a shipper to maintain a cause of action against the initial carrier (the carrier issuing the bill of lading) or the delivering carrier (the carrier delivering the goods to the final destination) for damage to goods in the course of an interstate shipment on a through bill of lading. See generally *S.C. Johnson & Son v. Louisville & Nashville Railroad Co.*, 695 F.2d 253, 256-57 (7th Cir. 1982); *AAACON Auto Transport, Inc. v. State Farm Mutual Automobile Insurance Co.*, 537 F.2d 648, 653-54 (2d Cir. 1976); *United States v. Mississippi Valley Barge Line Co.*, 285 F.2d 381, 389 (8th Cir. 1960); *Komatsu America Corp. v. Portside Cargo Securing Company*, 514 F. Supp. 619, 620-21 (S.D.N Y 1981); *Season-All Industries, Inc. v. Merchant Shippers*, 417 F. Supp. 998, 1001 (W.D.Pa. 1976); *Matter of: Southeastern Freight Lines*, 63 Op.Comp.Gen. 242, 245 (1984). The initial or delivering carrier may in turn seek to recover from the connecting carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property. 49 U.S.C. § 11707(b).

FREIGHT CLAIMS – RUNAROUND ON TEMPERATURE SENSITIVE SHIPMENT

Question: We are a broker that tendered a temperature sensitive shipment to a carrier who provides this type of service. The shipment originated on January 9th from a shipper in Milwaukee, WI for delivery to our client in Putnam, CT. On January 13th the shipment was refused by the receiver as the freeze watch indicator was activated. We immediately filed a letter of intent on behalf of our client and then an actual claim for less than $7,500.00. The carrier denied the claim (dated 1/30, we received on 2/23) on the basis that the indicator could have been defective and that unless the receiver performs testing to demonstrate that the product had been tainted there is no claim.

Our client said they were not going to test or accept the material, as this material is part of a product that eventually involves human blood. Subsequently, we received a notice of undelivered freight and a daily storage fee, which has been ignored, as I do not believe someone should pay storage for refused freight.

The shipper's bill of lading ("B/L") stated that the temperature had to be maintained between 40-60 degrees. The carrier's B/L that was signed "refused" also stated that. After numerous phone calls and emails over a period of several months, we were first told that the claim would be paid, and then told it would be denied unless we accepted a partial settlement as there was a question of whether the entire shipment was damaged.

I have dealt with claims in the past but have never come across a scenario of avoidance and deception like with this carrier. The carrier also said its denial will stand in court because even though the shipper's B/L states "during the winter months the material must be maintained

between 40-60 degrees", it also states in a preprinted part that lists the material number and explanation of the product type and shipping container (55 gal drums) "Freeze Thaw Stable, avoid multiple freeze thaw cycles, warm and mix prior to use". The carrier asserts that this terminology negates the use of the freeze watch indicator. What is the next step we should take with this carrier? Thank you for your assistance.

Answer: It does appear that you are getting a run-around from the carrier.

Without reviewing all the relevant documents and communications, I really can't advise you as to the merits of the claim. You do mention that the carrier raised the issue as to whether all of the product was "tainted". It would seem that the shipper could provide a statement or letter from its quality control department to address this issue. You might try sending such a statement or letter to the carrier and asking them to reconsider their declination of the claim.

Also, since you are a broker, I assume that you are attempting to handle this claim as an accommodation to your customer. I suggest that you advise the customer that the carrier is refusing to pay the claim, and that they may need to retain counsel and bring a lawsuit against the carrier.

Freight Claims – Salvage Allowance

Question: What is a good definition of "Salvage Allowance"? I'm trying to explain it to someone, but I want it to sound official and professional.

Answer: There really is no good definition of "Salvage Allowance", and the term is often misunderstood. Sometimes disputes arise as to whether a shipper has made reasonable efforts to salvage damaged goods, and carriers or their insurers will demand a "salvage allowance" in settling the claim. However, there is no standard rule or formula for determining whether there should be salvage or in what amount.

Whenever there is loss or damage to goods in transit, the parties have a duty to "mitigate damage". What this means is that a reasonable attempt should be made to segregate the damaged and undamaged portions of the shipment (if it is possible to do so). If the damaged goods can be repaired, cleaned, repackaged or otherwise salvaged at a reasonable cost, this should normally be done (sometimes there is only scrap value). I would note that with certain types of goods (such as food or food-related goods), there cannot be any salvage, and the damaged goods must be disposed of or destroyed.

It is a question of fact in each case as to whether damaged goods can in fact be salvaged with reasonable effort and cost, and whether or not they can be re-sold to a salvage buyer.

When filing a claim with a carrier for the value of damaged goods, if there is any salvage, a credit or "salvage allowance" should be given for the net proceeds of the salvage. If there is no salvage, i.e., salvage was not possible or reasonable under the circumstances, then there is no credit for salvage and there should be no "salvage allowance".

Freight Claims – Salvage Allowance for Damaged Fruit

Question: I am a current member of the Transportation & Logistics Council. It is my understanding that members may consult with you, from time to time, for free advice regarding transportation/freight-related questions. We are hoping you could help us answer the following freight claim question.

Does the carrier (trucking company) have the right to deduct any salvage allowance on a freight claim for the misdelivered shipment?

Summary of Facts:

We sold a truckload of fresh fruit to a customer (who arranged for their own carrier/buyer's truck to pick-up and delivery this product). The truck driver had a rollover accident, and due to a food safety issue, we had instructed the trucking company to dispose of the fruit, and to have a dump certificate issued within 48 hours of disposal. The trucking company has confirmed that they will have the load dumped but will deduct a salvage allowance from the total claim once it is filed.

Issues:

1) Freight Claims - Determination of Risk of Loss. Who is liable for a freight claim, and what determines who is responsible for filing a freight claim? The freight contract (bill of lading/purchase order) state of terms of sale as "FOB", but the freight contract does not define "FOB Destination" or "FOB Origin". If the transportation were arranged by the buyer/customer, how would you address the following issues:

- Buyer/Customer. Would the buyer/customer and its insurers be liable and responsible in any way for the lost freight and/or expenses?
- Carrier (Trucking Company). Should the carrier be totally liable for the freight loss and associated expenses because it caused the accident, and the subsequent damage to the freight? What if the carrier is self-insured?
- Seller (Sunkist Growers). Would the seller who sold the fruit to the buyer/customer as FOB, but who did not arrange for any of the transportation nor contracted with the trucking company for the pick-up and delivery of this freight, share in any liability for the freight loss and/or associated incurred expenses? What should Sunkist do, and who should Sunkist file a freight claim with to recoup its losses? If the carrier is self-insured, how should Sunkist proceed to collect on its losses and expenses?

2) What are the rights of the carrier to deduct for salvage allowance and administrative expenses? Since the carrier did not pay for the full value of the goods that were lost or damaged, I would not think that the carrier had any right to take any allowance for salvage. In addition, due to food safety and product liability issues, the shipment should be declared a "total loss", since the product may have been compromised and deemed adulterated due to the damage to the fruit in transport, and possibly contaminated for any further use or consumption as salvage.

We highly respect your legal opinions, and your kind assistance and help in this matter will be deeply appreciated.

Answer: Risk of Loss: Risk of loss is not determined by the bill of lading; it is determined by the agreement of purchase and sale between the seller and the buyer. From the facts as you have described them, this was a "customer pick up" situation. In the absence of some contrary terms in your purchase order or terms of sale, the presumption would be that the risk of loss transferred to the purchaser when the goods were tendered to the carrier at origin.

Thus, the purchaser would still be obligated to pay the seller for the goods, and would be the proper party to file a claim against its carrier.

Salvage Allowance: Whenever there is loss or damage to goods in transit, the parties have a duty to "mitigate the damage". What this means is that a reasonable attempt should be made to segregate the damaged and undamaged portions of the shipment (if it is possible to do so). If the damaged goods can be repaired, cleaned, repackaged or otherwise salvaged at a reasonable cost, this should normally be done. It is a question of fact in each case as to whether damaged goods can in fact be salvaged with reasonable effort and cost, and whether or not they can be re-sold to a salvage buyer.

With certain types of goods (such as food or drugs), there cannot be any salvage if there is any possibility of adulteration or contamination, and the damaged goods must usually be

disposed of or destroyed. The Federal Food Drug and Cosmetic Act, 21 U.S.C. §342(a)(4) – "Adulterated Food" provides that:

> A food shall be deemed to be adulterated ... if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health...

When filing a claim with a carrier for the value of damaged goods, if there is any salvage, a credit or "salvage allowance" should be given for the net proceeds of the salvage. If there is no salvage, i.e., salvage was not possible or reasonable under the circumstances, then there is no credit for salvage and there should be no 'salvage allowance'.

Responsibility of the parties: I assume that your company did not include any freight charges in its invoice to the customer, and that this was a "collect" shipment, i.e., the customer was to pay the carrier for the freight charges. First, the purchaser is obligated to pay your company for the invoice value of the goods. The purchaser then has a claim against the carrier for the invoice value of the goods plus any freight charges that were paid to the carrier.

I would note that, if for some reason the customer should refuse to pay your company for the goods, your company would still have the right, as a party to the bill of lading, to file a claim against the carrier. In that event, the measure of damages would be the invoice price to the customer, without any "salvage allowance".

Testimonial

Dear George,

Thank you so much for your thorough and detailed explanation to our question regarding the issue of 'salvage allowance'. Your kind assistance and prompt attention to this matter are greatly appreciated, and we hope to be able to resolve this issue to avoid any future litigation in this matter.

P.S.: We highly respect your opinions in these matters, and will be ordering your latest book/publication for our office for future reference in these types of matters. Thanks again!

FREIGHT CLAIMS – SALVAGE OF BRANDED GOODS

Question: What are a motor carrier's legal options pertaining to branded or labeled goods which have been damaged in transit and/or what alternative language would be considered more mutually fair in a contract for both parties, other than the language below pertaining to the salvage of branded or labeled goods? It would seem that a carrier should have some legal rights for salvage if brands or labels can be removed from the product or if parts can be salvaged for reuse and a mutual decision to do so but the verbiage below seems to make it totally the shipper's judgment and decision and that seems logically unfair.

"In the event branded or labeled goods are damaged, Shipper may reasonably determine whether the goods are to be salvaged, and if salvageable the value of such salvage."

Answer: There is, of course, a general rule that the parties have a duty to "mitigate damages", which usually means that some reasonable efforts should be made to repair, repackage or otherwise salvage damaged freight.

However, many shippers are concerned about potential product liability exposure and warranty claims, as well as for damage to their trade name and reputation if damaged goods enter the stream of commerce. This is particularly true where food or food products are involved, or for items such as electronics and household appliances where undetected damage may pose hazards to the users later on.

The contract clause that you refer to is typical of language that many shippers are including in their transportation contracts. I would note that it does imply a reasonableness standard

("Shipper may reasonably determine...") so that the shipper can't be totally arbitrary and capricious in determining whether goods can be salvaged.

FREIGHT CLAIMS – SALVAGE RETENTION RULES

Question: Is there a time frame within which a carrier is expected to pick up a damaged product? We shipped a granite vanity top on 8/22/08. It was received but not refused on 9/2/08, but the delivery receipt was clearly marked "product came in damaged". We filed the claim on 9/10/08 and the carrier acknowledged the claim on 9/12/08. On 9/30 the carrier asked about salvage or repair, and we responded to this in the negative on 10/16/08. On 11/20/08, the carrier sent us a letter stating that the claim has been approved for payment pending salvage pickup. The consignee does not have space to warehouse damaged merchandise and no longer has it after 3 months. Is it reasonable or legal for the carrier to expect to pickup the product at this point?

Answer: Assuming that you are dealing with a carrier that is a participant in the National Motor Freight Classification ("NMFC"), the answer to you question may be found in NMFC Item 300150:

> Item 300150
>
> SALVAGE RETENTION-REGULATIONS GOVERNING THE INSPECTION OF FREIGHT BEFORE OR AFTER DELIVERY TO CONSIGNEE AND ADJUSTMENT OF CLAIMS FOR LOSS OR DAMAGE
>
> SALVAGE RETENTION
>
> When visible or open damage to a shipment has been established by notation having been given at time of delivery or concealed damaged established by inspection report, it is the duty of the consignee to retain damaged merchandise and shipping container until the carrier desires to take possession of merchandise as salvage. If record conclusively reflects carrier liability, carrier will take possession of the damaged merchandise as soon as possible and in any event, within thirty (30) days from date shipment was noted damaged on carrier delivery receipt or from date of inspection report, if damage was concealed. If carrier does not take possession of the damaged merchandise within the time prescribed above, consignee must contact delivering carrier and request removal of goods from his premises within fifteen (15) days from the date of such communication. The above applies only when the carrier and consignee agree that the carrier will handle disposition of the salvage, and does not in any manner affect the legal duty that the consignee, when there is substantial value in the salvage, must accept and handle it in such a manner as to mitigate the carrier's loss as much as possible. If there is doubt of carrier liability, the carrier will so advise consignee; in which even the consignee may hold the merchandise until liability of carrier is determined, or may dispose of it so as to mitigate the damage, and may file claim for such damage. Carrier will remove the damaged goods within the fifteen (15) day period or advise consignee that carrier liability is in doubt and that damaged merchandise is to be retained by the consignee until carrier has completed investigation of claim.

Some practical suggestions:

Always notify the carrier and request an inspection IN WRITING. State that you are retaining the goods for inspection, how long you will retain the goods, and that if the carrier does not inspect the goods by that date, it will be deemed to have waived its right to inspect the goods and that you will salvage or dispose of them. If the carrier does not inspect the goods, make

sure that you thoroughly document the damage (OS&D Report, Inspection Report, Photos, etc.) before disposing of the goods.

FREIGHT CLAIMS – SALVAGING GOODS TO MITIGATE DAMAGES

Question: A shipment moved from Michigan to Jacksonville to a freight forwarder and the delivery receipt ("DR") was signed damaged; the cartons were torn, and the consignee wrote on the DR that 2 chairs has missing castors and 8 cartons were crushed and torn--damage unknown. The chairs went on to Puerto Rico. The claim is being settled by the land carrier and they want the salvage. Who is responsible for getting the salvage back to the mainland?

Answer: From your description it appears that the damage occurred on the inland movement from Michigan to Jacksonville, and the claim was filed with the domestic motor carrier, who now wants the damaged goods for salvage.

Frankly, it would seem to me unreasonable (more expensive) to return the goods from Puerto Rico, and that the proper solution would be to have the goods repaired and/or sold for salvage in Puerto Rico. Then the claim would be amended to show either the cost of repair or the invoice price less the salvage receipts.

FREIGHT CLAIMS – SEALS ON MULTIPLE STOPS

Question: In regard to multiple deliveries (stops) where it is shipper load and count at the distribution center:

1. Who is legally responsible for applying the seals after the first, second, delivery, etc.?
2. Who is responsible if there are discrepancies (shortages)?

Answer: As to your first question, there is no "law" that governs the responsibility for applying seals after a partial delivery at a stop-off. Unless there is some specific provision in the contract between the shipper and the carrier, it can be done either by the carrier or the consignee at the stop-off.

Responsibility for shortages is another issue. Obviously, with multiple stop-offs, it becomes more difficult to determine where a loss occurred, and which party was responsible for the loss. Accurate records of what was actually delivered at each stop-off, and good records of seals applied at each point, may help to pin-point responsibility. In any event, the claimant still has the basic burden of proving what was shipped and what was delivered.

FREIGHT CLAIMS – SETTING CLAIMS OFF AGAINST BROKER

Question: My corporate client, shipper, hired broker to secure transportation by carrier to truck satellite equipment out of state. Carrier was involved in a traffic accident damaging the equipment. I know that under the Carmack Amendment shipper is the party responsible for the damage. Broker continues to bill shipper for transportation charges involving the damaged equipment and for other shipments. Shipper filed a claim with the carrier who has insurance. The claim has not been resolved. Broker is trying to assist in resolving shipper's claim with carrier's insurance company.

I want to get my client's claim settled with the carrier for the shipper. The consignee of the satellite equipment in Colorado refused to accept the shipment of satellite equipment after being informed of the traffic accident claiming that all such equipment was damaged beyond repair by the accident due to the very sensitive nature of the equipment. The insurance company wants each piece of equipment tested. However, this is not feasible since the cost of testing per item

would be comparable to or exceed the value of the item. The consignee also claims that even if the various items tested passed the test, they will inevitably fail after being delivered to their customers.

I don't want to instruct my client to pay the broker for transportation fees where the transportation fees include fees to ship the equipment in question. There was clearly a failure of consideration even though the broker is probably not liable for the loss. My client also owes broker transportation fees for other shipments. My best-case scenario would be to get broker not to aggressively pursue payment of these fees from shipper while shipper has yet to be made whole.

Is my client, the shipper, permitted to offset, deduct, the damages it suffered to the satellite equipment from the traffic accident from the transportation charges submitted by the broker to shipper to transport the equipment in question and for other shipments?

Answer: The shipper's claim for the loss or damage is against the carrier pursuant to the contract of carriage (usually in the form of a bill of lading), and not the broker, unless the broker has somehow assumed liability. The broker's claim for its freight charges is against the shipper pursuant to its brokerage agreement with the shipper. In other words, they are legally independent contractual relationships.

Notwithstanding, shippers often withhold freight charges due to a broker when there is a cargo loss, even though the broker itself may not be liable for the loss or damage. It is not "illegal" to do so, but it is somewhat unfair to the broker, and has been the cause of some brokers actually going out of business because they have paid the carriers, and have not been paid by their customers. Also, if the broker were to sue the shipper for its freight charges, the shipper's cargo claim would probably not be a valid counterclaim in the action.

Brokers are not generally liable for loss or damage, unless they hold themselves out as a carrier, are negligent, or contractually assume liability. Apparently the broker has "volunteered" to handle the claim against the carrier as an accommodation to your client, the shipper. Since the broker may have more experience or leverage with the carrier, this is o.k.

I am not surprised that the insurance company is taking this position since they always argue the "duty to mitigate damages" as a way to avoid paying claims. However the duty to mitigate damages is subject to a reasonableness test, i.e., whether it is reasonable under the circumstances to attempt to inspect, segregate, repair, salvage, etc., see *Freight Claims in Plain English* (4th Ed. 2009) at section 7.1.4.

It is not clear what happened to the damaged items - were they returned to your client? If so, it might be possible to inspect the damage to determine if there is any reasonable way to salvage undamaged items or at least parts. In any event, you should get a written statement from a quality control supervisor (or equivalent) detailing the procedures required to adequately test the items, the cost, and the likelihood of failure after being delivered - with the commensurate cost and headache of warranty claims, etc.

You should make sure that the broker is claiming for the full invoice price, since the equipment had apparently been sold to your client's customer.

Your client can withhold payment of the freight charges, but I would not recommend it.

FREIGHT CLAIMS – SHIPMENT NOT DELIVERED TO NAMED PARTY

Question: In the "Ship to:" area of the bill of lading ("B/L"), there's a notation indicating who to leave the shipment with. The notation said "ATTN: Wallace, Burris, or Robinson". Well, the carrier left it with someone other than one of these people, and the customer said they never received it. Since the invoice and B/L left specific instructions on how this load was to be handled, we credited the customer for the full load. Does the carrier have any liability here?

Answer: As a general rule, a common carrier has a duty to deliver to the consignee named in the bill of lading and at the address specified in the bill of lading, and failure to do so is a breach of the contract of carriage for which the carrier is liable, see *Freight Claims in Plain English* (4th Ed. 2009) at Section 11.3.3.

Individual cases, of course, depend on the specific facts and circumstances.

You say there's a notation indicating who to leave the shipment with and that is said "ATTN: Wallace, Burris, or Robinson". The carrier could argue that this is not sufficiently clear as an instruction that delivery must only be made to one of these people at the consignee's address.

Also, you don't indicate whether the carrier actually delivered the shipment at the correct address, whether the driver obtained a signed delivery receipt, whether it was signed by an "impostor", i.e., someone who was not employed by the consignee or otherwise authorized to be on the premises, etc.

Any of these factors could affect the carrier's liability.

FREIGHT CLAIMS – SHIPPER DIRECTS CARRIER TO DISPOSE

Question: We are a truck broker. We arranged the movement of a food product load. The load was accepted by the consignee except for 4 cases, which were damaged. We advised the shipper who advised us to destroy or donate the 4 cases. The carrier donated the product and received a receipt. Four months later the shipper is filing a claim for the 4 cases. Can the shipper file a claim after giving instructions to dispose of damaged product?

Answer: Yes. Contamination of food products, drugs, medicines or other items intended for human consumption is a serious matter. The mere possibility of contamination may, in and of itself, be sufficient. 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.

If the integrity of any of the packages or containers has been breached or compromised in any way, that product should be destroyed, and the shipper is entitled to file a claim for the value of the damaged product. In any event, if you received any salvage proceeds, the net amount of the proceeds would reduce the claim.

FREIGHT CLAIMS – SHIPPER LOAD AND COUNT

Question: I have questions regarding shipper's load and count and multiple stop-off shipments.

I recently read your answer to this question and am glad that there is a legal opinion that drivers are responsible to make sure the right pallets are delivered to the right customer and get a count and signature.

Can you please provide any court decisions or cases that may apply to this information?

Also, since the driver will be on the dock performing this service is there a charge that may arise from this or is this considered part of the transportation cost?

Thanks for clarifying this issue for us.

Answer: I am not aware of court decisions that specifically deal with your fact pattern, but there are many cases that spell out the carrier's liability for mis-delivery.

As to your second question, there should not be any extra charge for the driver to wait for a proper count and signature on the delivery receipt. The only exception would be if there is a detention rule that comes into play if the trailer is held after the free time provided in the tariff.

FREIGHT CLAIMS – SHIPPER LOADS AND SEAL INTACT UPON DELIVERY

Question: I have a situation on a claim that I'm not sure who would be liable.

The shipper loaded a trailer which was said to have 32 pallets, the trailer was sealed by the shipper, the trailer arrived with the seal intact, but the consignee states that there were only 30 pallets of goods.

Who is liable for the loss ?

Answer: Shortages from sealed trailers are always a problem and you need to be somewhat of a detective to investigate the facts and to determine responsibility.

Obviously there are three possible ways the shortage could occur: that the shipper didn't load the 32 pallets into the trailer, that the carrier somehow stole the goods without breaking the seal, or the consignee or its employees either miscounted at destination or stole the goods.

When you have a shipper load & count ("SL&C") shipment that is sealed by the shipper and is delivered with the seal(s) intact, there is a strong presumption that the shortage did not occur in transit, i.e., the carrier would not be liable. Of course, each situation depends on the facts (if the carrier sealed the trailer instead of the shipper, or there is any evidence of tampering with the seals, locks, hinges, etc.)

Remember that the claimant has the burden of proving the condition and quantity of the goods tendered to the carrier and the condition and quantity of the goods actually delivered at the destination.

I would suggest that you ask the shipper and the consignee to provide written statements and documents as to what was actually tendered to the carrier and what was actually received.

FREIGHT CLAIMS – SHIPPER'S LOAD & COUNT

Question: A less-than-truckload carrier picks up a shipment of 3 pallets. The carrier is given the opportunity by the shipper to count the packages contained on each pallet and it is feasible for the carrier to count the packages, but the carrier chooses not to count the packages and instead writes on the bill of lading ("B/L") "3 pallets Said To Contain 50 packages each." One of the pallets arrives at the consignee containing 40 packages instead of 50. A claim is submitted to the carrier for the loss of the 10 packages.

The carrier denies the claim, referencing the Bills of Lading Act, 49 USC 80113 - the carrier refers to subsection (b) and says that the goods were loaded by the shipper, the B/L was qualified by the words "Said To Contain," and it did not know whether any part of the goods conformed to the description. The claimant tries to establish that the 10 packages were actually loaded onto the carrier's trailer, but there is really no convincing evidence either way. The shipper says the carrier lost the 10 packages, the carrier says it never received them, but neither can demonstrate anything more convincingly than the other.

If the B/L is all there is to go on, who's in the better position? Does the "Said To Contain" notation have any relevance in this situation?

Answer: The reference to the Bills of Lading Act is really not appropriate for the circumstances you have described. 49 U.S.C. Section 80113(b) and (c) are intended to apply to a "Shipper load & count" situation where the shipper loads and counts a full truckload or full container shipment, and the carrier's representative is not present or given an opportunity to witness the loading and counting.

This is made very clear by the subsection (d)(2) which states:

> (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.

In any event, it all boils down to the claimant's basic burden of proof -- to prove, with competent evidence, what was actually tendered to the carrier at origin, and what was actually delivered at destination. If the claimant can meet this burden, the carrier cannot hide behind words such as "said to contain" that are written on the bill of lading by the driver.

FREIGHT CLAIMS – SHIPPING TERMS DETERMINE WHO FILES

Question: Our company ships FOB Origin (prepaid 3rd party). Our company, as consignee, refused part of a shipment of baby car seats due to damage to the boxes. The carrier called the shipper and the shipper agreed to take the product back free astray for credit and inspection.

If a claim needs to be filed for re-boxing or product that is not salvageable, which party is responsible for filing claim?

Currently our company debits the shipper (our vendor) as product was not received and feels it is up to the vendor to file if product cannot be salvaged. The vendor is claiming since it shipped on our terms it is still our problem and claims we should file.

Usually our vendors (shippers) do not take back damaged product because it is our carrier. Therefore, I would file and work with the carrier for a disposition. In this case the carrier called the shipper and the shipper agreed to have the damaged product returned.

If we refuse the product due to damage and the shipper (our vendor) accepts it back, shouldn't they file the claim if after inspection it is determined the product was damaged?

Answer: For commercial sales transactions the Uniform Commercial Code ("UCC") establishes certain presumptions about "risk of loss" in transit based on the terms of sale specified in the sales contract. UCC 2-319 covers FOB and FAS terms. It essentially provides that where FOB place of shipment is specified, risk of loss passes to the buyer-consignee once goods are put in possession of the carrier at origin.

Risk of loss depends on the contract between the seller and the buyer. It does not depend on which party contracted with the carrier or which party pays the freight charges.

If the terms of sale were "FOB Origin" the risk of loss transferred to the buyer-consignee once the goods were loaded onto the truck. Thus, the buyer would normally be the party to file the claim against the carrier.

I would note that it is fairly common for consignees to ignore the terms of sale and deduct loss or damage from the shipper's invoice. Many shippers accept this and file the claims with the carriers because they don't want to lose a valued customer. However, this would be a business decision, rather than a legal decision.

FREIGHT CLAIMS – SHORT TIME LIMITS IN RAIL SERVICE GUIDE

Question: This question is in regards to rail moves with CSX Intermodal ("CSXI"); in the event of any damages or loss, CSXI refers their customers back to their "Service Directory" - this directory is said to supercede any and all other documents. Federal Regulations state that a claimant has nine months from the date of delivery to file a freight claim with the carrier; however, CSXI's Service Directory No 1, Section 9.8, page 32, states as follows:

> In the unlikely event that a Shipment arrives at destination with damaged or missing Cargo, Shipper shall notify CSXI in writing within 24 hours of delivery by facsimile sent to: 904-279-6393 advising CSXI of the nature and extent of the damage or shortage. Prompt Notification is required so that CSXI can arrange for an inspection of the Shipment if, in its sole discretion, doing so is warranted. The failure to promptly notify CSXI, as prescribed herein, shall constitute an unconditional release by Shipper of any responsibility on the part of CSXI to process or pay a claim relating to the Shipment.

As my company is a freight forwarder and not the shipper, we often are not aware of the damages until the proof of delivery ("POD") is received or our customer contacts us; therefore, it is a rare occasion that we would be able to notify them of the damages/loss within 24 hrs after delivering.

Can CSXI truly enforce this type of rule when the Federal Regulations give a claimant up to nine months?

Answer: The Interstate Commerce Act, 49 USC Section 11706(e) - the "Carmack Amendment" - provides: "A rail carrier may not provide by rule, contract or otherwise, a period of less than 9 months for filing a claim against it under this section ...." I would interpret this as saying the provision in the CSXI "Service Directory" is unenforceable.

I would, however, note that most rail shipments today are "exempt" and move under "exempt circulars" that are the equivalent of tariffs, and are usually incorporated into the bill of lading or rate agreement. Unfortunately, there are a few court decisions that have ignored the plain wording of the statute, and have applied shorter time limits for claims or suits. I do not agree with these decisions.

My suggestion would be to remind the claims people at CSXI of the language of the Carmack Amendment and, if necessary, bring a lawsuit.

Freight Claims – Shortage After Clean Proof of Delivery

Question: A shipment was sent from the warehouse and delivered to the consignee, who signed the proof of delivery ("POD") clear. The freight was not counted until the next day, at which time an overage and a shortage were discovered. The consignee kept the overage and filed a claim for the shortage. The warehouse denies liability for the shortage. The customer supplied the invoice where they were short paid by the consignee, would that be enough evidence to say there was a overage/shortage without pictures of the product at the consignee?

Answer: I'm not entirely sure of the facts as you have described them. However, it does appear that the consignee reported a shortage some time after delivery, and after giving the carrier a clear receipt.

A shortage can occur three places: at the shipper's facility, during transit while in the possession of the carrier, or at the consignee's facility.

If you think that the carrier is liable, the thing you must remember is that the claimant has the burden of proving (1) what was actually tendered to the carrier at origin, and (2) what was actually delivered at destination. In the situation where the shortage is not noted at the time of delivery there is an additional requirement to establish that the shortage could not have occurred AFTER the goods were delivered by the carrier.

I don't think that a short-paid invoice, by itself, would be sufficient to establish liability of the carrier, or, as you suggest, the warehouse that shipped the goods. You need more facts.

If this was a shipper load & count ("SL&C") full truckload shipment and the trailer was sealed and delivered with the seal intact, it is unlikely that the carrier was liable. Then, you probably

need to get a written statement from the consignee (as to what was actually received) and submit it with your claim to the warehouse-shipper.

FREIGHT CLAIMS – SHORTAGE IN DROPPED TRAILER

Question: Would like to ask a question regarding a Consignee Unload Agreement. Our company ships FOB-PPD to a large retail distributor. We have a consignee unload/drop agreement with delivering carrier and we pay freight and file claims.

The distributor deducts shortages from our invoices, we file a claim, and the claim is denied as exceptions are not being properly reported to our carrier within the terms of the consignee unload agreement and therefore credit is denied.

The retailer has stated they have a drop contract and is claiming once freight leaves our dock it would revert to their consignee drop agreement not ours. The retailer has refused to supply a copy of their drop agreement.

My question is whose drop contract applies? Currently it is not specified in the vendor/retail contract.

Thanks for your input!

Answer: These “dropped trailer” situations are always a problem when there is a shortage discovered after the trailer has been dropped and the driver has left.

As a threshold question, I note that you ship “FOB-PPD”. If you mean FOB Origin, then under the Uniform Commercial Code it would be presumed that risk of loss passes to the purchaser when the goods are tendered to the carrier at origin. In other words, the purchaser should be the one to file any shortage claims with the carrier.

Also, I would assume that these shipments are moving under your transportation agreement with the carrier since you are paying the freight charges (and not the consignee’s transportation agreement with the carrier). If so and it is properly drafted, the provisions of your contract should address and govern this situation.

In any event, I don’t think the carrier can decline a claim solely because a shortage was not reported within a time period specified in the consignee’s “unload agreement”.

Regardless of any “dropped trailer” agreement the carrier still has a duty to investigate each claim on the merits. The Federal Motor Carrier Safety Administration (“FMCSA”) claim regulations at 49 CFR Part 370 state:

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

The fact that exceptions are not noted at the time the trailer is dropped is not an absolute defense for the carrier, but falls within the rules for “concealed” shortage or damage.

Carriers ARE liable for concealed damage or shortage, but the thing to remember is the claimant’s burden of proof: (1) that the shipment was in good order and condition when tendered to the carrier at origin and (2) that it was damaged (or short) at the time of delivery, see *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 337 U.S. 134 (1964), reh. den., 377 U.S. 948. Once the claimant has established these two elements, the burden then shifts to the carrier to prove that the loss was caused by one of the recognized exceptions to liability such as act of God, act or default of the shipper, etc. AND that the carrier was not negligent. These are factual questions that depend on the specific situations of each shipment.

Obviously, these shortages could occur in three ways: the goods were not loaded on the trailer at origin, or they were lost during transit, or they were stolen after the trailer was delivered to the consignee. Sometimes you need to be a "detective" to find out where the loss occurred,

and at the least, you will probably need to get written statements from persons who have actual knowledge about the loading and the unloading. You may have to press your customer for more details about how and when the shortage was discovered, and for receiving reports or other evidence that the shortage actually existed when the trailer was delivered, and not afterwards. Your customer should not be allowed to merely deduct alleged shortages from your invoices without an adequate explanation.

FREIGHT CLAIMS – SHORTAGE ON SHIPPER LOAD & COUNT

Question: A full truckload shipment arrived at the consignee and the bill of lading was noted "7 cases short". My customer/shipper is doing a claim for those 7 cases. The carrier is denying the claim on the basis that the bill of lading did not state that the driver was to load and count, as well as the driver not told he was responsible for counting the product. In addition, the driver says the seal was intact upon delivery at the consignee. I do have to mention that the bill of lading had a seal # but consignee would not confirm if seal was intact or not upon arrival.
Is this a valid claim or is carrier right in denying claim?

Answer: If the shipper loads and counts a trailer, and the driver is not present and does not have the opportunity to observe the loading, the carrier can legitimately argue that it is a "shipper load & count" ("SL&C"). If the shipper also seals the trailer and the origin seal is intact upon delivery (with no evidence of tampering with the seal, locks, hinges, etc.) It is strong evidence that the loss did not occur in transit.

Each case must be investigated on the specific facts. Remember, it is the claimant's obligation to establish that the goods were tendered to the carrier at origin and there was a shortage at the time of delivery.

FREIGHT CLAIMS – SHORTAGE ON SL&C SHIPMENT

Question: We are a broker; our customer filed a claim with us stating the load was delivered 32 cases short. I called the shipper; they confirmed 2313 pieces were shipped, 38 pallets. I contacted the receiver who confirmed they received 2,281 pieces; they did not have a pallet count because they were broken down. The driver signed the bill of lading without exceptions. The consignee noted 32 cases short on the bill of lading. I filed the claim with the carrier, but it was denied due to the trailer being sealed, no evidence of tampering or damage, and the driver was not allowed on the dock at the shipper or receiver.
Does the carrier have a right to deny this claim? How should I respond to our customer? Thank you.

Answer: This sounds like a simple factual question -- how many cases were tendered to the carrier at origin and how many were delivered at destination. If you can get an written statement or affidavit from a shipper employee with personal knowledge of the facts that confirms what was loaded into the truck, and one from a consignee's employee that confirms what was delivered, the carrier should pay the claim.

You do mention a "seal". If the trailer was loaded by the shipper without the driver being present or able to count during the loading, and the shipper sealed the trailer, this would be a shipper load & count ("SL&C") shipment. And if the trailer arrived with the original seal intact, and there was no sign of tampering with the seal, the locks, hinges, etc., there would be a strong presumption that the shortage did not occur in transit. This may require further investigation.

FREIGHT CLAIMS – SHORTAGE ON THIRD PARTY COLLECT SHIPMENT

Question: We had an account take a large deduction stating we short shipped. I proceeded with filing a claim against the carrier. I have sent several emails and had no response and also called their phone number, which is no longer in service. I went back our account asking to provide us with a copy of the invoice where they paid the freight because it shipped 3rd party collect.

They have not been able to provide any supporting documents, therefore, can we demand payment of the product because it was a 3rd party collect, and they can go after their own carrier? Please advise.

Answer: I assume that the shortage occurred while in transit, in the possession of a carrier that apparently has gone out of business.

The freight payment terms (Prepaid or Collect) do NOT determine "risk of loss" in transit. What you need to know is the terms of sale, i.e., FOB Origin, FOB Destination, etc. because that is what determines risk of loss in transit. Under the Uniform Commercial Code, if the terms are "FOB Origin", then the buyer assumes risk of loss and is responsible to pay for the goods even if they are lost or damaged in transit.

There is one other possible avenue of recovery, even if the carrier is no longer in business. Motor common carriers are required to have a "BMC-32" cargo endorsement that provides for coverage up to $5,000 per shipment or $10,000 per occurrence. You can check the Federal Motor Carrier Safety Administration ("FMCSA") website to see if the carrier had a BMC-32 on file at the time of the loss, and submit a claim directly to the insurer.

Editor's Note: The following note shows the benefits of membership and is an example of how the Q&A forum helps to bring in new members (they joined).

Mr. Pezold,

I want to thank you for responding to my email, you have been extremely helpful. I disputed the large deduction using your counsel "Under the Uniform Commercial Code, if the terms are FOB Origin" because no one could provide me with their routing guide nor vendor agreement.

I have been working on two more difficult claims and was wondering if I could ask you a few questions. I also forwarded the application to my superiors for approval and should have that to you soon.

Thank you,

S. G.

FREIGHT CLAIMS – SHORTAGES FROM DROPPED TRAILER

Question: We are a third party logistics provider ("3PL"). We arrange transportation for our customers using carriers under contract with us. Our customers ship to all of the big box stores (Wal-Mart, Target, etc.) that require that trailers be dropped in the consignee's lot for unloading at the consignee's convenience. The primary denial used by the carrier in these situations is that the consignee did not report the "exception" to the carrier in a timely manner as required by their "Drop Trailer Agreement" with the consignee. Can a carrier deny claims based on an agreement to which our customer (and our company) is not a party? Is a denial based on the lack of a timely notification by the consignee valid grounds for a claim's denial? And finally, is the fact that the trailer was "dropped" at the destination a valid reason for denial?

The terms of shipment were FOB-Destination. If the carrier points to their tariff which specifies that exceptions on dropped trailers need to be reported to the carrier within 24 or 48

hours - does that lend any weight what so ever to the carrier's denial based on the consignee's failure to fulfill the terms of their agreement with the carrier?

The one company that really seems to rely on that defense for justification of their denials of liability is YRC. Now that I know how much weight this argument carries in legal circles, I will likely read the YRC tariff section regarding dropped trailers. I am curious to see how YRC represents this information in their Terms and Conditions.

Thank you so very much for your assistance. It is wonderful to have a source that isn't predisposed to any one particular point of view. Getting honest and straight forward information is a genuine treat!

Answer: The situation you describe is increasingly common and we have many questions about shortages from trailers that are dropped at the consignee's facility for unloading, where the driver is not present during unloading to verify the count and/or condition of the shipment.

Unless these shipments are "customer pickup", where the buyer/consignee has arranged for the transportation and is paying the carrier, the "contract of carriage" is between the shipper and the carrier. Since the shipper is not a party to some "drop trailer agreement" that the carrier may have with the consignee, the shipper cannot be bound by that agreement. In other words, a failure to report the "exception" to the carrier in a "timely manner", as required by their "drop trailer agreement" with the consignee, is not a valid reason for declining a claim.

The claim regulations at 49 CFR Part 370 require the carrier to "promptly and thoroughly investigate" the facts, not merely disallow the claim because of a "clear" delivery receipt, or because there was a notification requirement in a drop trailer agreement.

Essentially damage or shortage from a dropped trailer that is only discovered sometime after the delivery has been made is similar to a "concealed damage" situation. If you have this problem, the thing to remember is the claimant's basic burden of proof. The claimant must prove with competent evidence (bill of lading or receipt, manifest, statement or affidavit from an employee of the shipper having actual knowledge, etc.) what was actually tendered to the carrier at origin, and there must be competent evidence that there was in fact damage or shortage at the time the trailer was delivered (and that it did not occur after delivery).

These are all factual issues and each case must be investigated thoroughly. If you have recurring problems with a particular carrier or customer, you should bring this to the attention of management and you may want to look into improving your security or using a professional investigator.

I don't think such a tariff provision would be enforceable, even it the bill of lading incorporated the carrier's tariff provision by reference and the tariff had some type of language to the effect that the shipper would waive the right to file a claim on dropped trailers.

The federal claim regulations at 49 CFR Part 370 still require the carrier to investigate all claims. I also believe that it would be contrary to the Carmack Amendment, 49 USC 14706, that establishes the right to recover for loss or damage caused by a carrier, to limit liability in this manner.

In addition, the Carmack Amendment says that "A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section." You clearly have the right to file a claim, and the right to bring a lawsuit within the statutory time limits.

FREIGHT CLAIMS – SHORTAGES ON DROPPED TRAILERS

Question: My question is about dropped trailer agreements between the carrier and the consignee. Our company has shipper load & count ("SL&C") contracts with all of our less-than-truckload ("LTL") carriers. In the event of full pallet losses, a cargo claim is filed.

However, more and more carriers are using their dropped trailer agreements with the consignee regarding exception reporting timeframes to decline our claims. For example: a trailer is dropped at the consignee location on 1/11/10, but the consignee didn't report the exception of one pallet short to the carrier until 1/13/10. Their agreement (per the carrier) states the consignee should have reported within 24 hours. Therefore, the Carrier declines the claim. Is this the norm?

Does the dropped trailer agreement between the carrier and the consignee supersede our cargo claim? Also, do we have a right to demand to see the agreement as documented proof? Just receiving a form letter stating the "agreed timeframe for reporting exceptions" was not correct and then totally disregarding the missing pallet just doesn't seem right or fair. How do I know this agreement exists? I'd like to know what happened to the missing freight. Was it our own warehouse that didn't load it? Did the consignee not receive in correctly? Or did the carrier lose or mis-deliver the shorted pallet? When I receive these declinations, all investigating stops on the carrier end. What are the shipper's rights in this instance?

Answer: These "dropped trailer" situations are always a problem when there is a shortage discovered after the trailer has been dropped and the driver has left.

I don't think the carrier can decline a claim solely because a shortage was not reported within 24 hours. Regardless of any "dropped trailer" agreement the carrier still has a duty to investigate each claim on the merits. The Federal Motor Carrier Safety Administration ("FMCSA") claim regulations at 49 CFR Part 370 state:

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

On the other hand, what you have is a typical concealed damage or shortage situation.

Carriers ARE liable for concealed damage or shortage, but the thing to remember is the claimant's burden of proof: (1) that the shipment was in good order and condition when tendered to the carrier at origin and (2) that it was damaged (or short) at the time of delivery, see *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 337 U.S. 134 (1964), reh. den., 377 U.S. 948. Once the claimant has established these two elements, the burden then shifts to the carrier to prove that the loss was caused by one of the recognized exceptions to liability such as act of God, act or default of the shipper, etc. AND that the carrier was not negligent. These are factual questions that depend on the specific situations of each shipment.

Obviously, these shortages could occur in three ways: the goods were not loaded on the trailer at origin, or they were lost during transit, or they were stolen after the trailer was delivered to the consignee. Sometimes you need to be a "detective" to find out where the loss occurred, and at the least, you will probably need to get written statements from persons who have actual knowledge about the loading and the unloading. You may have to press your customer for more details about how and when the shortage was discovered, and for receiving reports or other evidence that the shortage actually existed when the trailer was delivered, and not afterwards.

Freight Claims – Shortages on Shrink-wrapped Pallets

Question: Is there a way to protect ourselves against shortages in a shipment? This tends to be an issue we face often where the supplier says they shipped a particular quantity, the intermediary (a non-vessel operating common carrier ("NVOCC")) goes off the count on the paperwork from the supplier (doesn't break the shrink wrap on the pallet) and when the shipment is received at our warehouse, it is a box or two short. The supplier blames the

NVOCC and the NVOCC blames the supplier. In the meantime we are short and neither will accept responsibility for the claim.

Answer: Unfortunately, shortages from shrink-wrapped and palletized shipments are a recurring problem. When cartons have been counted and loaded by the shipper on a pallet, and then shrink-wrapped, it is often impossible for the carrier's 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 or to enter "STC" or "Said to Contain" on the bill of lading.

Essentially the carrier only signs for the property "in apparent good order" unless otherwise noted, so that it is not assuming the responsibility for hidden problems such as shortages or damage that could be concealed by the shrink wrap or packaging. In a way, the shrink-wrapped pallet is similar to a shipper load & count ("SL&C") shipment where the shipper loads a trailer or container and seals it; in that case the carrier will usually insert "SL&C" on the bill of lading.

Basically, the issue comes down to your burden of proof. Remember that a shortage can occur at three places: at the shipper's facility, during transit, or at the receiver's facility. 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 at destination -- these are factual questions.

Some suggestions:

1. Make sure that the vendor or supplier shows the number of packages or cartons on the bill of lading - not just the number of pallets. Always try to get the carrier to sign for the actual number of packages.
2. Instruct your receiving personnel to carefully inspect all shrink-wrapped shipments to see if there is any evidence that the wrap has been torn or cut, or that the shipment has been re-wrapped by the carrier. Look for "voids" in the center of a stack of cartons. Record any observations of suspicious circumstances.
3. Require your vendors or suppliers to use distinctive shrink-wrap or tape that would help to determine if the shrink-wrap has been replaced during transit.
4. If you do have a dispute over these shortages, you should provide documentation (tallies, picking sheets, etc.) and a written statement from the loading supervisor to establish the actual carton count on the pallet in question. Likewise, you should get documentation and a written statement, signed by the receiver of the goods and submit these with the claim.

FREIGHT CLAIMS – SHOULD CARRIER PAY CLAIM PRIOR TO RECEIVING SALVAGE

Question: Good morning George, I have a question that I cannot find an answer to in all the copies of TRANSDIGEST I have and volumes of *Freight Claims in Plain English*.

I have a situation where I filed a claim against a carrier for a damaged air unit. After investigation by the consignee it was determined that the cost of repairs exceeded the value of the unit. We have offered the unit for salvage to the carrier if they paid our claim's full value. The carrier has accepted this offer, but has asked that they receive the unit prior to paying the claim. I am saying the same in reverse, I want the claim paid before the unit is picked up. This carrier is under contract with the consignee, however this issue is not spelled out in the contract.

Have you run across this before and if so, is there a legal solution or is a situation to be settled between the consignee and the carrier?

Answer: I don't think there is any "legal" answer. I suggest that you get some written confirmation that the carrier is going to pay the claim in full within a specific number of days after they pick up the damaged unit.

FREIGHT CLAIMS – SL&C ISSUES

Question: We are a paint manufacturing company. One container that we ship our product in is a 55-gallon drum. We ship 4 drums banded together (each drum weighs approximately 500 pounds) and placed on a wooden pallet. We have never banded the "banded drums" to the pallet itself, nor do any of our suppliers due to the weight of each drum. A freight transportation company is stating that a load of drums were not secured properly due to the drums not being affixed to the pallet causing them to shift during transit and a drum to be punctured.

We have never in 50 years had this happen before. I have the *Freight Claims in Plain English* books and cannot find anything specific to this issue. I feel that the driver signed the bill of lading after inspecting the load; clearly showing that he must have thought the load was secure for transport. The freight company is stating, "By signing the bill of lading, the driver is not a guarantor that the shipment is loaded and secured but that it appears to be so."

Is there a law or rule that can help support my claim pertaining to this issue? It is apparent to us that the driver made a sudden stop or brake to cause the 500 pound drum to move (when strapped to three others).

I have some additional questions:

1. What if we are the consignee and a less than truckload ("LTL") shipment is being delivered to us freight collect- 3 drums shipped, but only 2 were delivered. The carrier is stating that they are not responsible for the number of pieces contained within the wrap, only the number of pallets shipped. Is there a rule that applies to this?

2. Does a shipper load and count ("SL&C") situation need to be noted on the bill?

3. Many times the drivers that pick up at our location come in and sit in the lunchroom while their load is being loaded. The driver always looks at the loaded load and seals the trailer himself. Is that considered "SL&C"?

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 CFR Sections 392.9 and 393.100, also discussion in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 4.8.3.

If the carrier's driver was present and had an opportunity to observe the loading, then the carrier cannot shift the liability to the shipper for improper loading, blocking, bracing, etc.

The only possible exception would be a full truckload SL&C, where the shipper loads, counts and seals the trailer without the driver being present.

With regard to your other questions:

1 - As with any claim, you need to start with the basics - what was shipped, and what was delivered. It is the claimant's burden of proof: (1) that the shipment was in good order and condition when tendered to the carrier at origin and (2) that it was damaged (or short) at the time of delivery, see *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 337 U.S. 134 (1964), reh. den., 377 U.S. 948. These are factual questions that depend on the specific situations of each shipment.

It may be more difficult to prove that a shortage occurred in transit if the shipment is delivered with the original shrink wrap intact, e.g., you may need to get statements from people with actual knowledge of what was shipped and received. However, there is no

"rule" that says a carrier is not responsible for a shortage because the shipment is shrink-wrapped and/or palletized.

2 - A "SL&C" notation on the bill of lading may be made by the carrier on a full truckload shipment, but only if it is true -- that the shipper did in fact load and count the goods, and the driver did not have the opportunity to observe the loading.

3 - In my opinion, if the driver could have observed the loading, but decided to go off for lunch or a cup of coffee, the carrier has waived its right to a "SL&C" notation on the bill of lading.

FREIGHT CLAIMS – SPECIAL DAMAGES

Question: May I include repair, handling charges and re-stocking fees in my claim for missed appointments or damaged products returned to us, and replacements shipped due to missing items?

Answer: You are mixing "apples and oranges" -- in other words the damages that can be claimed may be different depending on the kind of loss, damage or delay to a shipment.

Where there is damage, and an item can be repaired, repackaged, refurbished at a reasonable expense, there is usually some duty to "mitigate the loss" and this should be done. The claim to the carrier will be based on the expenses for repair, repackaging, etc. If an item is "totaled" and it is not practical to repair, there may still be some salvage for parts or for scrap, which should be shown as an allowance or deduction from the claim.

If there is a non-delivery (shortage), then you would ordinarily be entitled to the invoice price (the amount you would have received from the customer if the item had been delivered).

Delay cases involving missed appointments, etc. are more difficult and turn on the specific facts. The court decisions generally don't allow "special damages" for delay, unless the carrier is put on notice at the time of shipment as to the need for delivery at a specific time and the consequences of failing to do so.

All of these subjects are covered in *Freight Claims in Plain English* (3rd Ed. 1995) which is available from the Council.

FREIGHT CLAIMS – SPECIAL DAMAGES

Question: I would like the Council's help in resolving a claim involving so-called "special damages" for my client. The carrier, a less-than-truckload ("LTL") provider, continually denies our claim. Below are the facts and circumstances involved with our claim as outlined in our letter to the carrier?

Are we correct in our argument that "special damages" are not involved in this claim? What case law is there to support our argument? What are our next steps if the carrier continues to deny our claim?

> Thank you for your response on our claim. We respectfully disagree with your assessment concerning "special damages" and subsequent denial of the claim.
>
> There are no special damages involved with our shipment, but total negligence of [carrier] handling our shipment! Below are the facts justifying our claim;
>
> 1. [Carrier] picked up our shipment on 4/3/2008 and we anticipated they would deliver on or before 4/13/2009.
>
> 2. According to your tracking report, our shipment departed on your Las Vegas terminal for your Salt Lake City, UT terminal on 4/5/2009.
>
> 3. Again, according to your tracking report, our shipment was unloaded at you Salt Lake City terminal on 4/6/2009

4. And finally, according to your tracking report, our shipment, which magically shows being in Cincinnati, OH and returned to terminal! As shown below, this is a totally false record!
5. On 4/9/2009 and 4/10/2009, we began tracking our shipment to make sure it would be delivered to our customer in Cincinnati, OH by Monday, 4/13/2009.
6. On 4/9/2009, your website showed our shipment being at your breakbulk terminal in Salt Lake City, UT
7. Being concerned that our shipment may not be delivered in time, we contacted B. L. in your customer service department and had several conversations with her about where our shipment was and when will it be delivered.
8. B. L. did admit that our shipment was lost and she was checking with your terminals hoping to find it.
9. B. L. told us that our shipment may have been delivered to a construction supply company in Grand Prairie, TX, which was a false alarm.
10. [Carrier] made no effort to find our shipment over the weekend of 4/11/2009
11. On Monday, 4/13/2009, which was the day our shipment was to be delivered, B. L. checked with your Cincinnati terminal hoping that our shipment magically made it through your network and could be delivered to our customer. To no avail, B. L. had no idea where our shipment was. Simply lost through their negligence.
12. Now, we have a very upset customer, who told us that if we cannot get them their product by Tuesday, 4/14/2009, they would cancel the order and would not order from us in the future.
13. We started to put a replacement order together that we would expedite to our customer in Cincinnati, OH.
14. Ironically, we received a call from a construction supply company in Las Vegas, NV and they reported that they had a pallet of our product, which was delivered to them by mistake.
15. We made arrangement with the construction company in Nevada to pick up our shipment at their Las Vegas facility; we brought the shipment to our distribution center to make sure was intact and all the product was there; and started the process to get our shipment to our customer in Cincinnati, OH next day, Tuesday, 4/14/2009
16. On Monday, 4/13/2009, we contacted B. L. in [Carrier's] Customer Service and advised her that we, found our shipment here in Las Vegas, that we recovered it and we were making arrangements to get it to our customer next day or we would lose the sale and customer if we did not.
17. [Carrier] was not empathetic to our situation, refused to help us, and declined to remedy their negligent handling of our shipment.
18. We then proceeded arranging the expedition of our shipment via an alternative carrier and they got our shipment delivered to our customer in Cincinnati on Tuesday, 4/14/2009.

Contrary to your assessment of "special damages", or that the carrier did not foresee the damages as an ordinary and natural consequence of a breach when the contract of carriage of carriage was made. For a carrier to be held liable for special damages, it must be given prior notice of the consequences or damages. As noted clearly above, [Carrier] had at least five days notice that they negligently handled and lost our shipment, which caused considerable damages to our customer and to us. There were no ordinary, natural consequences, but [Carrier's] negligence and lack of concern for their customers.

> Had our shipment not been found, [Carrier] would have been liable for the lost shipment at a considerable loss, then our finding the shipment, [Carrier] refusing to help us and expediting our shipment to our customer. It is very evident that [Carrier], and only [Carrier], caused the damages that were very detrimental and damaging to us.
>
> We believe it unconscionable that [Carrier] is trying to avoid its responsibility and liability for the damages they and only they caused! We, therefore, now demand your reimbursement of $966.43 for the damages caused by [Carrier] in negligently handling our shipment between 4/3/2009 and 4/14/2009.

Answer: Ordinarily, a carrier must be given actual notice at the time of shipment as to any "special damages" that would be incurred if the shipment is not delivered with reasonable dispatch, see *Freight Claims in Plain English* (4th Ed. 2009) at Section 7.3.

However, there are a number of cases in which the carrier was deemed to have "constructive notice", i.e., it would be reasonable in the particular situation that the carrier should have known what the consequences of a delay would be. In addition, there are cases in which the carrier was given notice after the shipment was received and while in transit, e.g., *Turner's Farms, Inc. v. Maine Central R.R. Co.*, 486 F.Supp 694 (D. Me. 1980).

I would think that your fact pattern would fall under these exceptions to the general rule, and that you should be able to recover the additional freight charges that were incurred to deliver the shipment after it was "found".

FREIGHT CLAIMS – SPECIAL DAMAGES AGAINST BROKER SURETY

Question: We recently contracted two (2) moves with one carrier that were both originating in Houston, TX on 8/9/2010 with scheduled crane offloading the following morning, 8/10/2010 at 10:00 am CST and 11:00 am CST. The rate confirmation between our company and the carrier was agreed upon for the dates, times as well as the rate for the line haul including permit costs due to the height and was signed by Summit Transportation as well as the representative for our carrier. The morning of the 8/10/2010 we received a call from the carrier stating that they had a delay on the permits and that both trucks had been delayed and were sitting about 17 miles from the TX/LA border. We immediately contacted our consignee and advised them of the delays but the crane was already on site and charges had begun to build. The carrier did make delivery on the afternoon of 8/10/2010 but not before a total of a little over $1,200.00 in back charges had been deducted from us by OUR customer. We at that point contacted the carrier and requested copies of the permits and any documentation regarding the delay and the carrier became angry with us and stated that they would not help with the claim at all before faxing over the copies of the permits. After reviewing what we were provided with by the carrier, contacting the state of Louisiana, obtaining documentation from the customer and the signed contract between our company and the carrier we found that only one of the orders should have had a delay.

The issue date is listed at the top of the permit which is issued by the state of Louisiana. One permit was issued on the afternoon of 8/9/2010 and the second was issued late morning on 8/10/2010. We have asked the carrier to help with the charges for one order and explained the situation and they are now saying that they will get the money one way or the other by filing against our bond. We have not threatened to hold payment from the carrier as that is not a way that we do business however on the same token we ask our carriers to be honest with us as well and they seem to think that they have no obligation here although we have a signed contract. A signed contract that clearly states pick up dates, delivery dates, times for both, accurate dimensions of the order and we even included instructions regarding the crane and the

charges that would be charged back due to late delivery. What are our rights in a situation like this? Can the carrier just file against our bond?

Answer: The fact pattern as you have described it falls into the category of "special damages". As a general rule, a carrier is only obligated to deliver with "reasonable dispatch", and the delays you have described would not give rise to compensable damages. However, when a carrier is given adequate notice of the consequences of a delay (failure to deliver by the agreed date and time, that a crane would be waiting to unload, etc.), the carrier can be liable for the damages that result from the delay. Note that this subject is discussed at length in *Freight Claims in Plain English* (4th Ed. 2009).

You indicate that the delay on one of the movements may be excusable since the delay in issuing the permits was not within control of the carrier, but that the other movement should have been delivered on time.

Based on the facts as you have described them I believe the carrier would be liable for the $1,200.00 in back charges that was charged by your customer.

As to whether the carrier can make a claim against your surety bond, the answer is "yes". However, if the carrier should do this, you should advise the surety company in writing as to the facts and request that they do not pay the claim.

FREIGHT CLAIMS – SPECIAL DAMAGES FOR DELAY

Question: We tendered a shipment thru an online service and upon checking on the shipment found out the carrier lost the shipment. I received a claim form from the online service and sent it back with the amount. In the meantime, we had to book a replacement order and reorder the material from our vendors.

About a month later the carrier found the "lost" shipment and delivered it to our customer. The material was okay and accepted by our customer. We now have the replacement order packed up, but our customer no longer needs it. We don't stock this material and won't resell it. I can return the material to our vendors, but will have to pay restocking fees and freight back. The online service won't pay the original claim because the material was eventually delivered. I understand that. My question is do I have any recourse in revising the claim or submitting a new one to recoup our costs for the return of the material we had reordered and are sending back to our vendors (the return freight charges and restocking fees)?

Answer: From your description of the facts, you did incur certain expenses (damages) because of the delay in delivering the shipment a month late.

A motor carrier is liable for damages resulting from delay, just as it is liable for loss or damage to the goods, *New York & Norfolk R.R. v. Peninsula Exchange*, 240 U.S. 34 (1916).

The question in delay cases is whether the damages were "foreseeable" at the time the contract of carriage was made, see *Freight Claims in Plain English* (4th Ed. 2009) at Section 7.2. If the damages were foreseeable, they are "general damages", but if not they are "special damages", which would require the carrier to have some actual or constructive knowledge of the consequences of the delay.

I think it would be reasonable for a carrier to know that a delay of a month in delivering goods would involve the type of expenses that you describe, and would suggest that you file a claim for delay itemizing the various expenses.

FREIGHT CLAIMS – SPECIAL DAMAGES FOR LATE DELIVERY

Question: We had a situation where a broker accepted a load from us, then delivered it 6 days late because they chose to intermodal the load. In this case the cargo was a tooling setup that cost our company significant dollars by not having it available to put into production. We plan to file a claim, but didn't know what our chances were on this sticking. Let me know you initial thoughts.

Answer: This is a classic example of "special damages". The general rule is that such damages are not recoverable unless the carrier has actual or constructive notice of the need to deliver by a certain date and the consequences of failure to do so. See *Freight Claims in Plain English* (3d ed 1995) at Section 7.3 for a thorough discussion of this subject.

Unless this information was conveyed to the carrier, and the carrier accepted the shipment with such knowledge, I think you will have a difficult time collecting your claim from the carrier.

The situation with the broker might be different, but only if the broker was on notice of the situation and you can prove that the broker was negligent in selecting the wrong mode of transport.

FREIGHT CLAIMS – SPECIAL DAMAGES ON CUSTOM MADE PRODUCT

Question: We are 3rd party logistics provider ("3pl") that arranged for a less-than-truckload ("LTL") shipment for our customer. The LTL carrier lost the product for 3 weeks then tried to return it, but our customer refused it.

Our customer has since ceased paying all freight bills owed to us, and is suing us in small claims court for the amount of the freight. They are arguing that their freight was custom made, that they cannot use it and lost out on the sale.

Answer: My first observation is that, as a broker, your company shouldn't be liable for this claim, unless of course you have assumed liability for loss or damage.

In any event, this is an example of a "special damages" situation. A carrier is generally not liable for damages unless they are "foreseeable", and the carrier has either actual or constructive knowledge that a delay will result in certain specific damages. Usually, this requires some actual notice at the time of shipment as to the consequences of failing to deliver by a certain time, see Section 7.0 in *Freight Claims in Plain English* (4th Ed., 2009).

Thus, the question is whether the carrier was aware, or should have known, that the shipment was "custom made" and that a three-week delay would mean that the consignee could not use the item and/or would lose out on a sale. This is a question of fact; I don't have enough information to venture an opinion.

To give you an example of a case in which a carrier was held responsible for a "lost shipment", the case of *Paper Magic Group, Inc. v. J. B. Hunt Transport, Inc.*, 2001 WL 1003052 (E.D. Pa., Aug. 29, 2001), affirmed, 318 F.3d 458 (3rd Cir., 2003) involved a delayed shipment of boxed Christmas cards. J. B. Hunt had picked up the shipment on October 16, 1998 at Paper Magic's facility in Danville, PA. The shipment was to be delivered to Target Stores in Oconomowoc, WI. Typically, such a shipment would have a transit time of two or three days. Unbeknownst to any of the parties, the shipment had been misplaced by Hunt. On February 5, 1999, almost four months after the shipment was picked up, Hunt found the shipment sitting at its Chicago, IL terminal. Both Paper Magic and Target refused to accept delivery of the shipment because Christmas had passed and the shipment was now worthless to both. Thereafter, Paper Magic filed a claim for $130,080.48, which represented the invoice value of the Christmas cards. Hunt was able to salvage the Christmas cards for $49,645.96 and offered

this salvage value to Paper Magic as full and final settlement of the claim. Paper Magic refused this offer. The district court ruled that Hunt's four-month delay in delivering the Christmas cards was essentially a "non-delivery." The appellate court agreed and determined that Paper Magic was entitled to recover its full invoice price.

Now, as to your particular dilemma, it appears that your customer is holding you, the broker, liable for the loss and is setting off freight charges that it owes to your company. This is not uncommon, and it is not "illegal" for customers to do this. If you should decide to pay the claim, you can ask the customer to assign its interests to your company, and then try to collect the claim from the carrier. As indicated above, this may be difficult because of the question of whether the "special damages" are recoverable under these circumstances.

FREIGHT CLAIMS – STANDARD LOSS AND DAMAGE CLAIM FORM

Question: Our customer does not want to file a claim with the carrier and insists that we should take care of it. If we want to file a claim for the customer against the carrier how do we get a hold of a standard carrier claim form? Keep in mind this is going to be a total loss claim due to product damage.

Answer: You can find a "Standard Form for Presentation of Loss and Damage Claim" at the back of the National Motor Freight Classification. The form is reproduced in "Freight Claims Filing and Recovery", which is available from the Transportation & Logistics Council. You may also ask the carrier - most carriers will provide a form.

FREIGHT CLAIMS – SUBROGATION OF CLAIMS

Question: My question regards claim subrogation to the responsible carrier.

Must a carrier settle a claim with a claimant before it can subrogate the claim to the carrier responsible for the loss or damage? Where is claim subrogation codified or authorized in the regulations?

Answer: The statutory authority is found in the "Carmack Amendment", namely 49 U.S.C. Section 14706(b):

> (b) APPORTIONMENT- The carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

This section creates a cause of action for indemnification against the responsible party, and the language implies that the carrier must have paid the shipper (...as evidenced by a receipt, judgment, or transcript) as a condition of commencing an action.

I would think you would need at least an agreement to pay the shipper's claim if you have not done so, or an assignment of the shipper's interest.

FREIGHT CLAIMS – SUPPORTING A SHORTAGE CLAIM

Question: We are a broker and are having issues with a particular consignee. We contract a carrier to pick up a shipment from the consignor and they deliver to the consignee. However, the consignee does not provide the carrier with a copy of the signed bill of lading. Then, the consignee submits a claim for shortage. Is it acceptable/legal for the consignee to not provide

the carrier with a signed bill of lading or even a copy, once they delivered the load? How would I dispute the shortage claim, especially when the shipper and receiver are affiliated companies?

Answer: First, I would observe that, as a broker, you should not have liability for loss or damage in transit, unless you have agreed with your customer to assume such liability. Of course, if you are merely handling the claim on behalf of your customer, as an accommodation to the customer, that would be o.k.

If there is a shortage at the time of delivery (and not a concealed shortage that is discovered later) the consignee should always note the exception on the bill of lading or delivery receipt. This is a good practice, but there is no law or regulation that specifically deals with this problem.

Based on the facts as you have presented them, here are some suggestions:

1. Get a written statement from the delivering driver that the shipment was delivered in good order, and that there were no shortages at the time the goods were being unloaded from the truck.

2. Demand a written statement from a person having actual knowledge of the facts, or at least a receiving report or OS&D (over, short & damage) report from the consignee to substantiate the alleged shortage at the time of delivery.

I would note that I have assumed that the carrier's driver was present at the time the goods were loaded at origin, and at the time they were unloaded at destination, and that the quantity was shown on the bill of lading. If this was an "SL&C" (shipper load & count) shipment or a dropped-trailer delivery, other issues would need to be addressed.

FREIGHT CLAIMS – SUPPORTING DOCUMENTS

Question: We ship out beverage product to various distributors in the US. We have one customer who has a miscellaneous delivery charge report - more like a check sheet that they use for inspection of incoming product. They get the carrier to sign off on it as part of their exit procedure. They then use this, and only this, as documentation to charge us for various perceived infractions on delivery failures. They claim that as they have the carrier's signature on this document that it is proof enough for a claim. Could we use this back up documentation to charge back the carrier?

Answer: A motor common carrier is liable for loss or damage that occurs while the goods are the care, custody or control of the carrier. A claimant has a basic burden of proof: that the shipment was tendered in good order and condition at origin, and that there was actually some shortage or damage at the time of delivery, and the measure of damages. Once this is established, the carrier can only assert certain limited defenses (act of God, act or default of the shipper, etc.) and must also prove that it was not negligent.

In order to document that there was loss or damage upon delivery, most carriers will accept a notation on the bill of lading or a delivery receipt that is made at the time of delivery and signed by the driver. It would seem to me that the inspection check sheet that you describe should be sufficient to adequately document the quantity and condition of the goods that are delivered, and should be acceptable to the carrier in support of the claim.

FREIGHT CLAIMS – TARIFF LIMITATION ON RETURNED FREIGHT

Question: My company was notified by one of our customers that they had a problem with oil on some of the parts that we supply to them and they wanted to return the parts to us. Our customer uses a Logistics company to handle their freight and the shipment to our customer was handled by them. To set up the return of rejected parts my company would be paying the

freight charges so I contacted a less-than-truckload ("LTL") carrier and had the parts shipped back to us. When the parts arrived they were severely damaged.

I took photos of the damaged skids and had the driver note on the bill of lading that the skids were damaged. I contacted the LTL carrier and filed a claim. The LTL carrier is denying the claim based upon their following tariff provision: "TARIFF ODFL 100-I (i) Liability for loss, damage or destruction of property being returned to the original shipper, which was not initially transported by ODFL from the original shipper, will be limited to lost freight only and ODFL will not be responsible for damages."

My opinion is that it should not matter how the parts got to my customer. I hired the LTL carrier to transport them back to me and they were not damaged when they were picked up at our customer and the LTL carrier is responsible for this damage no matter what their internal Tariff policy is.

Am I correct and if so what laws cover this? Also is "Tariff" just another name for internal policy or what exactly does it mean in regards to this?

Answer: There can be no question that motor carriers are liable for loss or damage to goods in their possession under the "Carmack Amendment" (49 USC 14706).

Carmack does allow carriers to limit their liability "to a value established by written or electronic declaration of the shipper or by written agreement between the carrier and the shipper if that value would be reasonable under the circumstances surrounding the transportation."

This requirement of a written agreement is usually satisfied by a clause in the bill of lading that incorporates a liability limitation in the carrier's rules tariff.

There is, however, a legal difference between "limiting" liability and having "no" liability, see e.g. *Tempel Steel Corp. v. Landstar Inway, Inc.*, 211 F.3d 1029 (7th Cir. 2000), in which the court stated:

> . . .What carriers may not do is simply declare that they have no liability for a value of $0 rarely will be "reasonable under the circumstances surrounding the transportation.

In my opinion the ODFL tariff provision that you referred to is unenforceable.

Freight Claims – Temperature Requirements on Bill of Lading

Question: Are temperature requirements required on a Bill of Lading ("B/L")? We tendered a refrigerated load to a carrier but when the driver arrived at the shipper the B/L did not have any temperature requirements listed and the third party warehouse did not instruct the driver to run the reefer at the recommended temperature. The product was warm upon delivery and now the carrier and the shipper are both denying responsibility.

Answer: I'm not sure from your description of the facts who was the "shipper", but it appears that the shipment originated at a "third party warehouse", and I would assume that the warehouse probably prepared the bill of lading. I would think that the warehouse would know that the product that it is tendering to the carrier required refrigeration, and that it had responsibility for indicating the temperature requirements on the bill of lading. If it failed to do so, you could argue that its negligence was the cause of the loss.

There is no law or regulation, but it certainly is the usual and customary practice to indicate temperature requirements on the bill of lading. In the absence of some other instructions or notice, drivers would normally get this information from the bill of lading. I suppose, depending on the facts, you might argue that the carrier should have known, especially if it had handled reefer shipments of the same product in the past, and regularly picked up such products from

that warehouse. However, unless the carrier had actual or constructive notice of the refrigeration requirements, it would be difficult to hold the carrier liable for the loss.

FREIGHT CLAIMS – TEMPERATURE VIOLATIONS ON FOOD PRODUCTS

Question: What is the precedence for product temperature monitoring devices being used as the bases for food based product claims? In particular when the actual destructive product temperature has been determined to be within the customer's specifications?

We have over the last 5 years had a number of claims situations where the product we are attempting to deliver has been rejected, placed on hold pending a potential claim based on the temperature monitoring device alarming. Although we can prove that the trailer equipment was working properly and that the actual product temperature was within specifications.

Answer: As you know, transportation of food and food-related products is a very sensitive subject. I assume that you are referring to temperature monitoring devices that have been placed in the truck by the shipper, such as recording thermometers. Your question is whether a shipment should be rejected or "placed on hold" based on a reading from a temperature monitoring device, when there is no other indication that the trailer refrigeration unit was not working properly.

The quality of a refrigerated product may be affected and/or degraded if it is exposed to improper temperatures, or held for a prolonged period of time, and many items have specified limits on shelf life. There are strict federal regulations that cover food and drug items, see *Freight Claims in Plain English* (4th Ed. 2009) at Section 11.5.

Basically, it is a factual question as to whether the product has (or has not) been exposed to improper temperatures that could cause damage or product degradation. There may be other independent ways to determine this, such as taking pulp sample temperatures or testing in a qualified laboratory.

While there is a general duty to "mitigate damages", shippers and consignees have a legitimate concern about the product quality, potential product liability, and injury to their reputation and trademark, and probably don't want to accept any risk if there is a question about the product.

There is no simple answer to your question. All I can suggest is to ask that a reasonable effort be made to determine if there has, in fact, been any actual damage to the product.

FREIGHT CLAIMS – THIRD PARTY CLAIMS AND TERMS OF SALE

Question: I have a question concerning the claims process with one of our dotcom accounts. This particular account is FOB destination and we currently ship their orders on 3rd party collect terms. They obviously have agreements with their preferred less-than-truckload ("LTL") carrier concerning rates, claims settlement, disposition etc. Due to the sales terms our company is required to seek repayment on damage and loss from this particular carrier. However, more often than not, when we file our claims they are denying based on their agreements with the dotcom account. For example, we will request payment for a damaged and refused table with an invoice of $200.00. They will then either deny stating it is ineligible or demand we amend the claim to our cost.

To my knowledge, amending to cost is standard when an item is damaged in return transit with the return not being the fault of the carrier. Is this not the case? We have requested but as yet not been provided with the previously mentioned agreements. Instead, the carrier sent us their Standard Operating Procedure handbook. Are we within our rights to request these agreements? Would we be out of line to refuse credit on these shipments and request the account handle their own claims?

Is our company obligated to operate by the processes dictated in the agreements between our account and their carrier? Also, having this account set up as FOB destination with 3rd party collect terms seems like a conflict. Since we own the goods and are responsible for loss and damage until they reach their destination shouldn't we be dictating which carrier is used?

I appreciate your time, any help or clarity you can provide would be wonderful as we are quite discouraged by this situation.

Answer: The problem is really with your customer. As you point out, the customer is actually contracting with the carrier to pick up the goods at your facility and is paying the carrier, presumably pursuant to its contract with the carrier.

In this situation, it is really improper for the terms of sale to be "FOB Destination", which under the Uniform Commercial Code ("UCC") would place risk of loss on the seller, and the buyer should be responsible to file claims for any transit loss or damage.

Unfortunately this is not an isolated situation when dealing with some major retailers, and they routinely deduct shortages and damage from the seller's invoices.

FREIGHT CLAIMS – TIME FOR INSURANCE TO PAY

Question: We are a 3rd party logistics provider and a carrier we used had its truck and trailer stolen. A police report was filed and the carrier has acknowledged the claim. How long does carrier's insurance company have to pay the claim?

Answer: There is no specific time limit within which an insurer must pay a claim under a carrier's cargo insurance policy. Some insurers pay promptly and others seem to delay payment as long as they can.

Our only advice is to keep following up on a regular basis - IN WRITING.

FREIGHT CLAIMS – TIME LIMIT TO FILE WITH INTERLINE CARRIER

Question: A claim was filed by the claimant within the 9-month time limit.

Claim was misfiled and later the error was discovered. The claim was transmitted to the interline carrier who did the delivery. The shipment was transferred clear at time of interchange. The interline carrier is denying the claim because, they received the claim past the 9 month filing limit. I advised them of section 11707(B) of the Interstate Commerce Act which provides that there is no time limit for filing claims against a interline carrier as long the claimant filed original claim within the 9 month requirement.

Does this still hold true or is there a court decision overturning this section 11707?

Answer: I am assuming this was an interlined movement under a through bill of lading. If a claim were timely filed with the receiving carrier, as far as the shipper is concerned, it would be a valid claim as against all connecting carriers and the delivering carrier.

But that is not really your question. You are asking whether a claim by your company, as the receiving carrier, against the delivering carrier is subject to a 9-month time limit.

First, it should be noted that the Carmack Amendment, 49 USC §14706, only prescribes a minimum time limit for filing claims, i.e., a carrier may not have a shorter time limit in its contract of carriage (bill of lading and/or tariffs).

Since time limits for filing claims are contractual, unless the delivering carrier issued a second bill of lading that had a 9-month time limit, or incorporated a tariff with a 9-month time limit -- which it apparently did not -- there would be no such 9-month time limit on your claim against the delivering carrier.

Furthermore, you refer to the indemnity provision in the Carmack Amendment, 49 UCS §14706(b), which provides:

> (b) APPORTIONMENT- The carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

This gives the receiving carrier a cause of action against the carrier responsible for the loss or damage if the receiving carrier has paid the claim. There is no time limit specified in this section.

In *Landair Transport, Inc. v. Schneider National Carriers*, No. 5:08-CV-182-C (N.D. Tex. Oct. 5, 2009), the Court observed that time limits in a bill of lading or tariff do not govern claims under 14706(b):

> Landair is seeking a claim under § 14706(b), the indemnity provision under the Carmack Amendment. See *Mercer Transp. Co. v. Greentree Transp.* Co., 341 F.3d 1192, 1197 (10th Cir. 2003) (calling suits brought under § 14706(b) indemnification suits). Under § 14706(b), Landair's claim could not have accrued until there was "an amount to be paid to the owners of the property." 49 U.S.C. § 14706(b). Hence, Landair's claim did not accrue until Wal-Mart deducted $91,387.70 from Landair's account in July 2007. See *Hercules, Inc. v. Stevens Shipping Co., Inc.*, 698 F.2d 726, 732 (5th Cir. 1983) (holding that a claim for indemnity arises only after the party seeking indemnity is held liable and that a statute of limitation provision cannot commence to run until the claim arises).

I trust this answers your questions.

FREIGHT CLAIMS – TIME LIMITS

Question: Legally how many months does a consignee or shipper have to file a claim? It used to be 9 months. Is this still correct?

Answer: The "Carmack Amendment", codified at 49 U.S.C. Section 14706, specifies a minimum period for the filing of loss & damage claims and bringing suits against motor carriers and freight forwarders:

> (e) MINIMUM PERIOD FOR FILING CLAIMS-
>
> (1) IN GENERAL- A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice.

There are some movements that are not subject to these time limits: shipments of "exempt" commodities such as fresh fruits and vegetables, intrastate shipments (movements that are solely between two points in one state), shipments that involve prior or subsequent movement by air, etc. A full discussion of time limits and exemptions can be found in *Freight Claims in Plain English* (3rd ed. 1995), which is available from the Council.

Freight Claims – Time Limits on International Shipments

Question: When the terms on an international order are "FCA forwarder" and the shipment is delivered to the forwarder in New Jersey and the customer is in China, at what point are we not responsible for shortage claims from our customer? For example, our packing lists are stamped "discrepancies must be reported within 7 days of receipt". We then deliver to the forwarder in NJ and shipment is signed clean. One or two months later our customer in China is claiming a shortage on the order. Is the forwarder responsible for checking the material for discrepancies and notifying us within 7 days? Are forwarders responsible in all cases to verify the contents of shipments delivered to them and report to the shippers/customer when a discrepancy is found? If this is not always the case how do we know when the customer in China receives the shipment to know if they are reporting the shortage claim within the 7 day period? Is the 7 day period unreasonable for international orders?

Answer: Under an "FCA" contract, when the seller has delivered the goods to the person nominated by the buyer (in your case, the forwarder), risk of loss in transit then passes to the buyer.

Whether delivery was actually made is a factual question. I assume that you used a motor carrier to transport the shipment to the forwarder, that the carrier issued a bill of lading when it received the shipment and obtained a signature from the consignee (forwarder) acknowledging delivery of the shipment. These documents ordinarily should be sufficient evidence that the goods have been delivered to the forwarder in accordance with your obligations under the contract.

There is one caveat: if the shortage was "concealed" because of the packaging and could not be ascertained by observation, additional questions arise as to where the loss actually occurred. As the shipper, some additional evidence may be needed, i.e., a statement from the person that packed the goods certifying the contents of the package, etc. Likewise, if no exceptions for shortage or damage were noted at delivery, it is incumbent on the consignee to prove that the loss did not occur after delivery.

As to the 7-day requirement, exceptions for any visible shortage or damage should always be made at the time of delivery. The longer the consignee delays in discovering and/or reporting concealed loss or damage, the greater the presumption that the shipment was delivered in good order and condition.

Freight Claims – Time Limits When Third Party Attempts Mitigation

Question: A rail carrier is declining a derailment claim based on the submission date being more then 9 months from delivery. Initially, a delivery attempt was made by the drayage carrier on 10/4/10. The consignee refused the freight (food product) because there was mold, wet damage and they were unable to unload. The freight was taken to a third party warehouse to sort the good product from the bad and thereafter be redelivered. On 10/21/10, the good product was received in by the original consignee. On 7/14/11, the claim was received from the claimant and filed with the rail carrier. The rail carrier declined the claim as being time barred, beyond 9 months from delivery, based on the initial delivery attempt date of 10/4/11. Our customer feels that the product was not suitable to be received until it was reworked and delivered on 10/21/11.

The customer did accept the good product in when it became available and mitigated the carrier's loss to the best of their ability. Would 10/4/11 be considered the actual delivery date or would 10/21/11 be more appropriate based on the commodity and circumstances?

Following are some more specific details relating to the original delivery attempt and final delivery. The original consignee refused the undeliverable freight to the drayage carrier. The drayage carrier informed the logistics provider of the refusal. The logistics provider arranged and hired a third party warehouse to sort, separate and palletize the product for delivery to the original consignee. The consignee received in the good product on 10/21/10.

Does the above sequence of events change anything?

Answer: This is not a simple question.

First, I would point out that the time limit for filing a claim is contractual, so you need to look at the "contract of carriage" with the railroad. This shipment probably moved under an "exempt circular" (tariff), so there may be terms and conditions that would determine the answer.

Second, there is a factual question: who had custody of the damaged goods between 10/4/10 and 10/21/10? If the railroad had completed its delivery by October 4th, i.e., the consignee arranged with a third party for sorting and reconditioning the shipment, I think that the time would run from the first tender of delivery by the railroad, since the consignee would be deemed to have taken possession of the shipment. On the other hand, if the railroad had arranged for the sorting and reconditioning, it can certainly be argued that it retained custody of the shipment and the date of the actual delivery on October 21st would govern.

Lastly, I would note that there are some jurisdictions that follow the *Hopper Paper* case (*Hopper Paper Co. v. Baltimore & Ohio R. Co.*, 178 F.2d 179 (7th Cir. 1949), cert. den. 229 U.S. 943 (1950)), which held that the time limit may not be a defense when the carrier has or is charged with actual notice of all the conditions and facts that a written claim would have given, see *Freight Claims in Plain English* (4th Ed. 2009) at Section 9.1.1.3. From the facts as you have described them, there is a good chance that this claim would fall within the rule of the *Hopper Paper* case.

In any event, it does seem rather shoddy to decline a claim that is only seven days late!

With regard to the additional details, I assume the logistics provider made separate arrangements with the drayage carriers and the railroad, and that the railroad was only contracted to provide ramp-to-ramp service. If so, I think the railroad had completed its delivery when it released the trailer to your drayage carrier, and that would start the time running for filing a claim against the railroad.

FREIGHT CLAIMS – TIMES TO FILE AND RETAINING RECORDS

Question: We are a shipper of bulk aggregates used in heavy highway construction projects. All shipments are T/L (truckload) divisible loads and shipped via common carrier. All shipments are weighed and the bill of lading ("B/L") produced for each load at the shipping location.

Typical deliveries can range from 5 to 50 loads per day and are dumped into a stockpile located on the customer's property. The carrier will obtain signatures and render a signed copy to the consignee and the shipper.

My questions are:

How long must a carrier hold records of signed delivery bill to provide proof of delivery ("POD")?

How long after delivery can the consignee claim non-delivery of one or more loads?

Answer: The federal requirements governing record retention are found in the Federal Motor Carrier Safety Administration's ("FMCSA") regulations at 49 CFR Part 379 - Preservation of Records, and apply to all motor carriers and brokers. The regulations specify various time periods depending on the type of record, and permit preservation "by any technology that is

immune to alteration, modification, or erasure of the underlying data and will enable production of an accurate and unaltered paper copy". Thus, it is clear that originals may be copied, scanned, microfilmed, etc. for this purpose.

A bill of lading or proof of delivery would generally fall into the group of documents that have a minimum one-year retention period (or one year after settlement if there was a claim involved).

Obviously, the best practice is to file a claim promptly upon delivery or discovery of any loss or damage. However, the "Carmack Amendment" (49 USC 14706) states that a carrier may not provide for anything less than 9 months from the date of delivery for the filing of a loss or damage claim, so that any claim filed within that period would be valid.

FREIGHT CLAIMS – TRANSLOADING OCEAN CONTAINERS

Question: We have a freight forwarder who is providing pricing for import containers based on transloading the product on the coast. In other words, ocean containers will be unloaded on the coast, and placed in either 53' trailers to be trucked to our facilities or placed into trailers for rail movement to our facilities. The anticipation is that we will enjoy a cost savings because: 1) three 40' containers would fit into two 53' trailers and 2) the carriers will give us a break because the ocean containers will be at the coast where they are needed rather than the carrier needing to move the containers empty from the middle of the U.S. back to the coast where they are needed.

We understand that. However, when I asked about carrier liability on this, so far they can't give me an answer. I really don't know yet which way we're going to go, but would like some advice on this issue.

Would the liability be the same as when we have less-than-container load ("LCL") shipments, which have to be de-vanned, etc.? Just the idea of breaking of a sealed container is giving me second thoughts.

Answer: I'm not sure what "hat" your "forwarder" is wearing. An ocean freight forwarder is not a carrier – essentially it acts as the agent of the shipper for making the arrangements with the actual ocean and inland carriers, handling the documentation, arranging for insurance, etc. A non-vessel operating common carrier ("NVOCC") is a carrier and has carrier liability according to its bill of lading - usually a door-to-door multimodal bill of lading.

If there is a through multimodal bill of lading, then the transloading of the cargo does not change the liability of the carrier. That generally will be governed by the Carriage of Goods by Sea Act ("COGSA"), and the COGSA limitations are usually extended to stevedores, terminal operators, inland road/rail carriers, etc. through a Himalaya clause.

If there are two separate movements, e.g., from origin to U.S. port, and from the U.S. port to final destination, the separate legs will be governed by the separate bills of lading and the applicable liability regime. Liability for the inland leg of the movement is not always clear: rail TOFC/COFC movements are exempt (49 CFR 1090.2) and usually subject to rail intermodal circulars; truck shipments are subject to Carmack, which permits liability limitations through bills of lading and tariffs. Here is where you must be careful to make sure your "forwarder" protects your interests.

Lastly, it should not make any difference if a load is full container/trailer or less than full container/trailer IF the bills of lading are properly prepared to show the number of packages and the description of the goods.

FREIGHT CLAIMS – USE OF SCANNED DOCUMENTS

Question: Do most courts require original documents, or can scanned copies be accepted? We have some carriers that only provided scanned copies of bills of lading, and we would like to know, if the need for court arises, if these documents will work.

Answer: For most purposes, scanned documents (.pdf or .tiff files) are admissible if the electronic copies are made and kept "in the ordinary course of business" and accompanied by a certification to the effect that they are a true copy of the original document.

Most courts - both federal and state - have rules specifying requirements for admission of such documents. I would note also that the rules for discovery now require production of electronic communications and records such as e-mails, faxes, EDI transmissions, etc. so that it is a good practice to have some formal procedure for their retention and archiving in the event of litigation.

One warning: if you have a situation where there may be possible litigation, be careful not to delete or destroy any relevant communications or documents. This is referred to as "spoliation of evidence" and can be subject to significant penalties by the courts.

FREIGHT CLAIMS – VALUE FOR PORTION OF UNIQUE SPECIAL ORDER ITEMS

Question: My question involves damage claims filed for "close out items" that are new, however, no longer being produced, or are one-of-a kind items. An example would be ceramic floor tiles. If a carrier damaged 1 out of 5 boxes of ceramic tile (no longer being made, so there would be none for replacement) sold to a customer for a specific project and the customer was then unable to use the entire order, would the carrier be liable for the lost sale of the entire order or only for the 1 damaged box of tile?

Initially, I see the carrier liability to be for the box it damaged, however, since there is only the limited supply because the floor tile purchased for the job is no longer being manufactured, the shipper has lost the sale on the entire order of this particular tile because the customer required 5 boxes and can't complete the job with only 4 boxes. I could not locate anything specific to this subject. In your Q&A Vol. III, Item 173 regarding Special Orders seemed like it may apply for the situation I am questioning. I would very much appreciate your insight and assistance with this dilemma. Thanks very much.

Answer: The problem you describe is analogous to the "pairs or sets" situation. This is discussed in *Freight Claims in Plain English* (4th Ed. 2009) as follows:

> 7.4.7 PARTIAL LOSSES - PAIRS OR SETS
>
> When only a portion of a shipment, or a part of an entire article is lost or damaged, the question arises as to whether the carrier is liable for the value of only the portion lost or damaged, for the value of the entire shipment or for the reduced value of the remaining parts or pieces.
>
> Illustrative of the problem is the lawsuit instituted to recover for damages to one of a pair of antique porcelain vases broken in transit. One was painted with the picture of the King of Austria, and the other a picture of his Queen. The plaintiff claimed that the value of the one remaining vase (the Queen) was of lesser value since its mate was destroyed. The court agreed after hearing testimony to the effect that as a pair, the vases were worth $5,000, but as a single vase, the remaining vase was worth only $1,500. Therefore, the court awarded $3,500 in damages to the plaintiff (rather than half of $5,000), holding:

In porcelain, a widowed Queen is of less value than the wife of a living King.

Railway Express Agency, Inc. v. Smith, 212 F.2d 47 (1954), affirming Smith v. REA, 110 F.Supp. 911 (N.D. Tenn. 1953).

Stated differently, "if the entire article, pair or set was given to the carrier to be transported, and a portion or part is lost or destroyed while in the custody of the carrier, the latter is liable for the value of the entire article, less the salvage value of the remaining part or parts." *Handbook on Transportation Insurance Claims*, Daynard, Fourth Edition, p.61.

In *J & B Schoenfeld Fur Merchants, Inc. v. Albany Insurance Co.*, NEW YORK LAW JOURNAL, March 25, 1988, the court held that, "under certain circumstances recovery may be had for undamaged property, but only when damage to one part of a matched set, pair, etc. prevents the sale of the undamaged part . . . the measure of recovery for that undamaged property is its 'actual cost' rather than net selling price."

FREIGHT CLAIMS – VALUE OF "LEMON" VEHICLE

Question: I'm dealing with a cargo claim whereas a transport company driver damaged a Land Rover while in his care, control & custody. The estimated damages were calculated to be $ $11,654.99. This vehicle unbeknownst to either the broker or the shipper was branded as a Lemon under the California Lemon Law code. Unit was transferred from California to an auction in Nevada.

Land Rover North America states the transport company is on the hook for $31,500.00 (Average Market Value) and they are requesting the transporter pay this amount. Once the transporter responsible for damages pays for the unit, the unit will be crushed.

Can you provide me or lead me to any information that may assist me in resolution. What I'm trying to find out is, "Can Land Rover North America legally force a transport company to pay for a vehicle if the vehicle is to be crushed"? I would think the transport company responsibility lies solely with the incurred damages sustained while in the possession of the carrier.

Answer: The "Carmack Amendment", 49 U.S.C. 14706, is a federal statute that governs the liability of a motor carrier for loss or damage on an interstate shipment. The statute provides that the carrier is liable for the "actual loss" to the property transported.

Ordinarily, if the vehicle can be repaired at a reasonable cost, there would be a duty to mitigate the loss and repair it. If so, the measure of damage would be the repair cost.

Auto manufacturers are very concerned about exposure to product liability claims and lawsuits. My guess it that Land Rover of North America takes the position that the vehicle could not be repaired in such a way that it could be sold with the manufacturer's warranty and/or without exposure to product liability claims.

A recent case, Logistics Insight Corp. v. JDL Trucking, LLC, No. 04-40162 (E.D. Mich. Feb. 16, 2006) is illustrative. This case involved a shipment of 88 automobile transmissions from Maryland to GM's Pontiac Assembly Center in Pontiac, Michigan that were involved in a highway accident. Because of the accident, some of the transmissions were visibly damaged and knocked out onto the floor of the truck, while others were simply shifted out of their shipping cases. When the shipment eventually arrived at the GM Assembly Center on May 4, 2002, all the transmissions were refused, and were later scrapped.

The defendant carrier argued that the plaintiff did not prove the amount of damages actually suffered because GM only did a cursory, visual check of the shipment, and rejected the entire shipment without inspecting each transmission.

In denying the carrier's motion for summary judgment, the court pointed out that some of the transmissions were visibly damaged, so the amount of damages for those transmissions were sufficiently determined. As to the rest of the transmissions, the court stated:

> The evidence in the record indicates that some kind of accident having a significantly large impact did happen, traumatic enough to knock several heavy transmissions out of their shipping cradles. There s also evidence that GM had a policy of rejecting an entire shipment of goods when there was some indication that a traumatic accident had affected the integrity of the goods. Again, when considering the facts in the light most favorable to the non-moving party, the evidence is sufficient for a jury to find that the integrity of the entire shipment had been compromised by the accident, and that all of the goods had been damaged. Plaintiff has established a prima facie case and Defendant is not entitled to judgment as a matter of law.

If the damaged Land Rover was badly damaged, it could be considered as having "affected the integrity of the goods", and Land Rover would probably be able to recover its full value.

However, you mention that the vehicle "was branded as a Lemon under the California Lemon Law code", and was being shipped to an auction. This raises the questions as to (1) whether the vehicle could have been sold (as a Lemon) and (2) how much the vehicle would have brought at auction if it had actually been delivered in the same condition as when shipped.

Since the claimant has the burden of proving its damages, it would need to prove that the "Lemon" could have been sold, and would need to have some expert testimony as to what would reasonably be received at the auction.

FREIGHT CLAIMS – VALUE OF LOST BUSINESS FILES

Question: We have a shipment involving an inter-company move where 12 cases of business files, weighing approximately 500 pounds, were lost in transit. The customer posed the question to us on how much they should file for.

They did not know "what the replacement costs would be which is difficult because these are one of a kind files that the value is not tangible meaning you can't just go out and replace the data in these files".

Some questions that have arisen:

Are these files considered used and subject to a carrier's tariff, limiting the liability based on weight?

Should the customer file for an estimate of what it might cost to duplicate these files?

Is there any legal precedence or case law we can review to come to an amicable conclusion?

I appreciate your advice and input, as always.

Answer: It is difficult to place a value on business records. I am only aware of one old case that specifically dealt with valuation for the purpose of a claim against a motor carrier (cost to reconstruct lost checks), namely *First National Bank v. Bankers Dispatch Corp.*, 221 Kan. 528, 562 P.2d 32 (1977).

You have not indicated what was contained in these records, but the most logical measure of damages is the cost to reconstruct the information from other sources, which could be quite expensive. It may be necessary to have an accountant or other expert provide an estimate of the cost to replicate the data.

In any event, the carrier's liability would normally be limited to the amount set forth in the bill of lading and/or applicable tariff. Unless there is a specific tariff provision covering "business records", the general liability limitation based on weight would apply.

I would not consider these as a "used" commodity!

Freight Claims – Value of Used Goods That Can Not Be Replaced

Question: We are a freight forwarder and I have a question. What is our liability for damage to unique used goods (such as drying racks for printed items, a specialized field) if the shipper says they cannot be repaired and they cannot find like equipment used, with the result that the shipper had to purchase new ones? Are we liable for the value at the time of tender or the purchase price for new ones?

Answer: There really isn't much case law that is directly on point for the facts you have described. The usual measure of damages is the "destination market value" for goods that are lost or damaged, but courts sometimes depart from this rule when another measure is more appropriate.

The leading cases that are usually cited for replacement value, i.e., the cost of procuring a replacement for the lost or damaged goods, are *Illinois Central R.r. Co. v. Crail*, 281 U.S. 57 (1930), and *Brockway-Smith Co. v. Boston & Maine Corp.*, 497 F.Supp. 814 (D. Mass. 1980). However in both of these cases the goods had a market value at destination, and the issue was whether the claimant would be entitled to the destination market value (the consignee's selling price) or only the cost of replacing the lost/damaged goods.

Two other court decisions shed some light on the issues.

In *Sutherland v. Ringsby Truck Lines*, 37 Colo. App. 333, 549 P.2d 784 (1976), the plaintiff purchased 161 new Worthington pump drive chucks at an auction in Utah for $15, intending them for resale. They were lost in transit en route to Colorado. The court stated that "damages are to be computed at the time and place of the scheduled delivery, and not at the point of shipment" and that the actual cost to replace the items ($20,158.48) was the proper measure of damages.

In *Delta Research Corp. v. EMS, Inc.*, No. 04-60046 (E.D. Mich. Aug. 16, 2005), Delta had purchased a used boring mill for $220,000 at a liquidation sale that it intended to use to manufacture products for a particular customer. The mill was damaged in transit and the plaintiff claimed $819,000, the cost to replace the mill with a new one. The court disagreed, distinguishing the Sutherland case on the grounds that the mill had not been purchased for resale. The court stated, "Plaintiff is not entitled to speculative estimates that are based on the replacement of the damaged boring mill with one that is newer and different from the one it purchased". Instead, the court said that Delta "is entitled to the market value of the boring mill at the time of delivery and genuine issues of material fact as to what that amount is render summary judgment inappropriate".

While neither of these cases may be directly "on point" based on the facts that you have presented, they do agree with the basic rule that the value at destination, and not "at the time of tender", is the proper measure of damages. I can't predict how a court would rule, but it would seem to me that the cost of replacing the drying racks with similar units would be the proper measure of damages.

FREIGHT CLAIMS – VALUE ON INTERNATIONAL SHIPMENT

Question: Can you advise me what is the correct measure of damages for shipments originating in Canada and moving to a U.S. destination? The carrier is saying that the claim pricing should be what is listed on the Commercial Invoice/Customs Paperwork/Proforma Invoice and not the price charged the customer. Shipments are prepaid.

On Canada shipments to the U.S. doesn't the carrier have to follow U.S. laws on destination valuation/invoice pricing?

I know that the RVNX for intra-canada is about $2.00/lb or 4.41 kg but believed that Canada to US was not the same. There isn't a contract agreement between carrier and shipper in effect and the carrier has never raised a question about invoice valuation in the past and now is doing so.

Answer: I realize that you are not asking about the carrier's limitation of liability, but the following may shed some guidance on the answer.

In Canada the terms and conditions of contract in bills of lading are prescribed by law in each of the provinces. For Ontario, the section on limitations of liability provides:

> 9. Valuation
>
> Subject to Article 10, the amount of any loss or damage for which the carrier is liable, whether or not the loss or damage results from negligence, shall be the lesser of,
>
> i. the value of the goods at the place and time of shipment including the freight and other charges if paid, and
>
> ii. $4.41 per kilogram computed on the total weight of the shipment.

This would suggest that the measure of damages would be "the value of the goods at the place and time of shipment including the freight and other charges if paid" (as opposed to the invoice price to the customer in the United States). I believe that this interpretation does reflect the case law in Canada, where a uniform bill of lading has been issued.

This does not specifically answer what document, e.g. a "Commercial Invoice/Customs Paperwork/Proforma Invoice", or some other document, would establish the value prescribed by the bill of lading.

I would note that you CAN, in a formal transportation agreement, agree on a different measure of damages and we usually do so.

With regard to shipments from Canada to the U.S. the general rule applied in a "conflict of laws" situation is that the applicable law is that of the place where the contract is made. If the bill of lading is issued in Canada, that is where the contract is made, and most courts will therefore look to Canadian law.

If you want a second opinion, you might ask Cathy Pawluch, who is the author of the Canadian Annotations section in the forthcoming 4th Edition of *Freight Claims in Plain English*. Her email address is: catherine.pawluch@gowlings.com.

FREIGHT CLAIMS – VALUING CONCEALED DAMAGE CLAIMS

Question: We are having challenges collecting on open freight claims from our carrier for concealed damages at 33% of invoice value, and noted damages at $25 per lb. Is there a government agency that dictates carrier policy, or is it left up to interpretation?

We have been paid in the past for concealed damages at 33% of invoice value. Carrier now claims that this is incorrect. They claim that we should be paid at 33% of $25 per lb. They are also withholding payment for claims with noted damages.

Our contract is up for renewal and we are hoping to negotiate the claims as part of the renewal process. Any suggestions?

Answer: First, you refer to concealed damage claims in which you have received a one-third settlement. Some carriers will offer a one-third settlement on concealed damage claims where it is impossible to determine where the loss occurred or what was the cause of the damage. The theory is that it could equally be the fault of the shipper, carrier or consignee.

There is no legal basis for this "one-third rule" and in fact it is contrary to the federal regulations at 49 CFR Part 370, which require carriers to investigate all claims, and to make reasonable efforts to determine the cause and/or place of the loss. If you can establish that the loss or damage occurred while the goods were in the possession of the carrier (and not before or after), the carrier should pay the full amount of the loss, i.e., the invoice price of the goods.

Second, you refer to a liability limitation of $25 per pound. Liability limitations are contractual, i.e., they arise out of the contract of carriage, usually the bill of lading, which incorporates provisions found in the National Motor Freight Classification or the carrier's rules tariff. If the bill of lading contained the usual language incorporating the carrier's tariff, and there was a liability limitation in the tariff, it probably is enforceable. However, as noted above, this would apply to the actual weight of the shipment that was lost or damaged, and not one-third of the value.

FREIGHT CLAIMS – WAIVER OF RIGHT FOR 3RD PARTY TO TRACK SHIPMENTS

Question: We have a customer that has waived their right to allow a 3rd party to track their shipments by contract. They have also waived their rights to refunds for late deliveries.

Below is the exact language in their contract.

> 9. Customer agrees to waive the Money Back Guarantee (Guaranteed Service Refund) provision as outlined in the UPS Service Guide for all UPS Ground services during the life of the Agreement.
>
> 10. Guaranteed Service Refunds (GSR): Customer agrees to the tracking limitations described in the current UPS Rate and Service Guide and Tariff/Terms and Conditions of Service in effect at the time of shipping. Customer also agrees that the use of a Third Party to track UPS shipments in strictly prohibited and constitutes a breach of the agreement.

This language would appear to prevent us (a third party) from tracking shipments under the Guaranteed Service Refunds ("GSR") clause (wherein the company waived the right to refunds for late deliveries). I am not sure if they can say this language, even though it is under the GSR clause, also prevents a third party from tracking any shipments period, no matter the reason.

Can the language the carrier included in their contract regarding guaranteed service refunds prevent us from tracking the shipments so we know which ones need to be filed for a loss or damage claim? Under the Carmack Amendment, does our customer have the right to allow us to track their shipments just for their lost or damaged shipments?

Answer: I can't see any reason why the "waivers" that you describe would prevent filing a claim for loss or damage to shipments (other than delay claims)

I would take the position that the restriction is limited to use for the purposes of a "Guaranteed Service Refund".

FREIGHT CLAIMS – WATER DAMAGE TO WOOD VENEER

Question: The motor carrier picks up a load of veneer paneling. The driver waits in the truck as the shipper loads the paneling. Halfway through the loading, an employee of the shipper hands the truck driver the paperwork to sign for the load, which the driver signs. It then commences to rain before the loading is complete.

The truck driver starts to tarp the load and shipper advises the driver to back up into their warehouse to finish tarping. The driver does so and then takes the load to the consignee where it is rejected for "water damage and no plastic or shrink wrap." Department of Transportation regulations state that the carrier is responsible to check the load and make sure it is properly secured, and common law says shippers have the duty to properly prepare and package the load. The carrier has denied liability based on "act or default of the shipper." Who is responsible here?

Answer: The Uniform Straight Bill of Lading has a statement at the top that says:

> Received ... the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown) marked, consigned, and destined as shown below...

It would seem that the driver was aware of the facts and knew that it had started to rain during the loading process. However, the driver accepted the shipment and apparently signed the bill of lading without any exception or notation that there was a problem.

Thus, by signing the bill of lading without exception, the carrier acknowledges that the shipment is in "apparent good order" and accepts liability for loss or damage in transit.

FREIGHT CLAIMS – WHAT ARE ITEMS OF "EXTRAORDINARY VALUE"?

Question: Under transportation law what determines that an item is of extraordinary value? Are there any guidelines in place that would support the shipper's right to recover full value for items that are "light weight, high dollar"?

I have a customer that ships electronic pet supplies. Their products are all fairly expensive but very light weight. When we file a claim for non-delivery or lost merchandise our claim is always grossly under paid. We currently have a claim filed with a carrier for 40 pieces at a weight of .45 lbs. per piece. The cost per piece is $74.16 for a total amount claimed of $2,966.40. Using the above arithmetic:

.45 lbs x 40 pieces = 18 lbs x $25.00 / lb = $450.00.

The National Motor Freight Classification ("NMFC") is 34430, and the class is 70 for doggie doors. Is a doggie door an item of extraordinary value?

Answer: You indicate that this product is shipped under NMFC Item 34430, which is Class 70. There is no released rate (liability limitation) in this item, so the carrier cannot limit its liability under Item 34450 of the Classification.

There is no "legal" definition of articles of extraordinary value, but many carriers do have provisions in their rules tariffs that define such articles and have applicable liability limitations. Some carriers also have liability limitations that are tied to the Class of the item. For example, Item 166-B of the UPS Freight Rules Tariff has this table of liability limitations:

CLASS	*MAXIMUM LIABILITY	CLASS	*MAXIMUM LIABILITY
50	$0.99	100	$15.00
55	$1.98	110	$15.25
60	$2.53	125	$15.81
65	$4.90	150	$16.10
70	$5.50	175	$17.15
77.5	$7.25	200	$18.10
85	$10.25	250 & up	$20.00
92.5	$12.25		

* Maximum liability per pound per package.

A suggestion - always ask the carrier for a copy of the tariff provision it is relying on when you are told there is a liability limitation.

FREIGHT CLAIMS – WHEN DOES 9-MONTH LIMIT TO FILE APPLY?

Question: I am a member of your organization and tried to find an answer to this question from your previous Q&As and publications, but I could not.

We are handling an interstate cargo claim for our insured, a carrier who transported three used automobiles. They damaged one of the autos resulting in $7,000 in repairs. We denied the claim because the claim was not made and received by our insured within 9 months of delivery. The claimant's lawyers are threatening to sue.

The autos were delivered to one consignee. There was no bill of lading issued and though each auto had a condition page showing the condition of each auto at pick up and then at delivery, there were no contract terms of any sort on any of these three pages. In addition, our insured has no tariff.

We believe our position in denying this claim is correct concerning our application of the 9-month filing limitation. It is our position that the 9-month filing limit for cargo claims is the "standard" in the industry and has been for some time. Barring a written and agreed upon time limit greater than nine months, this 9-month period is the standard time limit accepted in the industry by all involved in the movement of freight ... whether they be carriers or shippers. We further believe this time limitation to be the acceptable standard whether or not a bill of lading is issued by the carrier or if the bill of lading is silent about the time period in which to file a cargo claim. We further believe our position is supported by *L&S Bearing Company v. Randex International*, 913 F.Supp. 1544 (S.D. Fla. 1995). Here, as we understand it, the judge accepted the 9-month time limitation as the industry standard for filing a cargo claim even though there were no bill of lading terms.

Of course, the claimant's lawyers do not believe our position to be adequate enough to win in a court of law.

Please advise of your thoughts.

Answer: Time limits for filing claims and bringing lawsuits are contractual, i.e. there must be a contract (bill of lading, etc.) for them to be enforceable. The Carmack Amendment, 49 U.S.C. 14706 only says that a carrier may not by contract or otherwise provide for LESS than 9 months for the filing of a claim or 2 years for the commencement of a lawsuit.

To the extent that there may be some authority for a court to apply a 9-month time limit that is not explicitly set forth in a contract of carriage or bill of lading, there would have to be other factors involved such as a course of dealing over a period of time during which the claimant had received numerous bills of lading with the time limit.

The *L&S Bearing* case that you cite is distinguishable on its facts and does not support your position.

FREIGHT CLAIMS – WHICH LIABILITY REGIME APPLIES ON MULTIMODAL MOVE

Question: "X Logistics" is acting as an international freight forwarder when it brings a container in from China to a warehouse in the US. It then destuffs the container and ships the product to a construction site. At what point does X move from being a freight forwarder to a broker, or does it? If it does not move to a broker status, would it be liable for cargo claims as a domestic freight forwarder, international ocean forwarder? Which liability regime would apply if the freight were damaged moving between the warehouse and the final destination?

Answer: The answer will depend on the bill of lading, i.e., did X issue its own house multimodal bill of lading from origin to destination, etc. If you have a copy of the bill of lading, maybe you could send it to me (both sides).

1. From your description of the facts, multimodal bill of lading issued by X Logistics as a freight forwarder or NVOCC would show a foreign inland location or port as the origin, and X Logistics as the consignee, with the final destination as the X Logistics warehouse. Thus, the first "leg" of the movement from origin to the inland warehouse is governed by the multimodal bill of lading and its terms and conditions. Under this bill of lading, liability for loss or damage during the ocean portion would be governed by the Carriage of Goods by Sea Act ("COGSA"). On the inland portion, the bill of lading allows suit against the inland carrier responsible for loss or damage; it is not clear to me whether its liability would be governed by COGSA or by its own bill of lading and tariffs.
2. Assuming that X is not acting as a motor carrier or freight forwarder, the second "leg" of the movement, from X's warehouse to the job site would be governed by your transportation contract with the inland carrier, or if there is none, a separate bill of lading issued by the inland carrier, and subject to Carmack liability.

FREIGHT CLAIMS – WHO GETS THE MONEY

Question: We purchased and received a damaged shipment of steel mezzanine parts and one flight of separate steel stairs from a storage and equipment company in Texas. There were 3 companies involved in the shipping. The original contract was with a freight quote company on the internet, they contacted a motor transport company to pick up the mezzanine in Texas, and we received the load from a different transport company in California. The final freight company is accepting the blame for the damages. The "storage company/shipper" whom we purchased the mezzanine from made the contact with each shipper and it took over a year to have the claim settled. In late 2007 the "storage company /shipper" has received our funds for our claim but has deposited the funds into his bank account. He feels he is entitled to a part of the settlement because of the work his company went through to process the damage claim, and he was going to send us a portion of the claim. At 90 days of that announcement we are unable to get him to send us any part of our claim, are we the "purchaser/receiver/victim" entitled the whole claim and do we have a case of Interstate Insurance fraud if he does not?

Answer: From what you say, your company (the purchaser) had risk of loss in transit and actually suffered the loss because of the damaged shipment. You are correct in concluding that the seller should have turned over the proceeds from the settlement of the claim with the carrier.

The real question is how to collect this money from the seller. If the seller is not willing to voluntarily turn over the proceeds or to work out an agreeable settlement, you may have little option other than to bring a lawsuit. Whether this is practical and/or cost-effective you will have to discuss with an attorney.

I don't see a cause of action for "insurance fraud", since the seller was the shipper on the bill of lading, and there is no evidence that he committed any fraud in filing a claim for the loss.

FREIGHT CLAIMS – WRONG SIGNATURE ON POD

Question: We have daily shipments to customers at job site locations. When the delivery is made, there may be several contractors on the site that might sign for a delivery of light fixtures. Occasionally, the wrong contractor may sign and the original customer claims non-receipt.

We have a situation where one of our carriers delivered some light fixtures, a value of $17,970.00, that our customer claims it never received. The carrier is claiming delivery by providing us with a signed proof of delivery ("POD"). Upon review of the POD it appears not to be a valid signature of anyone on the jobsite, and our customer states that no one by the name of Ralph works for them on this site. No one has admitted to anything being delivered as the carrier states that their driver says was done. We are now in a situation where the customer is claiming non-receipt and that the POD is not valid, therefore we are being told to file a claim against the carrier for non-delivery. Do you know of anything legally that we can use for such a non-valid POD as proof of delivery?

On the POD it shows in Block letters "RALPH" as the signature.

Answer: I am sure you will have a problem collecting the claim from the carrier. While it is possible that the driver never delivered the shipment and forged the signature on the POD, it seems more likely that an impostor at the job site received and stole the shipment.

I would suggest that you request a written and signed statement from the consignee - someone that has actual knowledge of the facts and circumstances - to the effect that the shipment was not received and that the POD was not signed by their agent or employee, and send it to the carrier with your claim documents.

FREIGHT CLAIMS –LIABILITY LIMITATIONS

Question: We have a basic limited liability of $20.00/lb. in our 100 Rules Tariff, however, recently we picked up a shipment with a declared value of more than the $20.00/lb. What is our liability in a case like this... $20.00/lb or the Declared Value of the shipment?

The tariff liability limitation does not include the statement "unless shipper declares value" or anything similar.

I am having difficulty as I am of the opinion that with all the new limits of liability and special pricing we have in place we must be aware of the consequences involved when we pick up a shipment with a declared value that is more than our limited liability...

I have and continue to study *Freight Claims in Plain English* almost every day and know what it says however, I am being told that as long as we have a limited liability of $20.00 that is all we need to prove in the event that this would go to court....

Answer: Where the rate is dependent on value, the shipper is usually required to enter a value in the box on the face of the bill of lading in order to obtain a lower "released rate" for the transportation. If nothing is entered, the shipment will move at full value.

Some carriers now provide in their tariffs that a shipment moves at a specified limited liability unless the shipper "declares" a value and pays an additional excess valuation charge.

The legal answer to your question depends on the bill of lading and the tariff provisions applicable to the specific commodity being shipped. However, I would suggest that if your company accepted the shipper's bill of lading with a "declared value", it most likely would be responsible for that amount in the event of loss or damage.

For a limitation of liability to be enforceable under 49 U.S.C. §14706 (the "Carmack Amendment"), a carrier must: (1) maintain a tariff; (2) give the shipper a reasonable opportunity to choose between two or more levels of liability; (3) obtain the shipper's agreement as to its choice of liability; and (4) issue a bill of lading reflecting that agreement prior to moving a shipment. See *Bio-Lab, Inc. v. Pony Express Courier Corp.*, 911 F.2d 1580, 1582 (11th Cir. 1990); *Hughes Aircraft v. North American Van Lines*, 970 F.2d 609, 611-12 (9th Cir. 1992).

You need to comply with all four of the "tests", and from what you have told me, there is no choice of rates (# 2). If not, the liability limitation is unenforceable.

Note that the subject of Limitations of Liability is extensively covered in *Freight Claims in Plain English* (3rd ed. 1995) at Section 8.0.

FREIGHT CLAIMS –LIMITATIONS OF LIABILITY BY CLASSIFICATION

Question: We are a distributor of metals and alloys. We recently received a shipment of which 50% was damaged and unusable. Since I was buying the material FOB origin, it was my responsibility to file the claim. My cost was to $2830.00 (approx 437 pounds of stainless sheet with a cost of approximately $6.48/lb). The merchandise was shipped as a class 50.

This was the response from the carrier Old Dominion:

> Thank you for the information. Based on the weight of the damaged portion being 437 pounds, your shipment falls under the Old Dominion Freight Line maximum liability tariff 100, item 594. This item covers shipments of extraordinary value based upon the class of the items being shipped. To determine maximum recoverable locate, from the chart below, the class at which the shipment moved and the maximum value in the opposite column. Then multiply the weight of the affected items by that amount.

Class	Max. $ / lb.	Class	Max. $ / lb.	Class	Max. $ / lb.	Class	Max. $ / lb
50	$0.99	77.5	$7.25	125	$15.81	300	$20.00
55	1.98	85	10.25	150	16.10	400	20.00
60	2.35	92.5	12.25	175	17.15	500	20.00
65	3.92	100	15.00	200	18.10		
70	5.50	110	15.25	250	20.00		

> It was shipped at class 50. So the most that OD will pay is $432.63. Since we are not paying full invoice value, you may dispose of the damaged freight.
>
> Your claim is declined as filed. Upon receipt of an amended claim the file will be reopened and brought to a conclusion. You may fax your amendment. Please reference the ODFL Claim number on your documentation.

In your opinion, can they get away with this? I realize we're not talking big numbers, but do I have any recourse? Any help would be greatly appreciated!

The ODFL representative came into see me and told me I should ask for insurance on each shipment which is not that much money and would answer my problems. The stainless steel is the cheapest product I ship. I ship nickel and cobalt bearing alloys that can run $100.00 a pound.

Answer: It is quite likely that the ODFL liability limitation is enforceable. The ODFL 100-H rules tariff, which is on their website, and which was apparently effective on 11/15/2010, contains liability limitations tied to the National Motor Freight Classification ("NMFC") class of the articles. Articles with a class of 50 are "released" to $0.99 per pound per article.

I don't know when your shipment was made, nor do I have a copy of the previous ODFL 100-G rules tariff. I do note that the earlier 100-F rules tariff (12/17/2007) provided a limitation of $2.00 per pound on class 50. If your shipment moved prior to the new 100-H tariff (11/15/2010), it is possible that the 100-G tariff had the higher limitation amount.

I note that you describe the material as "stainless steel sheet". There are two possible articles in the NMFC that could apply:

IRON OR STEEL

Item 106120 Class-70

Plate, Sheet or Strip, NOI, crystallized, decorated, embossed, enameled, japanned, marbleized or sensitized, in boxes, in crates lined with fibreboard, or in wrapped bundles securely metal-strapped, see Note, item 106722

Note 106722

In addition to bundling requirements, sheet or strip, thinner than 16 gauge, other than in coils, not exceeding four inches in stacked height, must be protected around entire perimeter by a wooden frame securely metal-strapped or with perimeter protected by use of solid fibre angle forms of 1/4-inch thickness secured by strapping. Frame must utilize wooden cross members and skid blocks or runners where necessary to allow for mechanical handling and to protect against possible damage.

Item 106140 Class-50

Plate or Sheet, NOI, see Note, item 106142, galvanized, lacquered, leaded, painted, primed, tarred or plain, corrugated or not corrugated

Note 106142

Applies only on plate or sheet when neither surface has more than one coat of lacquer, one coat of paint, or both; neither surface to have more than one color. It may have holes when for fastening or for fitting purposes only.

If the stainless steel sheet were properly described under Item 106140 Class-50, the liability limitation is $0.99 per pound. On the other hand, if the proper description falls under Item 106120 Class-70, then the liability limitation would be $5.50 per pound. You should check this.

There is one additional factor to consider. The bill of lading ("B/L") is the "contract of carriage". Most standard B/Ls contain language that incorporates the classification and the carrier's tariff provisions by reference. If the B/L does not contain this language, then the classification and/or tariffs do not apply. I would need to see your B/L to advise you on this.

You can purchase an "inland marine" policy to cover your shipments in transit. Check with your insurance agent or broker.

The other alternative is to require your shippers to declare a value on the bill of lading and obtain excess liability coverage. But, watch out, because some carriers such as ODFL have a tariff provision that prevents this, e.g., the ODFL tariff which states: "Except as set forth in Item 574, carrier does not provide or furnish excess liability coverage and declaring request for same on bill of lading shall have no effect to carrier...." This probably isn't legally enforceable, since there are court decisions that say a shipper must be given a "choice of rates", but the aggravation to test a declination usually isn't worth it.

FREIGHT CONTRACTS – FAK LIABILITY LIMITATIONS

Question: Our company is a member of the Transportation & Logistics Council. We have a question concerning a contract clause that a Motor Carrier has inserted in a recent contract. The clause is as follows:

When a Freight All Kinds ("FAK") class or an exception class is provided under the provisions of this contract for a commodity that has available declared or released value provisions in the NMFC [National Motor Freight Classification] to obtain a lower class, it is agreed between the parties that the products are released to the lowest declared or released value provided in the governing NMFC.

> SHIPPER agrees to indemnify CARRIER against any third party subrogation for loss or damage over and above the agreed upon maximum liability contained therein.

Our question is, what is our exposure? We offered to accept this clause if the carrier would make an exception for "lost" shipments. The carrier is reluctant to exempt lost shipments. Our purpose to include lost shipments is to make the carrier responsible for full value of merchandise that may be lost due to employee theft. An employee could easily steal electronic equipment and resell it at far above the National Motor Freight Classification ("NMFC") released value of say $5.00 per pound for computer equipment. We feel the carrier should be liable for its own employee's actions.

We are also concerned that the ultimate purchaser of the freight may initiate a suit, if for some reason the bill of lading did not take the highest possible released value provisions available in the NMFC. Your thoughts in regards to this clause would be appreciated. Thank you.

Answer: The contract provision you have quoted is typical of language that many less-than-truckload ("LTL") carriers are including in their contracts where "FAK" rates are quoted. The effect is to limit the carrier's liability to the lowest released rate that is applicable to that article in the NMFC. I would note that some carriers also include language incorporating the liability limitations in their rules tariffs.

You refer to "merchandise that may be lost due to employee theft", which raises some other issues. There are some court decisions (and provisions in the Uniform Commercial Code) that say a carrier is not entitled to limit its liability if the carrier is guilty of "conversion" of the goods to its own use. However, the "conversion" exception generally only applies where the carrier actually takes or steals the goods; it does not apply where a carrier's employee is the thief.

Thus, if the commodity shipped is subject to a released value item in the NMFC, the carrier will be able to limit its liability, even if its own employee steals the goods. My suggestion is that you should not agree to this contract provision if you are shipping high value electronic equipment that is susceptible to theft, or include some language that the carrier would assume full liability for any loss due to employee theft.

As to your second question, whether a seller/shipper can have liability to the purchaser/consignee for shipping at a released rate or other limited liability, there is some case law on this subject to the effect that the seller would have the risk of loss in transit, notwithstanding that it would normally pass to the buyer on an FOB Origin shipment.

This principle or rule has been stated as follows:

> In delivering goods to a carrier, the seller must not sacrifice the buyer's right to claim indemnity against the carrier in case of loss or injury in transit; and if he does, the delivery to the carrier is not a delivery to the buyer, and the loss falls on the seller. Under this rule, where the seller in his contract with the carrier undervalues the goods without the knowledge or consent of the buyer, thereby limiting the carrier's liability, the risk of loss in transit falls on the seller. 55 C. J. 377

The rule finds its origins more than a century ago in the early English case of *Clark v. Hutchins*, 14 East 475, 104 Eng. Reports 683 (1811), and in the case of *Miller v. Harvey*, 221 N.Y. 54, 116 N.E. 781 (1917), and is also reflected in the Uniform Commercial Code, Section 2-504, which states:

> Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must (a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case...

and to Official Comment number 3, which states in relevant part:

> [I]t is an improper contract under paragraph (a) for the seller to agree with the carrier to a limited valuation below the true value and thus cut off the buyer's opportunity to recover from the carrier in the event of loss, when the risk of shipment is placed on the buyer by his contract with the seller.

Thus, the answer to your second question is that you could be responsible for the full value of the loss if you ship under a limited liability provision or released rate, without the knowledge or authorization of your customer.

FREIGHT CONTRACTS – INCONSISTENT TERMS REGARDING LIABILITY

Question: A provision of our Transportation Contract with carrier states that carrier will be liable for our (shipper's) full actual loss. With "full actual loss" defined as the shipper's original invoice price to its customer, plus freight charges. The Carrier has agreed to this language.

However, the carrier has included a provision that states "Shipments originating in the USA are subject to the released value provisions in the National Motor Freight Classification (NMFC) in effect on the date of the shipment and shall be considered to be released at the lowest released value stated therein." Aren't the two provisions inconsistent?

Answer: The National Motor Freight Classification contains a number of articles that have "released rates" or limitations of liability. One example is Item 70080:

> Item 70080
>
> Flatware, Dresserware or Holloware, sterling silver; or Flatware, Dresserware or Holloware, with sterling silver parts, such as backs, covers, frames, handles or tops; in boxes, see Note, item 70082:
>
> Sub-01 Class-100
>
> Released value not exceeding $1.00 per pound
>
> Sub-02 Class-200
>
> Released value exceeding $1.00 per pound, but not exceeding $5.00 per pound
>
> Note 70082
>
> The released value must be entered on the shipping order and bill of lading in the following form:
>
> 'The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding ______ per pound.'
>
> If the shipper fails or declines to execute the above statement or designates a value exceeding $5.00 per pound, shipment will not be accepted, but if shipment is inadvertently accepted, charges initially will be assessed on the basis of the class for the highest value provided. Upon proof of lower actual value, the freight charges will be adjusted to those that would apply if the shipment had been released to the amount of its actual value.
>
> (Classes herein based on released value have been authorized by the Interstate Commerce Commission in Released Rates Order No. MC-525 of December 17, 1962, as amended April 25, 1963 and April 10, 1980, subject to complaint or suspension.) (See elsewhere in this Classification for intrastate authorities.)

You can find a Released Rate Commodity List in Appendix 106 of *Freight Claims in Plain English* (4th ed. 2009).

In addition, Item 172 of the Classification, Limitation of Carrier Liability Where Value is Not Declared by Shipper, sets forth the "inadvertency rule" that limits carrier liability from between

$5.00 to $20.00 per pound on a number of commodities if the shipper fails to declare a value on the bill of lading.

To answer your question: YES, incorporation of the liability limitations in the NMFC would definitely be inconsistent with the "full actual loss" language in your contract if anything you ship is subject to released rates or other limitations in the Classification.

FREIGHT CONTRACTS – PROVISION FOR ATTORNEY'S FEES

Question: Is a provision inserted by a carrier in a contract concerning a shipment shipped under Carmack awarding attorney's fees to the prevailing party valid as against a shipper? Or would it be void? Know of any cases?

Answer: In the absence of a contract under 49 USC §14101, most courts have held that attorney fees may not be recovered in a Carmack action. Section 14704 - Rights and remedies of persons injured by carriers or brokers - does have a provision for attorney fees in subsection (e). However, this provision has not generally been applied in loss and damage cases - some other statutory provision must be violated. There is also a provision in Section 14708 for attorney fees under certain circumstances in household goods cases.

To answer your question, I would think a provision for attorney fees to the prevailing party in a transportation contract would be enforceable.

FREIGHT CONTRACTS – TIME LIMITATIONS

Question: I am inquiring to the legal validity of the following time limitation we have in our carrier contracts. We understand the Statute of Limitations found in the Carmack amendment 49 USC Section 14705 regarding 18 months.

We have published the following in our contracts and are wondering if this has any weight if we ever decided to execute it.

"Carrier agrees to cancel all transportation charges on shipments for which an original freight bill is not presented to the Shipper within 180 days after the date of shipment. Carrier shall not submit a freight bill for additional charges claimed to be due on any shipment after 180 days from date of original freight bill. No civil action for collection of undercharge or overcharge claims may be brought unless the required notice of claims within 180 days have been provided."

Answer: I assume that you have a formal transportation contract that you use with your motor carriers.

As you probably know, as a result of the ICC Termination Act of 1995, a provision was added to the law that expressly permits motor carriers to enter into contracts with shippers for "specified services under specified rates and conditions", 49 USC §14101(b). The statute provides:

> (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.

As indicated, the parties may "expressly waive" statutory provisions in Part B of Title 49, which applies to motor carriers, water carriers, brokers and freight forwarders. Thus, if there is an express waiver in the contract, the contract can provide for time limits and other provisions that depart from the statutory time limits that would otherwise be applicable to billing practices (Section 13710) or suits for the collection of freight charges, overcharges, etc. (Section 14705).

I would note that the contract cannot provide for shorter time limits for claims and suits for loss or damage to goods, since the "Carmack Amendment", Section 14706(e) provides:

> (e) A carrier or freight forwarder may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section.

FREIGHT TERMS – PAYOR OF FREIGHT

Question: Do you know the origin of this term "Payor of Freight"? Do you know the legal definition of this term and do you know how this term is used in transportation? How would you define the payor of freight?

What happens when the freight bill is sent to a third party freight payment company, do the shipper or consignee remain liable for the charges, depending on the terms?

I have my own opinion but it appears some others do not agree with me so I am seeking input from others.

Answer: There is no "legal" definition, but the term is most commonly used in connection with the payment instructions on the bill of lading. By custom and usage, most people would assume that carrier freight bills would be sent as follows:

freight prepaid = shipper
freight collect = consignee
bill to = a third party, such as a freight payment agent

With regard to third party freight payment companies, the freight payment company is an agent for its principal (could be the shipper or the consignee), so the principal remains liable even if it has paid the agent.

HAZMAT – HAZMAT SECURITY PLANS

Question: I got the request below from a new customer. Since we have traditionally done refrigerated freight, the area of dry/hazmat is still new for us. Is there a standard hazardous materials ("HazMat") security plan that we can use?

> Can you guys please send me on your company letterhead that you have implemented a HazMat Security Plan Verification, or Verification of a Haz Mat Security Plan, which is required by law.

I should note that we are a broker. As a broker, do we need to have our own HazMat plan or just ensure that the carrier we use on the load has one and have theirs on file?

Answer: The Federal Motor Carrier Safety Administration ("FMCSA") website (http://www.fmcsa.dot.gov/) has a tab "Safety & Security"; under that section there is information on "How to Comply With Federal Hazardous Materials Regulations". Regarding a "Haz Mat Security Plan" it says:

SECURITY PLANS

The security plan requirements in Part 172 Subpart I of the Hazardous Materials Regulations (“HMR”) require each hazmat employer subject to the security plan requirements to establish and implement a security plan. The employer is also required to train their hazmat employees on the security plan. The purpose of these requirements is to enhance the security of hazardous materials transported in commerce. Employers must establish and implement their security plan by September 25, 2003, and by December 22, 2003, each employee must receive training on the security plan and its implementation.

The security plan requirements apply to each person who offers for transportation in commerce or transports in commerce one or more of the following hazardous materials:

1. A highway route-controlled quantity of a Class 7 (radioactive) material, as defined in 173.403 of this subchapter, in a motor vehicle, rail car or freight container;
2. More than 25 kg (55 pounds) of a Division 1.1, 1.2, or 1.3 (explosive) material in a motor vehicle, rail car or freight container;
3. More than one L (1.06 qt) per package of a material poisonous by inhalation, as defined in 171.8 of this subchapter, that meets the criteria for Hazard Zone A, as specified in 173.116(a) or 173.133(a) of this subchapter;
4. A shipment of a quantity of hazardous materials in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500 gallons) for liquids or gases or more than 13.24 cubic meters (468 cubic feet) for solids;
5. A shipment in other than a bulk packaging of 2,268 kg (5,000 pounds) gross weight or more of one class of hazardous materials for which placarding of a vehicle, rail car, or freight container is required for that class under the provisions of subpart F of this part;
6. A quantity of hazardous material that requires placarding under the provisions of subpart F of this part; or
7. A select agent or toxin regulated by the Centers for Disease Control and Prevention under 42 CFR part 73.

The above first six categories are the same categories that require Federal Hazmat Registration. Number 7 is not listed for Federal Hazmat Registration.

The first step in determining whether you need a HazMat security plan is to see whether the proposed shipments will fall under one of the categories above. If so, then you will need to adopt a security plan. The FMCSA website references the following publications that explain how to develop a security plan and what it should contain:

GUIDE TO DEVELOPING AN EFFECTIVE SECURITY PLAN HAZARDOUS MATERIALS

http://www.fmcsa.dot.gov/documents/hazmat/security-plan-guide.pdf - 2003-12-19 - Text Version

GUIDE TO DEVELOPING AN EFFECTIVE SECURITY PLAN FOR THE HIGHWAY TRANSPORTATION OF HAZARDOUS MATERIALS. ...

http://www.fmcsa.dot.gov/safety-security/hazmat/security-plan-guide.htm - 185k - Cached

Part 172.802: Components of a security plan.

http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrruletext.aspx?reg=172.802 - 49k - Cached

The first one, “GUIDE TO DEVELOPING AN EFFECTIVE SECURITY PLAN HAZARDOUS MATERIALS”, is pretty comprehensive (about 54 pages) and can be downloaded. However, the FMCSA does not provide any type of “model” HazMat security plan for carriers, and I am not aware of any vendors that market these. Most carriers retain a security consultant to advise

them on the requirements and prepare an appropriate security plan. You might be able to "borrow" one from another carrier and modify it for your use.

I should note, though, as a broker you do not need a HazMat plan. I would assume that any carrier that holds itself out to transport hazardous materials would have one, but if your shipper needs to verify this, as the broker you should request a letter from the carrier certifying its compliance.

INTERMODAL CARRIERS – FREIGHT SECUREMENT

Question: We use several intermodal carriers and all of them seem to take the stance that they do not have to provide any straps or load locks to transport goods. Where can I find rules and regulations for intermodal carriers that would support them having to provide load locks or straps?

Answer: I am not aware of any federal regulations that would apply to your situation.

The railroads publish Intermodal Loading Guides that contain detailed specifications for blocking and bracing intermodal loads that may be incorporated by reference in their contracts of carriage. For example the old AAR Circular 43-C stated:

> It is the equipment supplier's responsibility to furnish trailers which are clean, have sound roofs, sides and end walls, smooth floors and snug fitting doors. Any exception is cause for rejection. The shipper also has a responsibility to inspect the trailer at origin to see that it is suitable to carry lading safely to destination.
>
> * * * * *
>
> If trailer supplied is not suitable for loading and shipper elects to load this trailer rather than reject it, it is the shipper's responsibility to properly prepare the trailer.

The circular also states that the shipper should fill voids and apply blocking and bracing, secure machinery or other equipment to prevent tipping, apply strapping, etc.

This does not really answer your question as to whether the carrier must provide "straps or load locks".

Ordinarily a motor carrier that provides intermodal service (such as J.B. Hunt or Schneider) has an obligation to provide the proper equipment. It would seem to me that special interior fixtures or items such as load bars that are designed to fit a particular trailer would clearly be the carrier's responsibility. Dunnage, inflatable filler material, etc. would normally be provided by the shipper.

If you are dealing with an intermediary (such as Hub or Pacer), I would suggest that you should specify in your contract that any carriers that they engage will provide the appropriate equipment to secure the load for an intermodal movement.

Lastly, if the trucker does not provide suitable equipment, reject the trailer.

INTERNATIONAL TERMS OF SALE

Question: We had a shipment coming from Mexico that cleared Customs in Laredo and went on a U.S. licensed carrier coming to us FOB Laredo, freight collect. The shipper in Mexico contacted the carrier and told him not to deliver the shipment until he called and gave him permission.

1) As importer of record, did we not have ownership of the freight as soon as it was cleared through Customs?

2) Assuming we had ownership and liability, could the trucker legally withhold delivery?
3) Again, assuming what the trucker did was not legal, what recourse would we have against him?

Answer: I am not sure that I can answer your question with the information provided, but I will give some general observations:

1. "Ownership" of the goods would be governed by the contract of sale between the seller and the buyer. On international trade the obligation with respect to "delivery" is usually determined by Incoterms (FCA, CPT, CIP, DAF, DDU, DDP, etc.) If, under the contract of sale, the seller has made "delivery" at a particular point such as a border, the buyer then has the right of possession of the goods.
2. It is not clear why the trucker was instructed not to deliver the goods. In any event, a motor carrier does have a carrier's lien on goods in its possession for its freight charges, which entitles the carrier to hold the goods until it has received payment. If the owner of the goods tenders full payment of the freight charges, the carrier must release and/or deliver the goods. Failure to do so would constitute "conversion", and the carrier would be liable for all consequential damages.
3. As noted above, if the carrier is holding the goods for payment of the freight charges, and you have tendered payment, the carrier must then release or deliver the goods. If it does not, your remedy is to bring an action for conversion and injunctive relief. For this, you would most likely need to retain an attorney.

INTERSTATE COMMERCE ACT

Question: Where can I find (preferably online) the full text of the most recent revision of the Interstate Commerce Act?

Answer: The former Interstate Commerce Act was codified in 1978 in Title 49 of the U.S. Code, and re-codified again as a result of the ICC Termination Act of 1995.

The present provisions of the ICA are now found in Title 49, Subtitle IV - Interstate Transportation which covers Rail Carriers (Part A), Motor Carriers, Water Carriers, Brokers, and Freight Forwarders (Part B) and Pipeline Carriers (Part C).

You can get Title 49 at most good libraries, or on-line through commercial legal services such as WestLaw or Lexis. It is also available on-line at http://www.gpoaccess.gov/uscode/index.html or http://www2.law.cornell.edu/uscode/html/uscode49/usc_sup_01_49.html at no cost.

LIABILITY – BROKER LIABILITY FOR PROPER SECUREMENT OF LOAD

Question: We have some heavy automotive parts placed on special racks and transported FCA from our customer's supplier to our assembly plant. We have brokered these loads out to CH Robinson with specific instructions on how to secure the load. The problem is that these loads have shifted at times and we have concerns about the potential liability if this causes an accident. My question is would we be liable if CH Robinson or whomever they hire to transport the load fails to secure the load properly and causes injuries or accidental deaths? Isn't the broker or carrier responsible for ensuring the load is properly secured regardless of who loaded the trailer?

Answer: I am not aware of any court decisions with the same fact pattern that you describe. However, the case of *Puckrein v. ATI Transportation Inc.*, 186 N.J. 563, 897 A.2d 1034 (2006)

gives some indication as to what might be expected in the event of a highway accident resulting from "negligent hiring" of a carrier.

In the *Puckrein* case, Browning-Ferris ("BFI") had contracted with World Carting to transport a load of glass residue from Brooklyn to American Ref-Fuel in Newark. World Carting, in turn, either subcontracted or brokered the load to an affiliated carrier, ATI Transport. The ATI tractor-trailer (which was unregistered, uninsured and had defective brakes) was involved in a fatal accident. The plaintiffs sued 22 defendants including the shipper (BFI), the consignee (American Ref-Fuel), the owner of the trucking companies and the carriers. The trial court granted summary judgment to BFI, holding that it was not negligent and was not vicariously liable for the accident.

The question before the appeals court was whether BFI, the shipper, violated its duty to use reasonable care in selecting a trucker and whether it knew or should have known that World Carting/ATI was incompetent to transport its property. BFI argued that it could not be held vicariously liable for ATI's actions, but the court disagreed and held that its motion for summary judgment should have been denied.

In addition to the *Puckrein* case, there have been a few other cases in which a "3PL" or a broker may be liable for negligent hiring of a carrier. Recent cases involving C.H. Robinson include: *Jones v. C.H. Robinson Worldwide, Inc.*, 558 F.Supp.2d 630 (W.D. Va. 2008) and an Illinois jury verdict on March 20, 2009 in which the jury awarded $22.75 million in damages.

The answer to your question really depends on all of the facts: whether your company exercised due diligence, the extent of your control over the independent contractor, etc. In any event, there is no guarantee that a plaintiff's attorney may not look for a "deep pocket" in the event of an accident involving serious injury or death.

Liability – Broker Obligations Under Recent Changes

Question: 1. How can freight brokerage companies protect themselves from liability due to their agents' liability, considering the new Federal Motor Carrier Safety Administration ("FMCSA") safety qualifications and the elimination of the BCM-32 coverage, removing a carrier's requirement to carry cargo insurance?

2. Does paying the salaries of our agent's employees make the agent our employee rather than an independent contractor? Would this open us, a freight brokerage company, (we hire agents, pay the carriers and invoice the customer) to liability due to an agent's negligence?

Answer: First, let me mention that some of the same questions you are asking (CSA 2010, BMC-32, etc.) were the subject of extensive discussion at the Council's Annual Conference in St. Louis - too bad you couldn't attend.

As to the new issues involving "due diligence" in selecting and qualifying carriers, obviously these recent changes make it more difficult to protect yourself as a broker. The best way a broker can effectively protect itself is through a good broker-carrier contract. I would strongly recommend that you consult a knowledgeable transportation attorney to prepare a contract if you do not already have one. (I would note that our firm specializes in transportation law and provides contracts to many of our broker clients.)

As to your second question, any time you exercise significant control over an otherwise "independent" contractor, it may be treated as your agent and/or employee. As such, you increase your exposure in the event the party is negligent and that negligence results in liability and/or damages. Payment of salaries (as opposed to commissions) is more likely to establish an employer-employee relationship.

LIABILITY – CARRIER NOTIFICATION ON INTERLINE SHIPMENT

Question: I met you this past spring at the Transportation and Logistics Council Conference in St. Louis, MO. I have been the claims manager at our company (a carrier) for a little over a year now and I have run into a situation where I could use your insight.

Our company received a shipment from an interline carrier in Denver, CO. Detailed damage was noted at the time of interchange and common practice is to fax that manifest with exceptions back to that interline within 24 hours.

A claim was received by the interline carrier and forwarded to our company. They do not have any record of receiving that faxed manifest with damage notations. This is the sole issue.

I had originally denied the claim as we had notations made to the inbound manifest. They came back and advised that they did not receive any notification of damages and subsequent refusal of the shipment in question. Their rebuttal letter also quoted a section of the interline agreement stating specifications regarding notifications of exceptions made at the time of interchange.

I pulled the copy of the interline agreement and this statement is not there. In fact, there is nothing in the interline agreement regarding exception notification at all.

Now that you have the facts, my question is this. Because our company cannot produce proof (fax transmittal) that the manifest with damage notations was faxed to the interline carrier, is our company responsible for paying this claim?

Thank you so much, George, for your time. I look forward to your response.

Answer: My first suggestion is to see if you have any independent evidence that the fax was sent. For example, if you have a copy of the fax that is stamped “Sent” with the name or initials of the sender and the date, that would help. Also, most fax machines print out a listing of faxes that have been sent with the time and date. You could also get a written statement from the person that sent the fax and submit that.

Now, whether the fax was sent or not, it appears that you do have a contemporaneous record or memo that establishes the damage at the time of interchange. From a purely legal standpoint, that should be enough.

As for your company’s liability, under the Carmack Amendment, 49 USC 14706(a)(1), both the receiving and delivering carrier are jointly liable to the person entitled to collect the claim. Assuming that your company is the delivering carrier, you do have liability for the claim. You also have a right of indemnity under 14706(b) “to recover from the carrier over whose line or route the loss or injury occurred” if you do pay the claim. If the interline carrier refuses to reimburse your company, you can bring a suit under this section.

I note that there is a question about the language of the interline agreement. There may be two different forms of the agreement - you might want to ask the interline carrier for a copy of the one they have.

LIABILITY – DRIVER INJURED WHILE LOADING TRUCK

Question: I am the claims mitigator for a 3rd party logistics company. We are a TLC member. We purchase your books each year and they are a great help to me. I have a couple of questions I would appreciate your help with.

We had a situation where a shipper was loading his product into a trailer of an LTL carrier. The one piece was a little top heavy and started to fall. The driver of the carrier reached up to prevent it from falling and helped load it into the trailer. He left without any problems.

Later, the shipper died and now the driver is suing the company that the shipper worked for saying he hurt his back and can’t work anymore.

First, who assumes liability for a driver who gets hurt while helping to load a truck? Do we as the 3rd party have any exposure there? Does the shipper have liability to the driver? As a broker, is there something we should include in our contracts with the carriers to protect us and the shippers from having this happen to them?

We appreciate your input in this matter and look forward to your response.

Answer: If the driver was injured in the course of his employment he would be covered by Worker's Compensation (which means he can't sue his employer).

However, in the "loading/unloading" situation, he could have a separate cause of action in negligence against the shipper, if the shipper was in some way negligent and that negligence caused or contributed to his injury. That, of course, is a factual issue to be determined at trial. Typically these cases involve unsafe loading docks, faulty equipment such as forklifts, and large items falling over during loading or unloading.

In the situation that you describe, I don't see how a 3rd party or broker could be considered negligent. The recent cases holding brokers liable generally involve highway accidents and claims of "negligent hiring", e.g., where the broker fails to exercise due diligence in selecting and checking out the carrier's safety record.

LIABILITY – DROPPED TRAILERS

Question: We are a carrier and are trying to determine who is liable if one of our trailers is dropped at a facility and there is a loss. Additionally, once delivery is made and the trailer is unloaded and moved to a "dropped trailer" location on the property, who is liable if the empty trailer is missing?

Answer: I assume that you are asking about the carrier's liability for loss, damage or shortage when the carrier has "dropped" a trailer at the consignee's facility for unloading at a later time. This practice often leads to disputes over liability because there is no carrier representative or driver present to verify the damage or shortage when the trailer is later unloaded and the goods are inspected and counted.

To minimize shortage claims, I recommend to carrier clients that all full trailer loads should be sealed by the shipper at origin and the seal number noted on the bill of lading; at destination the consignee should be asked to inspect the seal, note the seal number on the delivery receipt and the fact that the seal was intact. If the shipper's original seal is intact at the time of delivery, and there is no evidence of tampering with the seal (or the doors, hinges, etc.) then there is a strong presumption that the shortage did not occur in transit, and the carrier should not be liable.

Common carrier liability does not end until transportation of a shipment is completed. Transportation is not completed until a shipment has both arrived at its destination and has been delivered; see *Danciger v. Cooley*, 248 U.S. 319, 327 (1919). The test enunciated in the court decisions is whether anything remains to be done by the carrier to effectuate delivery, see *Tokio Marine & Fire Ins. Co., Ltd. v. Chicago & Northwestern Transportation Co.*, 129 F.3d 960 (7th Cir. 1997). This subject is discussed in *Freight Claims in Plain English* (3rd Ed. 1995), which is available from the Transportation & Logistics Council, Inc.

If the carrier has "dropped" a trailer and the consignee has acknowledged receipt of the trailer, it would appear that there is nothing further to be done by the carrier. Accordingly, there has been a "delivery" so that the carrier's liability has ended. If the trailer were subsequently stolen, the carrier would not be liable for the goods.

With regard to the theft of an empty trailer after delivery, in the absence of any other agreement, the consignee would be considered a “bailee” and would have a legal obligation to exercise reasonable care over the equipment that is in its possession.

What would constitute “reasonable care” is a factual question that depends on the particular situation. The burden would be on the carrier to prove that the consignee was negligent in some way, i.e., failed to use reasonable care (inadequate security, etc.), and that the negligence caused or contributed to the theft.

LIABILITY – GENERAL LIABILITY COVERAGE

Question: Recently we have noticed that a number of carriers are dropping their General Liability coverage (not the BI/PD or auto coverage). Should we have any concern about this trend and what does it mean in the event of a claim for either BI/PD or Cargo, if anything?

Answer: General Liability insurance principally covers the carrier in connection with any claims for bodily injury or property damage (“BI/PD”) related to the premises, such as the carrier's terminal, office, maintenance shops, etc. It usually excludes auto liability (BI/PD). It certainly is advisable to have this kind of insurance, but from the standpoint of a shipper, auto liability (including leased and non-owned vehicles) and good cargo insurance are more important.

LIABILITY – INTERFERENCE FROM “OCCUPY” PROTESTS

Question: I am emailing you as I require your knowledge on the subject of carrier liability as it relates to “Occupy” protests at US West Coast Ports.

My first question for you is whether or not ports are controlled by the Carriage of Goods by Sea Act (“COGSA”) and if so, would any claims for Delay for surface transportation shipments be lawfully declined by surface carriers based upon an “Uncontrollable Cause of Loss” defense? If not, would a surface carrier be able to lawfully decline a claim based upon an Act of Public Enemy? Would there be any liability for delay by a third party logistics provider (“3PL”) or broker if the surface carrier is not liable?

Please advise your thoughts on the matter at your earliest convenience.

Answer: The “Rights and immunities of carrier and ship” section in COGSA does include various defenses under Section (2), “Uncontrollable causes of loss” such as:

> (j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: Provided, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;
>
> (k) Riots and civil commotions;

First, it is unlikely “Occupy” protests would qualify under either of these two sections. In addition, these are only defenses available to the carrier or the ship, not to surface carriers. I doubt that an inland carrier could invoke these defenses even if there is a “Himalaya Clause” extending the provisions of COGSA to the inland portion of a through movement.

As to the common law defense of “public enemy” and the exceptions for “public enemy” and “riots and strikes” in the Uniform Straight Bill of Lading, I also doubt that these demonstrations would constitute a valid defense for a motor carrier, see *Freight Claims in Plain English* (4th Ed. 2009) at Section 6.4 and 6.8.

Regarding the liability of a 3PL or broker, it is possible that there could be some liability if the 3PL or broker was negligent in routing the shipment through a troubled area, failing to give the

carrier instructions or to take precautions to avoid the delay, etc. Otherwise, I don't see any liability.

LIABILITY – LIMITATIONS UNDER CARMACK AND UCC

Question: After reading your Editorial from January I was reading through the Uniform Commercial Code ("UCC") Article 7 for rules applicable to exempt motor carriers. I noticed that under 7-309(b) that carrier liability can be limited under the UCC if rates are dependent on the value of the goods shipped and the consignor has an opportunity (and notice of the opportunity) to declare a higher value. Curious as to why it would be the consignor rather than the shipper that is entitled to this notice and opportunity? Carmack counterpart provision refers to an agreement with the shipper. If I hire a carrier and send it to a pick up point, shouldn't I be the one given the opportunity to declare a higher value?

Also, I'm wondering if the UCC would apply to the airfreight forwarders example you mention in the editorial?

Answer: First, I would note that the terms "shipper" and "consignor" are essentially the same.

Both the Carmack Amendment and UCC assume that the shipper would be the one to enter a released value (or a declared value) since the carrier is required to "issue" a bill of lading or receipt to the shipper -- the one tendering the goods for transportation.

This does not prevent someone other than the "shipper" that contracts with the carrier from making a binding contractual agreement as to the carrier's liability. In other words the agreement as to the carrier's liability can be in a separate writing, and doesn't necessarily have to be on the face of the bill of lading.

As to air freight forwarders (for domestic shipments), I would think the UCC should apply since Secion 7-309 uses the word 'carrier' and is not limited to motor or rail carriers. Even if it does not apply, the common law requirements of notice, choice of rates, etc. are essentially the same.

First Follow-up Question: Thanks George, but I did want to point out that UCC 7-101 defines consignor as the party supplying the goods & the shipper as the party that contracts with the carrier.

I take it from what you are saying however that it's the party that contracts for the carriage that must agree to any limit on liability, regardless of what a literal reading of the text of the UCC might suggest.

First Follow-up Answer: I don't want you to mis-construe my comments. The party that contracts with the carrier CAN make a binding contractual agreement as to carrier liability. However, if that party does not have a written agreement as to liability, the default liability provisions would normally be the bill of lading and any tariffs that are incorporated therein by reference.

By the way, the definitions in the New York version of Article 7 of the UCC (7-102) do not include a definition for "shipper".

Second Follow-up Question: Sorry to pester you with this. But here's where I'm struggling:

If I hire a carrier, and we agree to a rate without any liability limitation, and it picks up from my consignor (and lets say we're under UCC here), and the carrier issues a bill of lading limiting liability to $.50 a pound, this could prevent me from recovering the actual value of any damaged goods, even though I was never presented with this limitation?

I would assume that if I'm unaware of the limitation (and did not agree to it), then no limitation applies. This idea that if the consignor is made aware of a limitation it binds me is what I'm struggling with...

Second Follow-up Answer: If you have a proper written agreement with the carrier that spells out the liability, and says that it supersedes any provisions of the carrier's bill of lading and/or tariffs, that should be sufficient.

LIABILITY – OCEAN FREIGHT FORWARDER

Question: What is a freight forwarder's Bill of lading? What are the liabilities of a freight forwarder? What is the liability of a carrier under freight forwarder's bill of lading? How are the title of goods transferred under freight forwarder's bill of lading?

Answer: I am assuming that you are asking about ocean freight forwarders.

In the U.S. we have two kinds of Ocean Transportation Intermediaries (OTI's) that are regulated by the Federal Maritime Commission ("FMC") -- Ocean Freight Forwarders and Non-Vessel Operating Common Carriers ("NVOCCs").

An Ocean Freight Forwarder essentially acts as an agent for the shipper, making arrangements with carriers, preparing documents, arranging insurance, etc. and is not a carrier, i.e., it does not issue its own bill of lading.

An NVOCC is treated the same as an ocean carrier, and issues its own "house" bill of lading which covers the transportation between the points shown on its bill of lading. The NVOCC often will subcontract the inland and ocean portions of the movement to truck, rail or ocean carriers. The NVOCC is primarily liable to the shipper in the event of loss or damage in transit pursuant to its "house" bill of lading. A shipper may also pursue the responsible carrier if the place of the loss is known.

Title to goods is normally determined by the contract of sale between the seller and the buyer and most international trade now uses the "Incoterms". In some situations, sellers still use a negotiable ("order") bill of lading; the actual physical document must be presented to the carrier in order to obtain possession of the goods described therein.

These subjects are covered in *Freight Claims in Plain English* (3rd ed. 1995), which is available from the Transportation & Logistics Council.

LIABILITY – TERMS IN NON-CONTIGUOUS DOMESTIC TRADE

Question: Quick question, that may lead to other, less quick questions: in your experience, do carriers providing intermodal service to and within Hawaii opt for steamship-like terms (ocean carrier liability under the Carriage of Goods by Sea Act ("COGSA")), or ground-carrier type terms (Carmack Amendment liability)? We succeeded in getting a carrier, including barge and steamship, to agree to land carrier liability in our moves to and within Alaska (you helped with that one), but given both the relative length of the sea leg and the internal land distances, relative to Hawaii, I wonder what is common in the latter.

Further, one service provider has balked at the concept of an agreement at all, indicating "this is a regulated environment" and that they just do rate agreements in this context. I don't think that sounds right, but wanted to check with you based on your experience or that of others in your firm.

Answer: To fully explain the history of regulation and deregulation of motor carriers, freight forwarders and water carriers engaged in "non-contiguous domestic trade" (Alaska, Hawaii,

Puerto Rico, U.S. possessions, etc.) would involve a lengthy dissertation, so I'll try to be a brief as possible.

Subtitle 4, Part B of the Interstate Commerce Act (Title 49), applies to motor carriers, water carriers, brokers and freight forwarders. Jurisdiction over motor carriers, including those that provide joint motor-water service, is covered in Section 13501; jurisdiction over water carriers is covered in Section 13521. Special provisions apply to Alaska (Section 13502); Hawaii (Section 13504); Rates for non-contiguous domestic trade (Section 13701), and tariffs for non-contiguous domestic trade (Section 13702).

Basically, there is still some remnant of “regulation” over rate reasonableness and tariff publication/filing for Alaska, Hawaii, etc. However, there is also a general provision in Section 14101 that allows any “carrier” (including motor carriers, freight forwarders and water carriers) to enter into a contract with a shipper (other than for the movement of household goods) to provide “specified services under specified rates and conditions”. In other words, carriers can (and do) enter into transportation contracts that are in many ways similar to the trucking contracts that you are familiar with.

There is one somewhat arcane provision applicable to carrier liability in the Carmack Amendment, Section 14706 (c) (2), that provides:

> (2) WATER CARRIERS- If loss or injury to property occurs while it is in the custody of a water carrier, the liability of that carrier is determined by its bill of lading and the law applicable to water transportation. The liability of the initial or delivering carrier is the same as the liability of the water carrier.

Thus, if you do not have a contract, and the loss occurs while in the custody of a water carrier, the bill of lading comes into play, and most likely either the Harter Act or COGSA would govern the loss by incorporation through the bill of lading.

My preference is to use a formal transportation contract, and to cover the carrier’s liability with a uniform “door-to-door” Carmack liability provision, with some reasonable provision for limiting liability to some defined maximum amount per pound and/or per container.

Liability Limitations – Canadian Shipments

Question: In the absence of any other contract, is it correct that the limit of liability of a carrier on a shipment from the U.S. into Canada would be full value of the goods, but on a shipment from Canada to the U.S., it would be $2.00/lb unless a higher value was declared on the bill of lading?

Are you aware of any legal cases supporting this?

If a Canadian carrier produced a “Canadian bill of lading” written up by the driver at time of pickup in the U.S., and the “Canadian bill of lading” contained the limit of liability clause, would that hold up as a contract over-riding the application of 49 U.S.C. §14706?

Answer: Your observations are essentially correct: Canada has a statutory “limited liability” regime ($2 per pound) and the U.S. has a common law “full liability” regime that is codified in the “Carmack Amendment” at 49 U.S.C. §14706.

As to your second question, the use of a Canadian bill of lading on a U.S. to Canada shipment may or may not result in an enforceable liability limitation of $2 per pound.

For a limitation of liability to be enforceable under the “Carmack Amendment”, a carrier must: (1) maintain a tariff; (2) give the shipper a reasonable opportunity to choose between two or more levels of liability; (3) obtain the shipper’s agreement as to its choice of liability; and (4) issue a bill of lading reflecting that agreement prior to moving a shipment. See *Bio-Lab, Inc. v. Pony Express Courier Corp.*, 911 F.2d 1580, 1582 (11th Cir. 1990); *Hughes Aircraft v. North*

American Van Lines, 970 F.2d 609, 611-12 (9th Cir. 1992). If any of these elements are missing, the limitation will not be enforceable.

I would note that the subject of liability limitations - both in the U.S. and in Canada - is discussed extensively in *Freight Claims in Plain English* (3rd Ed. 1995).

MOTOR CARRIERS – CONTRACT AND COMMON CARRIERS AND INSURANCE

Question: I have several questions: 1) How does the change in the Interstate Commerce Act by the I.C.C Termination Act of 1995 "ICCTA", Pub. L. 104-88, Dec.29, 1995, 109 Stat 803 affect contract carriers in regards to tariffs? 2) Do contract carriers have to have cargo insurance and what are the benefits in this change in regards to common and contract carriers?

3) How does insurance work in regards to freight crossing the Mexican border? How can we verify Mexican carriers and their insurance?

Answer: Let me try to answer your questions.

1. The I.C.C Termination Act of 1995 ("ICCTA") essentially eliminated any remaining requirements for filing tariffs with the I.C.C. except for household goods and certain non-contiguous domestic movements (Alaska, Hawaii, etc.). Earlier legislation in 1994 ("TIRRA") had previously eliminated filing requirements for collectively-made tariffs. ICCTA also eliminated the statutory distinction for "common" vs. "contract" carriers, and provided that all motor carriers could enter into contracts with shippers, 49 U.S.C. 14101(B)(1). The I.C.C. had not previously required "contract" carriers to file tariffs.

2. The FMCSA has never changed its regulations, notwithstanding the statutory changes in 1995. It is still possible to apply for "contract" or "common" carrier operating authority. The FMCSA does not require "contract" carriers to have the mandatory minimum cargo insurance, the BMC-32 endorsement. Some "contract" carriers do have cargo insurance and others do not.

NOTE – The FMCSA is imposing a change, effective March 21, 2011, that would eliminate the BMC-32 filing requirement for motor common carriers. See TRANSDIGEST 148 for a full report

3. On a shipment from the U.S. (and probably from Canada) to Mexico, it is our understanding that cargo insurance policies usually have an exclusion for loss or damage occurring in Mexico. A special endorsement is required to cover Mexico.

On shipments originating in Mexico, the Mexican motor carrier's liability is governed by Mexican law that provides: "When the user of the service does not declare the value of the goods, liability will be limited to an amount equivalent to 15 days of the minimum daily wage then current in the Federal District per ton, or the corresponding proportionate part of a metric ton that is damaged or lost." At U.S. Dollar/Mexican Peso exchange rates this is about six U.S. cents (.06) per pound. In order to get higher liability limits it is necessary to declare a value and pay an excess valuation charge.

MOTOR CARRIERS – DRIVER LIABILITY FOR OVERWEIGHT TICKET

Question: When an independent driver allows his truck to be overweight and receives a ticket, is the driver responsible for this ticket or is the name the truck is registered to responsible for this ticket?

Answer: Practices vary as to which name will be shown on the ticket, depending on whether it is issued by local or state police, DOT inspectors, etc.

However, it would be my opinion that the authorized carrier (DOT or MC number on tractor) is primarily liable for an overweight violation. The carrier usually would then have a right of indemnification from the driver or the owner-operator, if it they are at fault for the overweight violation.

MOTOR CARRIERS – INTERSTATE VS. INTRASTATE

Question: I worked for a local garbage company. They pick up garbage and recyclables in Door County, Wisconsin and transport them to Brown and Kaweenee Counties in Wisconsin. The companies that they take these items to in turn send them out of state for disposal or recycling. At that point they get paid or they pay for the disposal of the waste.

They claim since it's the intent of the waste or recycling materials to go out of state, the shipments are considered interstate commerce.

I think they are intrastate since they have no shipping papers indicating that the shipment is going out of state.

What is the requirement for a company to engage in interstate commerce? Or is the intent all they need?

Answer: At one time the Interstate Commerce Commission (before it was "sunsetted" in 1996) generally took the position that garbage and refuse was not "property" requiring motor carriers to have operating authority to transport these materials in interstate commerce.

Most of the recent court decisions deal with whether state or local governments can regulate the collection and disposal of solid waste. The general rule is that such functions are considered primarily a function of state and local governments, and therefore any regulation of this transportation would be subject to local or state regulation, see, e.g. *AGG Enterprises v. Washington County*, 281 F.3d 1324 (9th Cir. 2002).

This does not entirely answer your question. If a for-hire carrier is transporting recyclable materials in interstate commerce that have a commercial value (such as scrap metal or paper for recycling), I believe it would be required to register with the Federal Motor Carrier Safety Administration and obtain operating authority.

MOTOR CARRIERS – SCAC CODES

Question: I am aware of SCAC codes that carriers are identified by. Is there a code that the Surface Transportation Board uses that is different than the SCAC code? And if so, where can this code be found?

Answer: The following information about "SCAC codes" is taken from the website of the National Motor Freight Association -- http://www.nmfta.org

> STANDARD CARRIER ALPHA CODES
>
> The Standard Carrier Alpha Code (SCAC) is a unique two-to-four-letter code used to identify transportation companies. NMFTA developed the SCAC identification codes in the mid 1960's to facilitate computerization in the transportation industry.
>
> The Standard Carrier Alpha Code is the recognized transportation company identification code used in the American National Standards Institute (ANSI) Accredited Standards Committee (ASC) X12 and United Nations EDIFACT approved electronic data interchange (EDI) transaction sets such as the 856 Advance Ship Notice, the 850 Purchase Order and all motor, rail and water carrier transactions where carrier identification is required. The SCAC is required on tariffs

filed with the Surface Transportation Board (STB). The United States Bureau of Customs and Border Protection has mandated the use of the SCAC for their Automated Manifest (AMS) and Pre-Arrival Processing (PAPS) Systems. SCACs are required when doing business with all U.S. Government agencies and with many commercial shippers including, but not limited to, those in the automobile, petroleum, forest products, and chemical industries as well as suppliers to retail businesses and carriers engaged in railroad piggyback trailer and ocean container drayage. Carriers who use the Uniform Intermodal Interchange Agreement (UIIA) are required to maintain a valid SCAC. The petroleum industry uses SCACs in their integrated software programs that expedite the movement of bills of lading, pipeline tickets, product transfer orders, and inventory data. Many commercial shippers and receivers utilize SCACs in their freight bill audit and payment systems.

Certain groups of SCACs are reserved for specific purposes. Codes ending with the letter “U” are reserved for the identification of freight containers. Codes ending with the letter “X” are reserved for the identification of privately owned railroad cars. Codes ending with the letter “Z” are reserved for the identification of truck chassis and trailers used in intermodal service.

The National Motor Freight Traffic Association, Inc. (NMFTA) assigns SCACs for all companies except those codes used for identification of freight containers not operating exclusively in North America, intermodal chassis and trailers, non-railroad owned rail cars, and railroads. [Application forms can be obtained online through the NMFTA website] Companies seeking identification codes for freight containers not operating in North America should contact the Bureau International des Containers, 167, rue de Courcelles, F-75017 Paris, France. Owners of intermodal chassis, trailers, non-railroad owned rail cars should contact Frank Dunleavy, Railinc, 7001 Weston Parkway, Suite 200, Cary, NC 27513 (919) 651-5011, email private.marks@railinc.com. Railroads should contact Scott Phillips, Railinc, 7001 Weston Parkway, Suite 200, Cary, NC 27513 (919) 651-5042, email scott.phillips@railinc.com.

DIRECTORY OF STANDARD CARRIER ALPHA CODES

The Standard Carrier Alpha Codes are published by the National Motor Freight Traffic Association, Inc., in the Directory of Standard Carrier Alpha Codes (SCAC). The Directory is updated on a quarterly basis and is reissued annually. The SCAC data is also available on CD-ROM in ASCII format. The record length is 254 characters.

For further information, refer to the website or write to the National Motor Freight Traffic Association, Inc., 1001 N. Fairfax Street, Suite 600, Alexandria, VA 22314

OCEAN FREIGHT – DIFFICULTY GETTING GOODS MOVED

Question: I am exporting vehicles to Dominican Republic. I make my bookings, deliver the vehicles on time, clear customs on time, prepare the master bill of lading (“B/L”) and Shipper’s Export Declaration (“SED”) on time and send them to the vessel company; and my vehicles are left for another week or sometimes 2 weeks until they have space on a vessel. They never tell me until I ask that my cargo never shipped. Usually I find out the day the vessel arrives at port and the client is upset because the cargo is not there. When asked, the answer I get is that the vessels are full; but I am never told this ahead of time, not even when I made my bookings.

This week I have 18 vehicles that will sit at the port and lots of very upset clients. If I was at least told ahead of time that there is no room, I would have the option to book with another

vessel company of my choice. And the worst part is that if I decide to pull my cargo out of the port, they will fine me for all those expenses.

I know many exporters that run into this problem but most of them don't have the time, resources or money to go after a big company for damages.

I am just a new victim on their list since I only started shipping in July of 2007.

Answer: As a small shipper you probably don't have much leverage with the ocean carrier. You might try shipping through a local non-vessel operating common carrier ("NVOCC"), since they usually have service contracts with the ocean carriers that guarantee a certain volume.

RAIL CARRIERS – HOW EXTENSIVE IS THE DEFINITION?

Question: I have a series of very basic questions about rail and intermodal transportation, which will show my ignorance on the subject. I apologize in advance.

1) Does the term "rail carrier" normally include entities other than the major railroads such as Union Pacific, CSX, Santa Fe, etc.? I'm reading Union Pacific's Master Intermodal Transportation Agreement, and there are provisions that say things like, "UPRR or any rail carrier party to an agreement that is subject to this agreement..." and "cargo loss and damage claims presented to UPRR will be resolved for the account of all domestic US and Canadian rail carriers involved in the transportation of shipments moving under the authority of this agreement..." Who are the "rail carriers" being referred to here? Are they other railroads, companies who manufacture the containers, companies who arrange rail transportation such as 'Intermodal Marketing Companies,' or someone else?

2) When a shipper or intermediary tenders a shipment to, say, UP Railroad, for an intermodal movement that is to be transported to its final destination by a drayage motor carrier, is there normally a Bill of Lading ("B/L") issued that would govern the entire trip, even the dray portion? Whether or not the entire trip is governed by one B/L, would there be a B/L pertaining to the rail portion that somehow incorporates the railroad's Rules Circular? (I'm noticing that 49 USC 11706 reads almost exactly like 49 USC 14706 and says that bills of lading will be issued.)

3) Are all these railroads exempt from the federal regulations?

Would you agree that someone like JB Hunt whose containers and equipment are put on railroads qualifies as a rail carrier? 49 USC 10102 has the following definitions:

(5) "rail carrier" means a person providing common carrier railroad transportation for compensation...

(6) "railroad" includes-

(A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;

So it seems to me that when a shipper tenders a continuous intermodal TOFC/COFC (trailer or container on flatcar) shipment to anyone who qualifies as a rail carrier, that shipment would be exempt but that the carrier would be required to offer Carmack protection to its customer, and if it doesn't Carmack liability would apply (because of sec 10502(e) of 49 USC and interpretations of that). Is that generally right?

Answer: Let me try to answer your questions.

1. Unless there is some other relevant language in the UP's Master Intermodal Transportation Agreement, I would think that the reference to "rail carriers" in the intermodal agreement means the actual railroads (receiving, interline and delivering carriers) that are parties to an intermodal movement that is covered by the contract.

Intermediaries such an "IMC" are not normally considered to be a rail carrier, although it is possible that a stack-train operator might be considered a carrier depending on how it holds itself out to the public.

2. Usually an IMC does not issue a bill of lading. The IMC is similar to a broker, and most of them essentially disavow any liability for loss or damage in their "terms and conditions". (There are some IMC's that contractually agree to assume liability.)

Usually, separate arrangements are made with the drayage carriers and with the origin railroad, and there is no through bill of lading (contrary to the mandate of the Carmack Amendment). What this means is that the shipper must look to the responsible carrier in the event of loss or damage. This could be the receiving or delivering drayage carrier, or the receiving, interline or delivering railroad. Drayage carriers may or may not attempt to limit their liability through bills of lading and/or tariffs. The liability of a receiving, interline or delivering railroad will usually be governed by the origin railroad's tariff or exempt circular.

Sometimes a receiving motor carrier (drayage carrier) will issue a through bill of lading (or sign one prepared by the shipper). While there is little case law on this, under the Carmack Amendment, both the receiving and delivering motor carriers would be liable - regardless of where the loss occurred.

3. Railroads are not "exempt" from federal laws and regulations, but a substantial class of commodities and movements are exempt, either by statute or regulation, e.g., TOFC/COFC and boxcar movements, fresh fruits and vegetables, etc.

TOFC/COFC transportation provided by a RAIL carrier is "exempt" under 49 CFR 1090.2. Thus, although the railroad's liability is still subject to Carmack, see *Tokio Marine and Fire Ins. Co., Ltd. v. Amato Motors, Inc.*, 996 F.2d 874 (7th Cir. 1993), rail carriers usually offer "alternative terms" in their exempt circulars as provided in 49 U.S.C. 10502(e).

The TOFC/COFC exemption is not applicable to services provided by a MOTOR carrier that uses "substituted service" by rail for a portion of the movement.

I believe that J.B. Hunt would be considered a motor carrier that uses "substituted service" by rail (TOFC) as provided in 49 CFR 1090.3. It would not be considered a rail carrier, and the freight would move under its motor carrier's bill of lading.

SECURITY – BIOTERRORISM ACT OF 2002

Question: One of our customers told me about what they call the terrorist act of 2001, which in part states that all carriers must present at time of pick up a copy of their driver's license, as well as requiring that the shipper must seal the truck. If this is true and all shippers must seal the trucks then what happens at time of delivery when there are shortages noted?

Answer: I believe you are referring to the "Public Health Security and Bioterrorism Preparedness and Response Act of 2002".

One of the purposes of this law was to protect against possible terrorist attacks on the nation's food supply. The U.S. Food and Drug Administration ("FDA") has issued regulations and guidelines that are applicable to shippers, receivers and carriers of food products.

Information is available on the FDA website at http://www.cfsan.fda.gov. The following is a brief summary that will give you an idea of the applicable rules:

> The final rule requires that persons who manufacture, process, pack, transport, distribute, receive, hold or import food in the U.S. (and foreign persons that transport in the U.S.), unless they qualify for an exclusion, must establish and maintain records sufficient to identify the immediate previous sources and immediate subsequent recipients of such food. The final rule also requires that these records be made available to FDA for inspection and copying when the agency has a reasonable belief that an article of food is adulterated and presents a threat of serious adverse health consequences or death to humans.

As far as I know, the federal regulations do not specifically require that all trailers must be sealed, although this is a common practice on any full truckload shipments of food products.

SHIPMENTS TO MEXICO

Question: I am trying to research the Mexican laws around direct shipments from the US to our Mexican customers. I am trying to get some direction on claims and liabilities as well as appropriate contracting terms. My boss suggested that you might be a good place to start.

We know very little to nothing on the subject so any direction, information or suggestions you could provide would be helpful. I look forward to hearing your thoughts on the subject.

Answer: I would direct you to *Freight Claims in Plain English* (4th Ed. 2009). Shipments to and from Canada and Mexico are covered in Section 18.2.2. In addition, there is an entire section (Chapter 20, Mexican Annotations) that covers Mexican laws and regulations relating to carrier liability, claims, insurance, etc. Check our website (www.tlcouncil.org) for ordering information.

TARIFFS – BNSF STATUTE OF LIMITATIONS ITEM

Question: While looking for another item in the BNSF Rules Book (Tariff) 6100-A, I came across the item below that I found strange. Are they no longer subject to the federal statute of limitations in the Interstate Commerce Act?

> Item 1165 - Statue of Limitations - Issued: October 1, 2009 - Effective: October 21, 2009 (New Item) - Unless otherwise provided, interpretation and enforcement of the Price Authority shall be governed by the laws of the State of Texas.

Answer: There are two federal statutes of limitation that are most often involved:

1. 49 U.S.C. §11705 covers actions by carriers to recover freight charges, by shippers to recover overcharges, etc. and provides:

> 49 U.S.C. §11705. Limitation on actions by and against rail carriers
>
> (a) A rail carrier providing transportation or service subject to the jurisdiction of the 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.
>
> (b) A person must begin a civil action to recover overcharges under section 11704(b) of this title within 3 years after the claim accrues, whether or not a complaint is filed under section 11704(c)(1).

2. The “Carmack Amendment” for rail carriers governs loss & damage claims:

> 49 U.S.C. § 11706. Liability of rail carriers under receipts and bills of lading
>
> * * * * * * *
>
> (e) A rail carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice...

While it could be argued that the parties could contract for different (longer or shorter) time limits than those set forth in Section 11705, the language of Section 11706 is significantly different. It says the carrier cannot “provide by rule, contract or otherwise” for any periods less than those specified. In my opinion this section applies to all rail transportation, including

"exempt" or "contract" transportation, and that it prohibits any time limits shorter than those specified.

In any event, I don't know what the statute of limitations would be under Texas law, but in most states the limitation period applicable to actions based on a contract would be longer than those in the Interstate Commerce Act (New York is 6 years).

TARIFFS – UPS SIX MONTH STATUTE OF LIMITATIONS

Question: United Parcel Service, Inc. ("UPS") has recently changed their website with regard to the ability to file claims with them. It seems that they only provide access to 6 months of records, and require the acceptance of their technology agreement before allowing you to log on to "MY UPS" (http://www.ups.com/media/en/UTA_with_EUR.pdf). If you decline they will not allow a log on. UPS Item 9(c) pertaining to this reads:

> CLAIMS NOT MADE WITHIN SIX (6) MONTHS AFTER THE FIRST EVENT GIVING RISE TO A CLAIM SHALL BE DEEMED WAIVED.

I view this as a clear violation of 49 U.S.C. §14706 (the Carmack Amendment) addressing liability of carriers under receipts and bills of lading. Pursuant to Carmack, a shipper has a minimum of 9 months from the date of delivery to file a claim. It is my understanding that this time period may be extended if agreed upon, but cannot be reduced.

UPS in general sets their own policies with regard to filing claims. For instance you cannot send them a formal claim for a non delivered package without following their procedures, which requires logging on to their system and providing all pertinent information and acquiring a tracer number. This is extremely time consuming and meant to discourage the filing of claims.

I would appreciate your input, and if you agree that UPS is in violation of 14706, I would appreciate if you could publish this in TRANSDIGEST. It seems that UPS, because of their size feels that they can rewrite Transportation Law as they see fit. What are the implications of accepting this agreement?

Answer: The answer is in the Carmack Amendment -- 49 U.S.C. 14706(e):

> (e) MINIMUM PERIOD FOR FILING CLAIMS-
>
> (1) IN GENERAL- A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice.

This language is very clear: it says the carrier cannot "provide by rule, contract or otherwise" for any periods less than those specified. In my opinion this section applies to all motor carrier transportation, including "contract" transportation, and that it prohibits any time limits shorter than those specified.

This does not mean that UPS can't restrict access to their on-line information system, which can obviously make it more difficult to get delivery information or file claims on-line. However, if you file a claim in writing that conforms to the requirements of 49 CFR Part 370 within 9 months, I believe that UPS must accept and process the claim.

Unfortunately, the only way to resolve the questions may be through litigation.

TRANSPORT PROVIDERS – DEFINITION OF TYPES

Question: What is the legal distinction between a carrier/broker and an agent?

Answer: The Interstate Commerce Act, 49 U.S.C. section13102, defines the terms “broker”, “carrier”, “freight forwarder” and “motor carrier” as follows:

(2) BROKER- The term “broker” means 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.

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

* * * * *

(8) FREIGHT FORWARDER- The term “freight forwarder” means a person holding itself out to the general public (other than as a pipeline, rail, motor, or water carrier) to provide transportation of property for compensation and in the ordinary course of its business--

(A) assembles and consolidates, or provides for assembling and consolidating, shipments and performs or provides for break-bulk and distribution operations of the shipments;

(B) assumes responsibility for the transportation from the place of receipt to the place of destination; and

(C) uses for any part of the transportation a carrier subject to jurisdiction under this subtitle. The term does not include a person using transportation of an air carrier subject to part A of subtitle VII.

. . .

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

Motor carriers, freight forwarders and brokers are required to “register” (obtain operating authority) with the Federal Motor Carrier Safety Administration (“FMCSA”) and must comply with applicable regulations, including financial security (insurance and surety bonds), agents for service of process, etc. It is illegal to provide such services without registering and compliance with the regulations.

Shippers’ “agents” are not defined in the statute and are not regulated -- unless they are providing a regulated service as a motor carrier, freight forwarder or broker.

Typically brokers are compensated by a “commission” (usually the markup over what the broker pays the carrier) on each shipment. If your compensation is based on the difference between the freight charges paid to the carrier and billed to the shipper, you would be considered a broker. If there is a different method of compensation - e.g., a monthly management fee, or a flat per-transaction fee, etc. - you might be considered an “agent” and not a broker.

There are other type of “agents” of course, such as sales agents for motor carriers, brokers, etc. The authorized carrier or broker would be responsible for its agents and to ensure compliance with the applicable laws and regulations.

When Can Shipment Be Booked as Revenue?

Question: I have a question dealing with when a shipment is a shipment (and can be booked as revenue). I have been challenged by our internal auditors in regards to when we can book revenue for a shipment and I am curious if you have run into this situation before and/or can offer any guidance. Our scenario:

Our terms are FOB Origin, freight prepaid

Order releases to ship direct from our Monterrey, Mexico manufacturing facility

We pick the order and process on UPS' Worldship system in Mexico (the Worldship system is set up as if shipment originates from Dallas)

UPS' system updates with "Billing Information received"

UPS orders are palletized and placed on the rear of a truckload carrier and transported to our Dallas distribution center

Upon arrival at Dallas, UPS pallets are unloaded and reloaded onto the UPS trailer (along with other UPS shipments that were processed in Dallas)

Is it OK to record the revenue for the shipment when the shipment is tendered to a truckload carrier in Monterrey, Mexico or is it necessary to wait until the shipments are picked up in Dallas? Any guidance on this issue would be appreciated.

Answer: It would seem logical that when the terms of sale are "FOB Origin", you could book a sale when the goods are tendered to the carrier, since that is where risk of loss transfers to the purchaser under the Uniform Commercial Code.

However, this is really an accounting question, and I am not an accountant. I presume that there may be some generally accepted accounting rules that would apply, and your question should be addressed to a qualified accountant.

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